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**INDIAN HIGH COURT REPORTS**

*Being a re-print of all the cases of the Privy Council on appeals from  
India and of all the High Courts in India  
from the year 1901.*

**BOMBAY VOL. V**  
(1909-1910)

**I. L. R. BOMBAY VOLS. XXXIII AND XXXIV.**

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DURING 1909—1910.

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## Chief Justice :

The Hon. Sir Basil Scott, *Kt.*

Hon. Mr. N. G. Chandavarkar (*Acting from 14th June to 9th July 1909*).

---

## Puisne Judges :

Hon. Mr. L. P. Russel (*On leave 1909*).

„ „ N. G. Chandavarkar.

„ „ S. L. Batchelor.

„ „ D. D. Davar.

„ „ F. C. O. Beaman.

„ „ J. J. Heaton.

„ „ N. C. Macleod (*Acting in 1909 additional in 1910*).

„ „ R. R. Knight (*Acting*).

„ „ L. J. Robertson (*Acting*).

„ „ G. S. Rao (*Acting*).

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Hon. Mr. T. J. Strangman (*Advocate-General*).

„ „ M. R. Jardine (*Acting in 1910*).

Mr. L. C. Crump (*Legal Remembrancer*).

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PRIVY COUNCIL.

BANK OF BOMBAY AND OTHERS (*Defendants*) v. SULEMAN SOMJI  
AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).\*

[13th and 14th May and 31st July, 1908.]

[*On appeal from the High Court of Judicature at Bombay.*]

*Mortgagor and Mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will, directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which, on 13th September 1890 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title-deeds relating to the property charged by the will; and on 12th January 1899 executed a mortgage of the same property in favour of the Bank for Rs. 52,000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would [2] have become aware of the charge created on the property by the will. The younger sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter

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\* *Present* :—LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.



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pleaded that the mortgage was made for valuable consideration, and that they were *bona fide* transferees without notice.

*Held* (upholding the decision of the High Court) that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

*In re Queale's Estate* (1) followed.

*Held* also that, the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between creditors and legatees in such a case: Spence's "Equitable Jurisdiction," Vol. II, page 376, referred to.

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891, and the mortgage was not executed until eight years afterwards; and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs).

*Held* that, although in cases of this kind delay was a circumstance to be taken into consideration, yet, having regard to the fact that two of the plaintiffs were still minors when the title-deeds were deposited with the Bank, and that continued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance.

APPEAL from a decree (14th April 1905) of the High Court at Bombay in its appellate jurisdiction which reversed or varied a decree (23rd August 1904) passed by a Judge of the said Court sitting in exercise of its Original Civil Jurisdiction.

The main question for decision on this appeal was whether a mortgage, dated 12th January 1899 in favour of the appellants, the Bank of Bombay, had priority over the claims of certain pecuniary legatees under the will of one Somji Parpia deceased.

The testator was a Khoja Mahomedan, inhabitant of Bombay, who traded as a furniture dealer and died on 15th February [3] 1885. He had a brother Dhanji, and both the brothers jointly purchased a house in Bhajipala Street, one of the properties now in dispute. Dhanji died childless in 1867 leaving his widow, Meenabai, as his heir.

At Somji Parpia's death he left him surviving his widow Labai and eight sons, of whom four were sons of a former wife, namely, Rahimtulla Somji Parpia, the respondent Jaffer Somji, Goolam Hussein Somji, and the respondent Alladin Somji. The four younger sons were the respondents, Suleman Somji, Goolam Ali Somji aged 4, Mahomed Somji, and Habib Somji (who were twins) aged 2.

The will of Somji Parpia was dated 13th February 1885, and by it, after enumerating the items of property belonging to him (which included the moiety of the house in Bhajipala Street, and the entirety of some land in Falkland Road on which the Elphinstone Theatre was erected, and which then stood in the name of his son Goolam Hussein Somji) and defining his heirs made the following (among other) provisions.

"*Clause 3.*—I bequeath all my abovementioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the abovementioned moiety of the house, situated in Bhajipala Street and the theatre, &c. (*i.e.*), the whole of the (said) property and goods to the sons of my former deceased wife (namely), Rahimtulla, Jaffer, Goolam Hussein and Alladin (4 persons). None of (my) other heirs has any claim or title thereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rahimtulla and I reserve

(1) (1886) Ir. L. R. 17 Ch. D. 361 at page 368.



the right of my three sons only, namely, Jaffer, Gulam Hussein, and Alladin, these three persons to (my) said moiety of the house. To the remaining property the above-mentioned four persons are entitled in equal (shares).

"*Clause 4.*—For (my) remaining heirs I order my abovementioned sons (four persons), whose names are Rahimtulla, Jaffer, Gulam Hussein, and Alladin, that they shall, duly give and act in accordance with what is written below ;—

"*Clause 5.*—To my present surviving wife Labai and to her sons named Suleman, Gulam Ali, Mahomed and Habib my said elder sons, four persons to whom I entrust all my goods and property, shall within 6 years, namely six years after my decease, duly make up and pay Rs. 30,000, namely thirty thousand, to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period, and upto that period there shall duly be paid Rs. 125, namely one hundred and twenty-five every month, for [4] house-hold expenses and before the abovementioned sum of Rs. 30,000, namely thirty thousand, is fully made up if the betrothal (or marriage, &c.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty-five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against the four persons (namely my) sons by my first deceased wife, or against my said goods and property in any way whatever.

"*Clause 6.*—As to the (sum of) Rupees thirty thousand directed to be paid out of my abovementioned goods and property as a share of inheritance by my abovementioned elder sons (four persons) to my surviving wife and her sons mentioned in the 5th Clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jaffer Somji, Gulam Hussein Somji, Jaffer Ladhahbai Chatu and my second surviving wife. I appoint these four persons (as trustees) and I direct them as follows:—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the abovementioned sum of Rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons as a share of inheritance the outlays on auspicious and inauspicious occasions, whatever the same may come to—having been deducted, as to whatever sum may remain over, a good estate or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them ; or (the moneys) shall be deposited at interest at a good place, and out of the income that may be realized therefrom, (moneys) shall be paid to my surviving wife during her lifetime for her and her children's lodging, food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) Rs. 30,000 the same shall truly be divided and given in equal shares to her children.

"*Clause 9.*—I recommend my four elder sons mentioned in the 4th Clause as follows :—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhajipala Street.

"*Clause 10.*—I recommend my said four elder sons, to whom I bequeath all my goods and property, shop, &c., as follows :—After my life-time they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned their respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

"*Clause 12.*—I nominate or (and) appoint my said four sons named Rahimtulla, Jaffer, Gulam Hussein and Alladin executors of (this) my said will."

[5] Meenabai, the widow of Dhanji, died in 1889 leaving a will dated 18th December 1880 by which after reciting that the house in Bhajipala Street had belonged to Somji Parpia and her husband in equal shares, she bequeathed the half-share which came to her from her husband to Rahimtulla Somji Parpia whom she described in the will as her and her husband's adopted son.

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After the death of Somji Parpia the four elder sons and the widow Labai (until her death in 1894) and the four younger sons all lived amiably in the house in Bhajipala Street; and the four elder sons took over the whole of the property and carried on business as Somji Parpia and Company, the Bank of Bombay acting as their bankers; and in the course of their business they became largely indebted to the Bank, and eventually on 12th January 1899 executed in favour of the Bank the mortgage now in suit for Rs. 52,000, as security for which they deposited with the Bank certain documents relating to the house in Bhajipala Street, namely a copy of the will of Meenabai, and a conveyance dated 12th March 1861, by one Khan Mahomed Habibhoy and Karim Khatav to Dhanji Parpia; and others relating to the Elphinstone Theatre in Falkland Road, namely, a copy of lease, dated 14th October 1892, by one Sha Mulchand Nensey to Gulam Hussein Somji Parpia; a conveyance dated 26th August 1882 by one Peerbhoy Nathu to Gulam Hussein Somji; and an Indenture dated August 22nd, 1884 between one Javerbai and Gulam Hussein Somji. The mortgage included the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon which are in dispute on this appeal.

In June 1903 the Bank of Bombay, in exercise of the power contained in their mortgage, advertised the sale by public auction of the properties comprised in it, whereupon the four younger sons of Somji Parpia gave notice in writing to the Bank that under the will of their father they claimed a charge on the properties in suit to the extent of Rs. 30,000 and that if the properties were sold they should be sold subject to the charge. The Bank postponed the sale after having intimated in writing that the sale was to be of the right, title and interest of the mortgagors.

[6] The four younger sons then, on 15th September 1908, filed the suit out of which the present appeal arose, against the four elder sons and the Bank claiming a charge on the properties in suit in priority to that of the Bank for the balance they stated to be due to them in respect of the legacy of Rs. 30,000. They alleged that the mortgage was executed in fraud of their rights and in breach of the trust imposed on the first four defendants by the will of Somji Parpia; and that the Bank took the mortgage with actual or constructive notice of the charge; and they asked for a decree for the due administration of the properties of the deceased Somji Parpia which they alleged became vested in the first four defendants as his executors and heirs, subject to the charge.

On 14th January 1904 before the suit came on for hearing the Bank of Bombay transferred their mortgage to one Dwarkadas Dharamsey who was added as a defendant to the suit.

The defendant Rahimtulla did not defend the suit. The defences made by the other defendants appear from the issues which were as follows:—(1) What was the property or properties conveyed by the mortgage of 12th January 1899? (2) Whether the plaintiffs have a charge on the property, the subject of the said mortgage? (3) Whether the Bank of Bombay were not *bona fide* transferees for value of the property mentioned in the said mortgage? (4) Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs? (5) Whether the plaintiffs are entitled to the relief claimed or any part thereof? (6) Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property subject to the said mortgage?

On these issues the first Court (CHANDAVARKAR, J.) held that on the construction of Somji Parpia's will the plaintiffs had a charge on the



properties conveyed by the mortgage ; that the Bank had no actual notice of the charge made by the will ; but that they had constructive notice of it from the recitals in Meenabai's will which was one of the documents deposited in their custody ; that according to the law in India there was no distinction between the powers of an executor over the real property and personal estate of a testator such as obtains in English law ; that a purchaser or mortgagee from an executor who was also devisee obtained a free, complete, and valid title unaffected by the debts or legacies charged, unless it was clearly proved that the purchaser or mortgagee had notice of any fraud or breach of duty on the part of the devisee executor in the transaction ; that the Bank did not know of the breach of trust on the part of the defendants 1 to 4 and was not a party to their fraud ; and that the Bank were *bona fide* transferees for value of the properties comprised in their mortgage.

As to the findings on the 3rd and 4th issues the learned Judge said:

" If then I must presume from the fact that the Bank had notice of the recitals in Meenabai's will that they had notice of the charge in plaintiffs' favour under their father's will and of the capacity of the defendants 1 to 4 as absolute devisees and executors, I must deal with the equities between the parties to the mortgage on the footing that defendants 1 to 4 mortgaged the properties to the Bank in both the capacities and gave a good title unless it be proved that the Bank had knowledge that the loans advanced by them which formed the consideration for the mortgage were the personal debts of defendants 1 to 4."

And after considering the evidence as to that and the circumstances of the case bearing on the matter he concluded:—

" Upon the whole then I am not satisfied that the Bank knew of the breach of trust on the part of the defendants 1 to 4 and was a party to their fraud.

" The truth of the matter appears to me to be this. Judging from the evidence and the surrounding circumstances neither Labai and her adult son plaintiff No. 1 nor defendants 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as defendants 1 to 4 had the property absolutely bequeathed to them under their father's will they had every right to alienate it. Defendants 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and plaintiff 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts. They hoped to share in the profits which defendants 1 to 4 were expected to make out of their trade by having their legacy provided out of those profits. The Bank were not informed of the legacy or the will because the parties believed that the legacy had nothing to do with the property bequeathed to defendants 1 to 4. When however they saw that Ahmedbhoy had fallen out with defendants 1 to 4 and the Bank [8] were trying to enforce their rights under the mortgage, they (plaintiffs and defendants 1 to 4) found that plaintiffs had a charge and that that was a good weapon of attack. These are the probabilities of the case and they go to support the *bona fides* of the Bank. \* \* \* \* \*

Chandavarkar, J., also held that Meenabai had no power to dispose of the moiety of the Bhaji Pala Street property by will and that therefore the half part of that moiety which devolved on the plaintiffs was unaffected by the mortgage; and that the theatre on the land in Falkland Road was included in the mortgage to the Bank.

The decree was that the Bank had a prior charge on the properties mortgaged which comprised three-fourth parts of the house in Bhaji Pala Street, and the entirety of the land and buildings in Falkland Road; that the plaintiffs were entitled to the remaining one-fourth part of the house in Bhaji Pala Street; and they were entitled to a charge for the legacy in the will but ranking subsequently to the Bank's mortgage.

From that decision the plaintiffs appealed, and the Bank and Dwarkadas Dharamsey filed cross-objections claiming that the whole of the house

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in Bhaji Pala Street was comprised in their mortgage. The first four defendants appealed from the finding that the mortgage included the building on the land in Falkland Road.

The appeals were heard by Sir L. JENKINS, C. J., and BATTY, J., who agreed with the lower Court that the plaintiffs had a charge on the property; that the Bank had constructive notice of the will; and that there is according to Indian law no such distinction as there is in English law between moveable and immoveable property; but they held without impeaching the *bona fides* of the Bank, that the Bank's mortgage was subject to the payment of the plaintiff's legacy of Rs. 30,000. The material portion of the judgment, which was delivered by the Chief Justice, was as follows:—

" Though the first four defendants derive their title from the will of their father, it is not suggested that this was known to the Bank. This want of knowledge was not due to any concealment on the part of the mortgagors; the Bank made no investigation of title, and so far as the mortgage of the 12th [9] January 1899 goes took this security without any enquiry, assuming that the mortgagors were the owners of the property mortgaged. But ignorance resulting from abstention to make the ordinary investigations and enquiries cannot better the Bank's position. In not investigating the title under which he takes a person is ordinarily guilty of great and culpable negligence (*Jones v. Smith* (1) and *Neesom v. Clarkson* (2)) which disentitles him from defeating claims that would have come to his notice had he exercised reasonable care.

" The title therefore under the mortgage must be judged as though the Bank had actual notice of the will and its contents. What then would have been its knowledge with that notice? It would have seen that in his will the testator gave a list of his properties; that he gave all those properties to his four sons, the first four defendants; that he directed those four sons to whom, as he said, he *entrusted all his goods and property* to pay within 6 years the legacy in respect of which the plaintiffs now claim; that he described that legacy as directed to be paid out of his *abovementioned goods and property as a share of inheritance* by the first four defendants; and that he appointed his first four sons executors of his will.

" And so we have to see how matters would have stood had the Bank taken the mortgage with that knowledge.

" It must be borne in mind that for this purpose there is no such distinction here, as there has been in England, between moveable and immoveable property. The English authorities, therefore, which appear to me most pertinent, are those that relate to the disposition by executors of personal estate, and they have not been cited in argument either here or before the first Court. These authorities may legitimately be considered, for in regard to the questions at issue the law here and in England runs at parallel lines.

" I will first then consider the first four defendants' power to effect the mortgage as executors of their father's will.

" Executors have full power of disposal over their testator's estate, and generally speaking neither creditors nor legatees can follow assets aliened for value in exercise of that power. And so strong is this rule, that the alienees for value are safe in their title, though the alienation was for a purpose foreign to the will, if they took without notice of this vice. But if the alienees take with notice, then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees, who have been prejudicially affected. *Elliot v. Merriman* (3), *Bonney v. Ridgard* (4), *Hill v. Simpson* (5).

[10] "We must therefore see whether in this case the money intended to be secured by the mortgage was applied in accordance with the duties of the first four defendants as executors. It is clear it was not: it was applied wholly for the private purposes of the executors, and this was a devastation of the testator's assets.

" Then, had the Bank notice of this? We start with the fact that the Bank admittedly did not deal with the first four defendants as executors, but as owners of the property mortgaged; this was conceded before us in argument and is a fair inference from what is stated in the mortgage. Then the consideration for the mort-

(1) (1813) 1 Phillips 244 at p. 255, 1 Hare 43.

(2) (1842) 2 Hare 168 at p. 173.

(3) (1740) Barn. 78: 2 Atk. 41.

(4) (1784) 1 Cox. Ch. 14 cite 4 Bro. Ch. O. 130.

(5) (1802) 7 Ves. June. 152.



gage was not an advance at the time but an antecedent liability of the first four defendants; and the materiality of this is a matter of common and obvious comment: *M'Leod v. Drummond* (1).

"But the matter does not rest there, because the recitals in the deed clearly indicate that the liability arose in connection with partnership transactions in which the first four defendants were jointly engaged. From the recitals it appears that the liability was in respect of bills drawn by the mortgagors' Bombay firm on their Indore firm and the Bank's witness Chunilal states in reference to the Indore firm that they 'used to draw hundies on themselves in Bombay under instructions from the head office of the Bank of Bombay.' This point is not clearly made in the pleadings, but the Bank's Counsel raised the issue, 'Whether the Bank of Bombay were not *bona fide* transferees for value of the property mentioned in the mortgage, and it was apparently discussed before Chandavarkar, J. as it certainly was before us, without any complaint that it was outside the legitimate scope of the suit.

"On a consideration of all the materials in the case I hold that the Bank knew that the assets were applied to the private purposes of the executors, and that treating the mortgage, as I at present do, as one by the first four defendants in exercise of their executorial powers the Bank became a party to the devastation; see *Wilson v. Moore* (2) The result would be if things rested there that the plaintiffs as pecuniary legatees prejudiced by the mortgage could follow the assets into the hands of the Bank or its transferees.

"In coming to this conclusion I have not overlooked *Nugent v. Gifford* (3) and *Mead v. Lord Orrery* (4). But they cannot be regarded as authorities on the facts with which I have hitherto been dealing. Lord Brougham said of them in *Wilson v. Moore* (5); 'It is impossible to read the argument of Lord Hardwicke in each of these decisions without being satisfied that he considered the knowledge of the executor's misappropriation as not distinctly brought home to the party.' And in *M'Leod v. Drummond* (6) Lord Eldon says that 'It is impossible to deny that Sir Thomas Sewell in effect, and Lord Kenyon in terms, shook the authority of *Nugent v. Gifford* (3) and *Mead v. Lord [11] Orrery* (4); if those cases are supposed to establish doctrine so general as some of the dicta upon this subject import.' But in the suggested explanation of these cases it has been pointed out that in *Nugent v. Gifford* (3) the executor was the sole residuary legatee, and in *Mead v. Lord Orrery* (4) he was one of the residuary legatees: *M'Leod v. Drummond* (1), though Mr. Roper in his work on legacies maintains that this circumstance did not influence Lord Hardwick.

"And this leads me to consider how far it makes a difference in the case that the first four defendants were universal legatees as well as executors. That this may in some respects alter the position is apparent from *Taylor v. Hawkins* (7) and *Graham v. Drummond* (8).

"In *Graham v. Drummond* (8) a second mortgage from an executor and residuary legatee was held to have a title which prevailed against creditors and Romer, J. (as he then was), in delivering judgment said: "I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.' Later the learned Judge says: 'The Chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him but not as against purchasers from the legatee for valuable consideration.' But in *Graham v. Drummond* (8) as in *Taylor v.*

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(1) (1809-10) 17 Ves. Jun. 152 at p. 155.

(2) (1884) 11 Myl. & K. 337.

(3) (1738) 1 Atk. 463.

(4) (1745) 3 Atk. 235.

(5) (1834) 1 Myl. & K. 337 at p. 355.

(6) (1809-10) 17 Ves. Jun. 152 p. 165.

(7) (1803) 8 Ves. Jun. 209.

(8) [1896] 1 Ch. 968.



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*Hawkins* (1) it was a creditor who sought to impugn the alienation: here the plaintiffs are legatees.

"This is not fanciful distinction; it is recognised in *Spence's Equitable Jurisdiction*, Vol. II, p. 376 where it is said 'A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will may be ascertained but as to creditors it is different: if [12] a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets to payment of the debts, if any; therefore the mortgagee would be safe as against creditors.'

"If the view of Chandavarkar, J., is correct, there is a still further distinction, for he held that the legacy was charged on property in suit, while the decision in *Graham v. Drummond* (2) proceeded on the ground that 'unsatisfied creditors have no lien or charge on any asset'. In support of this view Chandavarkar, J., has relied not only on the language of the will as rendered in the translation before the Court, but also on the vernacular, which seemed to him to bring out the intention still more clearly.

"I have nothing to add to the reasoning of the learned Judge on this point; my only doubt has been whether it can be said that the charge is nugatory and inoperative, as adding nothing to the obligations that would exist without it: cf. *Scott v. Jones* (3); *Freaker v. Cranefeldt* (4). But agreeing as I do with Chandavarkar, J. as to the effect of the will, I think there is a charge on specific property which has a legal operation: cf. *Girish Chunder Maiti v. Annudo Moyi Debi* (5). The testator in the first clause of the will enumerates the items of which his property at the time consisted and he therein mentions the property in suit. It is on the 'above mentioned goods and property,' that the charge is imposed, and though in fact he died two days after the execution of the will, he might have acquired other property, to which this express charge would not have applied.

"Had the Bank's advisers seen the will they would have learnt of the legacy and that it was charged on the property in suit. This must have led to the enquiry whether the legacy had been discharged, and we must assume that an honest and not a false answer would have been given; *In re Morgan* (6) *In re The Alms Corn Charity* (7). That answer must have been that the legacy had not been satisfied, and if the Bank took with knowledge of that fact it would have held subject to the charge.

"I see no reason to suppose that the mortgagors would have met the enquiry with the answer that the Bank must be satisfied with the fact that the mortgagors were both executors and legatees of the property and must take that as evidence of assent, for even apart from the specific charge it would have been wrong on their part to have deprived the legatees of the right they had to have the property realized for payment of the legacy, and we ought not to presume that they would have done an act which would have been a breach of trust. *In re Queale's Estate* (8).

[13] "This last cited case, a decision of the Court of Appeal in Ireland, bears a striking resemblance to the present, and there the Bank, a mortgagee by deposit of title deeds, was held to be postponed to a pecuniary legatee who had no specific charge.

"No doubt some reliance is placed on the fact that the mortgage was only equitable, but the cases seem to show that for the purpose in hand it makes no difference that the assignee or mortgagee does not obtain the legal estate in or legal control over the asset: see *Graham v. Drummond* (9).

"The question seems to hinge not so much on the character of the disposition as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor, and on this point the reasoning in the Irish decision is closely applicable to the facts of this case.

"Mr. Roper in his work on Legacies at page 443 deals with a disposal of an asset by one in whom the double character of executor and legatee is combined, and after pointing out that as mere executor his disposal of assets to pay or secure his own debt would not prejudice individuals interested under the testator's will, he says, 'and as residuary legatee he could only dispose of what he was entitled to in that character,

(1) (1803) 8 Ves. Jun. 209.

(2) (1896) 1 Ch. 968.

(3) (1838) 4 Cl. & F. 332.

(4) (1838) 3 Myl. & Cr. 499.

(5) (1887) 15 Cal. 66; L. R. 14 I. A. 137.

(6) (1881) 18 Ch. D. 98 at p. 102.

(7) (1901) 2 Ch. 750 at p. 762.

(8) (1886) 17 Ir. L. R. Ch. D. 361 at p. 363.

(9) (1896) 1 Ch. 968 at p. 975.



vis. what remained after all the trusts of the will were performed. It appears then that the accident of an executor being also residuary legatee cannot upon principle impart to him any larger authority over the assets than what he possessed by virtue of his office as executor.' No doubt the learned author does not here notice the implication of assent to which Romer, J., alludes in *Graham v. Drummond* (1) but the passage shows what in his opinion the position would be apart from assent. Here there was no representation to the Bank that the mortgagors were legatees to whose legacy an assent had been given; the Bank had no knowledge and sought no knowledge as to the title; and as I have already said we ought not (in my opinion) to presume that the mortgagors would have made any representation involving a breach of trust.

"In Mr. Lewin's book on Trusts, pages 529, 530 of the 9th Edition, we have a conveyancer's view of the position.

"The whole doctrine which enables an executor legatee to dispose of a testator's assets to the detriment of claimants under the will is found on convenience; but I cannot see in the circumstances of this case anything that requires us on that score to treat the Bank as alienees free from the legacy bequeathed by the will.

"It is true that in the cases there are expressions which point to fraud or collusion as being an essential element but this is not an exhaustive statement of the law. *Hill v. Simpson* (2) shows that gross negligence will suffice. There an executor and residuary legatee assigned to his bankers certain stocks [14] as a security for his private debt, and the Bank accepted without looking at the will his representation that he was residuary legatee subject only to a few small legacies. It was, however, held by Sir William Grant that the funds were liable to answer the demands of persons treated as being in the position of pecuniary legatees. The Master of the Rolls in the course of his judgment remarked 'common prudence required that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously and without the common attention used in the ordinary course of business; the reference in the will of Mrs. Smith to the will of her husband making it the same as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will under which alone a title could be given to them. It was not necessary to use any exertion to obtain information which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding that assets transferred under such circumstances may be followed.' So here, I do not impute direct fraud to the Bank, but it certainly was guilty of gross negligence unless (as the circumstances suggest) the Bank was content to get what it could, and so that its conduct should be judged not by the standard of one exercising an unfettered choice, but of one seeking to secure a desperate debt as best he can.

"There is much in common between the facts of *Hill v. Simpson* (2) and those now under consideration, the principal divergence being the difference in the time that elapsed between the coming into operation of the will and the impugned disposition. There as here we find a complete transfer by way of security while the present case is stronger in that there the claimant was treated as being in the position of a simple pecuniary legatee without a specific charge. No doubt here there is the difference that a considerable time had elapsed between the death of the testator and the mortgage in suit, but in the opinion of Chatterton, V. C., 'the circumstance that there the transaction was very shortly after the death of the testator was not the only or even the main ground on which the Master of the Rolls grounded his decision'. *Connolly v. Munster Bank* (3).

"Moreover *In re Queale's Estate* (4) shows that lapse of time is not necessarily a bar where, as here, possession is consistent with the purposes of the will, and in the argument before us no contention was based on the lapse of time as a bar to the suit or a circumstance affecting the rights of the parties.

"Hitherto I have dealt with the cases as though the Bank's claim rested on the mortgage of the 12th of January 1899, and on that alone and as a consequence that the charge was to secure an antecedent debt. But Mr. Inverarity [15] has sought to escape from this position and the inferences it involves, by suggesting that long before this there had been a mortgage by deposit of title deeds; therefore, he argues it cannot be said that the security originally was for an antecedent debt.

(1) [1896] 1 Ch. 968 at p. 975.

p. 127.

(2) (1802) 7 Ves. Jun. 152.

(4) (1886) Ir. L. R. 17 Ch. D. 361.

(3) (1887) Ir. L. R. 19 Ch. D. 119 at

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33 B. 1=1  
I. C. 369=10  
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1065=35 I.  
A. 130.



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MAY 13, 14.  
JULY 81.

PRIVY  
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83 B. 1=1  
I. O. 369=10  
Bom. L. R.  
1065=35 I.  
A. 130.

But no reference is made to this in the Bank's written statement nor was any issue raised on the point. The evidence as to the deposit is of the vaguest description and leaves it absolutely uncertain what was the liability in respect of which the deposit was made. There certainly is no ground to assume that the documents of title were deposited to secure a contemporaneous advance: for the deposit alleged is said to have been made in 1890 while the evidence of the 1st defendant is that his firm began to get credit from the Bank of Bombay about a year or a year and a half after his father's death, i.e., in 1886 or 1887 and this is confirmed by Ex. A 4.

"I must not omit to notice the learned Judge's determination that clause 10 of the will does not forward the Bank's claim. Apparently it was never suggested until the plaintiff's reply that the clause had any bearing on the case, and then the suggestion proceeded from the learned Judge who on further reflection decided not to hear the plaintiffs' Counsel on the point, having regard to the admitted facts of the case and the terms of the will. It is admitted that the testator carried on a business in his lifetime and that the business of the partnership in respect of which the indebtedness was incurred was in no sense a continuance of it, and it is manifest that the Bank was not misled or influenced by the presence of this clause. In the circumstances therefore I am of opinion that the Bank's position is in no way bettered by clause 10 of the will.

"I see that in the course of his judgment it is said by Chandavarkar, J., that 'It cannot be that Labai and plaintiff No. 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts'. If by that is meant that Labai and plaintiff No. 1 knowingly stood by and permitted defendants 1 to 4 to deal with the Bank as if they were the absolute owners of the mortgaged property, it so far as these two were concerned might have made a material difference in their rights. But no plea to this effect is to be found in the pleadings nor is the point raised in the issues; not a word in support of this view was urged in the course of the argument before us, and I cannot find any real foundation for it in the evidence. The first plaintiff distinctly says that the first intimation he had of the mortgage was in June 1908. I think therefore the suggestion of the learned Judge can be no more than mere speculation and impression and therefore not a legitimate basis for legal decision.

"The conclusion therefore to which I have come on this part of the case is that the plaintiffs' claim must prevail over the mortgage to the Bank and the title of its transferee."

The appellate Court dismissed the appeal of the first four defendants and overruled the objections taken by the Bank and Dwarkadas Dharamsey, and concluded—

[16] "We must declare that the undivided moiety of the house in Bhaji Pala Street, and the property in Falkland Road left by the will of Khoja Somji Parpia, deceased, form part of the estate of the testator and are as such available for the payment of the plaintiffs' legacy in priority to the claim thereon of the Bank as mortgagee of the same and of its transferee the defendant Dwarkadas Dharamsey.

"The decree must therefore contain a declaration to the above effect."

On this appeal Sir R. Finlay, K.C.; Levett, K. C.; and Frank Russell, K.C., for the appellants contended that under their mortgage the Bank of Bombay had a complete title to the property mortgaged and not subject to any charge created by the will of Somji Parpia. The mortgage had been executed in good faith and for valuable consideration by the executors of the will who were also residuary legatees, and the Bank was fully justified in believing that their mortgagors were competent to give them a good title. Under the law of India the executors had full power to dispose as they thought fit of all property moveable or immoveable vested in them as executors. The Probate and Administration Act (V of 1881), sections, 4, 90, 113, 115, 116, and the Amending Act (IV of 1889), section 14, were referred to. The Bank had no notice, actual or constructive, of the existence of any charge on the property in priority to their mortgage. Under those circumstances, and considering that the Bank had no notice of any other ground which rendered it improper for the executors to deal



with the property under the will as the mortgagors had done, the Bank's mortgage was, it was submitted, valid against any unsatisfied creditors of the testator. Reference was made to *Graham v. Drummond* (1); *In re Whistler* (2); *Colyer v. Finch* (3); and *In re Venn and Furze's Contract* (4). The two last cited cases showed that the fact that the mortgage purported to secure a debt due from the mortgagors personally was immaterial and did not affect the title of the mortgagee. But even assuming that the Bank had constructive notice of the will, the fact that the mortgage was executed 14 years after the death of the testator entitled the Bank to assume that at the time of its execution the legacy now said to be a charge on the property [17] mortgaged had been paid, especially as by the terms of the will it was payable within 6 years after the testator's death; and it was not necessary for the Bank to inquire whether it had been paid or not. Reference was made to *In re Queale's Estate* (5) relied upon by the Appellate Court in India which it was contended was distinguished from the present case by the length of time that had elapsed between Somji Parpia's death and the execution of the mortgage; and by the fact that in the case in Ireland the mortgage was merely an equitable one. Lewin on Trusts, 11th Ed., page 557, was also referred to. The executors had full power to pledge the assets of the testator's estate, and no concurrence or assent of the plaintiffs was necessary to free the mortgage, at its execution, from the charge, if any, created by the will.

*Danckwerts, K. C.*, and *P. S. Stokes* for the plaintiff-respondents contended that the Appeal Court in India had rightly held that the mortgage to the Bank was subject to the charge in favour of the plaintiffs under the will of Somji Parpia. Some facts had been concurrently found by both the Courts in India, one of which was that the Bank had constructive notice of the charge created by the will on the estate, and the rights of the plaintiffs under it. That being so, and the defect in the title of the executors and mortgagors to mortgage the property appearing on the face of the documents of title deposited with the Bank, the latter were thereby put upon inquiry and were guilty of negligence in not calling for and investigating the title of the mortgagors to the property comprised in the mortgage, and must be held to have taken the mortgage subject to the charge on it created by the will. Reference was made to *Agra Bank Limited v. Barry* (6); *Corser v. Cartwright* (7), as to constructive notice through Solicitors, the latter case showing that the plea that the mortgage was for value without notice was no protection where the Bank might have had notice by using due diligence in investigating the title; *Jackson v. Rowe* (8); *Jones v. Smith* (9); *Patman v. Harland* (10) where an express representation by the vendor that a deed [18] did not affect his title was held not to protect a mortgagee or purchaser who had not looked at the deed; *Wilson v. Hart* (11); and *In re Whistler* (2).

Another fact concurrently found by the Courts below was that the mortgage was executed on account of money borrowed to pay pre-existing debts of the mortgagors; it was therefore not in respect of matters or transactions or for purposes authorised by the will, and the Appellate Court in India found that the money had been in fact applied to the

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A. 130.

(1) [1896] 1 Ch. 368 at pp. 971—974.

(2) (1887) 85 Ch. D. 561.

(3) (1856) 5 H. L. C. 905.

(4) [1894] 2 Ch. 101 (111, 114).

(5) (1886) Ir. L. R. 17 Ch. D. 361.

(6) (1874) L. R. 7 H. L. 185 (157).

(7) (1875) L. R. 7 H. L. 731.

(8) (1826) 2 Sim. & Stu. 472.

(9) (1841) 1 Hare 48 : 1 Phillips 244.

(10) (1881) 17 Ch. D. 353.

(11) (1866) L. R. 1 Ch. 463 (466, 467).



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33 B. 1=1  
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private purposes of the executors and mortgagors. As to this it was contended that, for such purposes, the mortgagors had no power to pledge the assets of the testator to the prejudice of any charge the plaintiffs had under the will, and that the fact that they were also residuary legatees could not give them any larger authority over the assets than they had as executors, their power as residuary legatees being limited to disposing of what they were entitled to in that capacity after all the trusts of the will had been performed, that, in short, the Bank could not acquire from their mortgagors any greater interest than those mortgagors themselves had in the property under the will. Reference was made to Roper on Legacies, page 443; and on the construction of the will *In re Kirk* (1), and *Wigg v. Wigg* (2) were cited.

As to the powers of an executor under the will of a Mahomedan the case of *Shaik Moosa v. Shaik Essa* (3) was cited; and the Succession Act (X of 1865), section 271; and the Probate and Administration Act (V of 1881), sections 2, 4, 5, 12 and 90, were referred to.

As to the advantages to the plaintiffs of their being not merely creditors, but legatees with a specific charge on the testator's estate the arguments and authorities cited in the judgment of the High Court on appeal were adopted; and that judgment, it was submitted, should be affirmed.

[19] *Levett, K. C.*, replied, referring to *Graham v. Drummond* (4); *Mead v. Lord Orrery* (5); and *Taylor v. Hawkins* (6) [*Danckwerts, K. C.*, with reference to the two last named cases cited *In re Morgan* (7), and *In re The Alms Corn Charity* (8).]

1908, July 21st.—The judgment of their Lordships was delivered by—

SIR ANDREW SCOBLE.—The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title-deeds relating to the property in suit, by way of equitable mortgage, with the Bank; and on the 12th of January 1899 the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of

(1) (1882) 21 Ch. D. 431 (437).

(2) (1739) 1 Atk. 383.

(3) (1884) 8 Bom. 241.

(4) [1898] 1 Ch. 968 (974).

(5) (1745) 3 Atk. 235 (241).

(6) (1809) 8 Ves. Jun. 209.

(7) (1881) 18 Ch. D. 93 (103).

(8) [1901] 2 Ch. 750 (762).



Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified [20] by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants, contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham v. Drummond* (1) in which that learned Judge says (at p. 974):—

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who had no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditor and [21] legatees is well pointed out in Spence's "Equitable Jurisdiction," Vol. II., p. 376, where it is said:—

"A mortgage by an executor, who is also residuary legatee, to secure his private debt, may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained: but as to creditors it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts if any; therefore the mortgagee would be safe as against creditors."

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank,

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33 B. 1=1  
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(1) [1896] 1 Ch. 968 at p. 974.



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33 B. 1=1  
I. C. 369=10  
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1065=88 I.  
A. 130.

the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind ; but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the older sons was not inconsistent with the purposes of the will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance. The case of *In re Queale's Estate* (1) bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds ; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering Judgment, FitzGibbon, L. J., says :—

[22] " The Bank dealt with him (the mortgagor) as, and in his capacity of, an individual owner—not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its creditor really had in the capacity in which he was dealt with, namely, as beneficial owner, i.e., as residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwaraka Das Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants:—*Cameron Kem & Co.*

Solicitors for the respondents:—*Rawle Johnston & Co.*

33 B. 22 (=1 I. C. 378=6 Bom. L. R. 285=1 Cr. L. J. 263).

### CRIMINAL REFERENCE.

*Before Mr. Justice Chandavarkar and Mr. Justice Aston.*

EMPEROR v. DHONDU BIN KRISHNA KAMBLYA.\*

[14th February, 1904.]

*Workman's Breach of Contract Act (XIII of 1859), sections 1, 2—Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870), section 81—Court fee on petition of complaint—Liability of the workman to pay.*

An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to

\* Criminal Reference No. 142 of 1903.

(1) (1886) Ir. L. R. 17 Ch. D. 361.



make him pay to the complainant the Court fee paid on the petition of complaint.

[Fol: 33 Bom. 25; Ref: 52 I. C. 58=41 All. 322; 59 I. C. 917=19 A. L. J. 22=22 Cr. L. J. 165; Fol: 72 I. C. 881=32 M. L. T. 347=1923 M. W. N. 402=45 M. L. J. 36=18 L. W. 111=24 Cr. L. J. 465;]

[23] THIS was a reference made by Mr. J. K. Kabraji, District Magistrate of Ratnagiri.

The reference was in the following terms:—

1. In this case the complainant Gharu Rama Pilankar complained that the accused Dhondu bin Krishna Kamblya having agreed to serve as a Khalashi on the complainant's ship on condition of his paying him Rs. 25 in addition to food for a season of 7 months, received Rs. 3 in advance; that it was agreed two rupees more would be given to the accused at the time of sailing; that the accused wanted the balance earlier which the complainant refused to pay; however the complainant paid him two annas in the interval; that the accused worked for 3 days on the ship and left the service and thus committed a breach of contract of service punishable under section 2 of Act XIII of 1859. The accused almost admitted these allegations and stated that in consequence of the ill-treatment by the tindal of the ship employed by the complainant he left the service. The Magistrate held the accused liable for the breach of the contract.

2. The accused was summarily tried and convicted of the breach under section 2 of Act XIII of 1859 and ordered by Mr. A. R. Chitre, Magistrate, First Class, Ratnagiri, to pay the complainant Rs. 3 and annas 2 advanced by him in addition to Rs. 1-4-0 on account of the expenses incurred in the prosecution by the complainant.

3. The order awarding the expenses in the prosecution made presumably under section 31 of the Court Fee Act as well as the conviction are considered illegal and are recommended to be quashed and the whole amount awarded to be ordered to be repaid.

4. The conviction is considered illegal inasmuch as the case cannot be tried summarily, an enquiry to be made under section 2 of Act XIII of 1859 not being an enquiry into an offence which may be tried summarily (I. L. R. 4 Mad. 234). The order about the payment of compensation is considered wrong on the ground that according to section 2 of the Act, the Magistrate is to order only the repayment of the money advanced or such part thereof as may seem to the Magistrate just and proper (High Court Ruling 2 of 1891). Further, according to the same section the workman must be shown to have wilfully and without lawful and reasonable excuse neglected or refused to perform the work contracted, but from the papers of the case it does not appear that the Magistrate has found this to be so.

The reference came up for disposal before Chandavarkar and Aston, JJ.

*Per Curiam.*—The question whether an offence under Act XIII of 1859 can be tried summarily has been answered in the affirmative by the Madras High Court in *In re Higgins* (Weir's Criminal Rulings, p. 466) and by the Allahabad High Court in [24] *Queen Empress v. Indarjit* (1) and in the negative by the former Court in another case, *Pollard v. Mothial* (2). We prefer to follow the ruling last cited. A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, sections 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any "offence" as defined in the Criminal Procedure Code. Where there has been a wilful neglect or refusal on the part of a person to perform his part of the contract, the Statute enables the Magistrate to give at the option of the complainant to such person a *locus poenitentiae* by ordering him either to return the advance or perform the contract. If he obeys the order, he commits no offence. It is only when the order has been disobeyed that there is "an act or omission, made punishable" by the law and falling

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CRIMINAL  
REFERENCE.

33 B. 22=  
1 I. C. 378=  
6 Bom. L. R.  
255=1 Cr. L.  
J. 263.

(1) (1889) 11 All. 262.

(2) (1881) 4 Mad. 234.



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REFERENCE33 B. 22=  
1 I. C. 378=  
6 Bom. L. R.  
255=1 Cr. L.  
J. 263.

within the definition of "offence" in the Criminal Procedure Code. The Magistrate has only then jurisdiction to deal with the disobedience of his order and sentence the person who has disobeyed to imprisonment.

There is no doubt this to be said for the contrary view that, having regard to the recital in the preamble that "it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment," and to the provisions of section 1 enabling the party aggrieved by such breach to make a complaint to a Magistrate and the Magistrate to issue a summons or warrant, it was the intention of the Legislature to treat such fraudulent breaches as "offences," and that, though the punishment provided is only for disobedience of the Magistrate's order, yet it is in reality punishment for the fraudulent breach. This view of the Act has been suggested in *Queen-Empress v. Kattayan* (1). There is no express decision of this Court on the point, but had that been the intention of the Legislature they would have said that the punishment provided was for the fraudulent breach itself, not for disobedience of the order of the Magistrate.

[25] The order of the Magistrate awarding the expenses of the prosecution is illegal (see *Imperatrix v. Budhu Devu*) (2). As was held there, the repayment to the complainant of the Court fee paid on his petition of complaint could only be ordered "in addition to the penalty imposed" upon the person complained against and no penalty could be imposed till the person complained against had disobeyed the order for the payment of the sum advanced to him.

As the person complained against admitted the advance made to him and agreed to repay it and has repaid it, no prejudice can be said to have been caused to him by the summary trial held by the Magistrate and we decline to interfere with that part of the order which directed repayment. But we set aside the order as to Rs. 1-4-0 and direct that the complainant do refund it to Dhondu bin Krishna Kamblya.

33 B. 25 (=1 I. C. 387=10 Bom. L. R. 1126=8 Cr. L. J. 409).

### CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. BALU SALUJI.\*

[13th October, 1908].

*Workman's Breach of Contract Act (XIII of 1859)—Inquiry under the Act—Summary trial not permissible.*

An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

*Emperor v. Dhondu Krishna* (3), followed.

[Ref. 59 I. C. 917=19 A. L. J. 22=22 Cr. L. J. 165.]

THIS was a reference made by F. J. Varley, Acting Sessions Judge of Ahmednagar.

The reference was in the following terms:—

2. (i) The facts out of which this reference arose are that the accused Balu Saluji passed a *nokarnama* to do certain weaving work, in consideration of a sum of Rs. 99, which he wilfully and without lawful excuse failed to perform.

\* Criminal Reference No. 92 of 1908.

(1) (1897) 20 Mad. 285.

584.

(2) (1891) Cri. Rul. No. Unrep. Cri. Cas.

(3) (1904) ante p. 22: 6 Bom. L. R. 255



(ii) Mr. R. B. Phansalkar, Magistrate, First Class, Sangamner, who tried the case under Act XIII of 1859 directed the accused under section 2 to repay [26] Rs. 99 to the complainant within 15 days. The accused having failed to comply with the order has been sentenced by the said Magistrate to two months' rigorous imprisonment or until such sum has been sooner paid.

(iii) Summary nature of the trial.

(iv) Reasons. It has been laid down in *Emperor v. Dhondu* reported at 6 Bom. L. R. 255, that offences under Act XIII of 1859 are not triable summarily. The practice of the Magistrate in this district varies considerably. At the time when the reported reference was made, the contrary view was not pressed upon the attention of their Lordships who heard the reference. They say "We prefer to follow I. L. R. 4 Mad. 234," while saying "there is no doubt this to be said for the contrary view."

. . . that the preamble seems to prescribe punishment for fraudulent breach of contract.

The District Magistrate has appeared through the Public Prosecutor and adduced the following considerations for the contrary view:—

(i) The word "complaint" is used in section 1, and complaint is defined in section 4, Criminal Procedure Code, as "an allegation made to a Magistrate with a view to his taking action under the Criminal Procedure Code." Had the breach been merely disobedience of the Magistrate's preliminary order, the word "application" would have been used.

(ii) It is the practice of some Magistrates to pass preliminary order while some make the order and penalty on failure to comply in one and the same order, the latter seems to be justified by the fact that the wording of section 2 is not disjunctive. "And, if . . ."

3. The following considerations appear also to the Court to have weight.

(i) The penalty is 3 months' imprisonment and this is within the limit of summary jurisdiction.

(ii) The order is conditional "or until such sum of money be sooner paid," so the workman is not prejudiced.

(iii) Summary jurisdiction is exercised by Magistrates of experience, and they only take action under Act XIII of 1859 when the case is a clear one. If a regular procedure be prescribed, the object of the Act will be largely defeated, for an element of delay will be introduced, and the remedy of masters and employers will be as speedily obtained through the Civil Courts, though the Act was designedly framed to avoid the necessity of resorting to the Civil Courts.

4. The necessity for making this reference arises as it is desirable to have the point cleared up definitely, whether cases under the Act XIII of 1859 can be legally tried in a summary manner or not.

The reference was heard by Chandavarkar and Heaton, JJ.

M. B. Chaubal Government Pleader, for the Crown.

[27] PER CURIAM.—The law enunciated in *Emperor v. Dhondu* (1) ought, we think, to be followed. It is in accordance with the rule of construction applicable to an Act, such as Act XIII of 1859. That rule is well explained by Lord Herschell in *Derby Corporation v. Derbyshire County Council* (2). The action there was a proceeding in the County Court under the 10th section of the Rivers Pollution Act, 1876, under which a County Court Judge had power to order any person to abstain from polluting a river and the said person might be required to perform that duty in the manner specified in the order. If the order were disobeyed, the County Court Judge had jurisdiction to impose a penalty not exceeding £ 50 a day, as he should think reasonable.

As Lord Herschell says in his judgment, the proceeding in which the County Court Judge orders any person to abstain from polluting the river and requires him to perform that duty in a specified manner is not a

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33 B. 25=1  
I. C. 387=10  
Bom. L. R.  
1126=8 Cr.  
L. J. 409.

(1) (1904) ante p. 22; 6 Bom. L. R. 255.

(2) [1897] A. C. 550.



1903  
OCT. 13.  
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CRIMINAL  
REFERENCE.

33 B. 25=1  
1 I. C. 387=  
Bom. L. R.  
1126=8 Cr.  
L. J. 409.

penal proceeding, because "all it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance." Then his Lordship goes on: "The Legislature has provided that if that order is disobeyed then the County Court Judge may impose a penalty . . . That is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed."

This Court, therefore, quashes the orders in this case. The lower Court will be at liberty to take fresh proceedings according to law.

*Order set aside.*

33 B. 28 (=10 Bom. L. R. 688=1 I. C. 451).

[28] APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY  
(Appellants) v. KARSANDAS NATHU AND OTHERS (Respondents)\*  
[1st July 1908.]

*Compulsory acquisition of land—Compensation—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result.*

The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area made off for the roadway.

Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated.

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in [29] various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule.

[Ref. 11 O. L. J. 393=3 I. C. 277; 10 Bom. L. R. 931; Dist. 15 I. C. 672; Ref. 77 I. C. 847=45 M. L. J. 339=18 L. W. 356=1923 M. W. N. 682; 79 I. C. 876.]

\* First appeal No. 157 of 1905.



**V.] TRUSTEES FOR IMPROVT., CITY OF BOMBAY v. KARSANDAS 33 Bom. 30**

APPEAL from the decision of the Tribunal of Appeal, constituted by the City of Bombay Improvement Act (Bombay Act IV of 1898).

The facts are set forth in the judgment.

*Robertson and Jardine* (with *Crawford, Brown & Co.*) for the appellants.

*Inverarity, Setalvad and Jinnah* with *Nanu & Co.*) for the respondents.

BACHELOR, J.:—This is an appeal by the Trustees for the Improvement of the City of Bombay against an award of the Tribunal of Appeal appointed under section 48 (3) of Bombay Act IV of 1898.

The area of the land taken up is 5,576 square yards and the Special Collector awarded a total sum of Rs. 65,511-2-0. On reference to the Tribunal, the Tribunal has increased that award to a total sum of Rs. 87,798. This works out to an average of Rs. 15-11-0 per square yard according to the present appellants, and to a few annas less according to the respondents. With this small difference we are not further concerned, and the real question before us—when all is said and done—amounts to this: Is the allowance of Rs. 15-11-0 per square yard shown to be excessive?

Apart from the general principle which restrains a Court of civil appeal from interfering with any decree unless it is satisfied that that decree is wrong, we have here two special considerations which should deter us from lightly disturbing the award under appeal. One of these considerations is that the matter in dispute is one where absolute precision or mathematical accuracy is not attainable; and the other consideration is that the Tribunal of appeal has acquired long and valuable experience in these matters of valuation, with which alone the present controversy is concerned. Upon this point we follow the principle enunciated by Sir Lawrence Jenkins in *Anandray Vinayak v. Secretary of [30] State* (1). And the result is that before interfering with the award, we must be clearly satisfied that it is substantially erroneous.

Now the Tribunal has grounded its decision largely upon the footing that the land under acquisition is conceived to have been laid out in small plots for building purposes, inasmuch as that admittedly is here and now the most profitable method for the disposal of such property as this. It was admitted before the Tribunal that the land should be valued as laid out for building purposes in small plots, and should not be valued merely as one integral parcel of land.

The method adopted by the Tribunal has been described as the method of hypothetical development. And for the purposes of this case, we will adopt that description without pausing to investigate its accuracy. Now the objection offered to this method is—as we understand it—that it involves or presupposes the intermediation of a third person whom you may call the speculator or exploiter, that is to say, a person who purchases this land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The whole case of the appellants, as it seems to us, depends upon this presupposition being made good; and in our opinion it is not made good. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on the most profitable terms. There is no doubt that here, as we have said, the most profitable method of disposing of it is to lay it out in small parcels for building sites. And the owner, it seems to us, is not to be deprived of the most advantageous

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APPELLATE  
CIVIL.

33 B. 28=10  
Bom. L. R.  
688=1 I. C.  
451.

(1) (1905) 29 Bom. 565.



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JULY 1.—  
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CIVIL.  
—33 B. 28=10  
Bom. L. R.  
688=1 I. C.  
451.

way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then no doubt allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And for our own part we can see no necessary reason why the claimant should be [31] driven to have recourse to the speculator for a business which he could do for himself.

It is true of course that, on the case we are now putting, we are assuming a sale which could not be completed in a day. But the Tribunal of Appeal has made ample allowance for this consideration and has reckoned a period of two years as the period which would be required for the completion of the sale. Upon this footing it has written back the total sum for one year at 6 per cent. which seems to us to give an adequate provision for the period over which the realisation of income will be spread.

When this deduction is made, we are of opinion that the resulting figure does give us the present market value of the land of the claimant, subject of course to such minor expenses as would be incurred by advertising, planmaking, etc., for which Rs. 500 have been allowed by the Tribunal.

Complaint was made that no separate allowance or deduction had been made on account of the passage or roadway shown in the plan. But if we are right in the foregoing observations upon the general principle adopted by the Tribunal, we do not think that this particular argument of the appellants has any weight, for when once you have adopted the general principle of a sale of the land split up into parcels suitable for building, it appears not only unnecessary but inappropriate to make a special deduction on account of the small area marked off for the roadway. For the Tribunal has found that the whole site is worth to the claimant Rs. 15-11-0 per square yard over all, and in that whole site is included the area set aside for the roadway. The evidence shows not only that this point was not overlooked by the Tribunal, but also that it is not unusual for the purchaser of a plot adjoining the roadway to pay for half the roadway, as well as for the site actually available for building.

So much then as to this special method of valuation which the Tribunal in this instance has invoked for its assistance. But it is important to observe that the Tribunal has not relied exclusively upon this method. It has employed this method in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring [32] lands. And since the consequence is that these two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence, but also that the method of hypothetical development is itself corroborated.

We have looked into the evidence as to sales of neighbouring lands, and we have considered the arguments addressed to us on this point by Counsel, but it is not, we think, necessary to examine that evidence again in detail. It is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of this land in reference. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast law. It will suffice, therefore, for us to say that upon a general consideration of all the



circumstances which have been adduced, we are of opinion that the neighbouring sales afford ample support for the view which the Tribunal ultimately took.

Only one point remains to be noticed and that is as to the allowance of Rs. 1,330 for damages under—as the judgment goes—sub-section 3 of section 23 of the Land Acquisition Act. After reference to the President of the Tribunal and upon consideration of the general language of the judgment, we are satisfied that sub-section 3 was misquoted for sub-section 4, and that the damages given were given not on account of severance as such, but by reason of the acquisition having injuriously affected the claimant's other property. Of this injury there is, we think, sufficient evidence in the deposition of witness Raghunath and in the map itself, Exhibit Q. And nothing has been said which would justify us in reducing the sum which the Tribunal has awarded upon this head.

The result therefore is that this appeal must be dismissed with costs.  
*Appeal dismissed.*

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CIVIL

33 B. 28=10  
Bom. L. R.  
688=1 I. C.  
451.

33 Bom. 33 (=10 Bom. L. R. 759 =8 Cr. L. J. 267=1 I. C. 454).

[83] CRIMINAL REVISION.

*Before Chief Justice Scott and Mr. Justice Knight.*

EMPEROR v. BHAUSING DHUMALSING.]\*  
[7th July, 1908.]

*Criminal Procedure Code (Act V. of 1898) sec. 106 (3)—Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.*

Section 106, clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority.

*Mahmudi Sheikh v. Aji Sheikh* (1); *Muthiah Chetti v. Emperor* (2) and *Paramasiva Pillai v. Emperor* (3), dissented from.

*Dorasami Naidu v. Emperor* (4), referred to with approval.

[Fol : 33 All. 48; Ref : 37 Mad. 153; Rel : 81 I. C. 145=25 Cr. L. J. 657.]

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898), from an order passed by E. G. Turner, Magistrate, First Class, of Yeola.

The accused with eight others was tried by the Second Class, Magistrate of Yeola for rioting and causing hurt, offences punishable under sections 147, 323 and 325 of the Indian Penal Code (Act XLV of 1860). The Magistrate convicted the accused of offences under sections 174 and 323, and sentenced him to undergo simple imprisonment for 15 days.

On appeal, the First Class Magistrate of Yeola altered the conviction to one under section 323 of the Indian Penal Code, reduced the sentence to simple imprisonment for five days, and ordered the accused, under section 106 of the Criminal Procedure Code (Act V of 1898), to execute a bond of Rs. 100 with one surety in like amount to keep the peace for one year.

\* Criminal Application for Revision No. 84 of 1908.

(1) (1894) 21 Cal. 622.

(3) (1906) 30 Mad. 48.

(2) (1905) 29 Mad. 190.

(4) (1906) 30 Mad. 182.



1908  
JULY 7.

CRIMINAL  
REVISION.

33 B. 33=10  
Bom. L. R.  
759=8 Cr. L.  
J. 267=1 I.  
C. 454.

The accused applied to the High Court.

*M. V. Bhat*, for the applicant.

[33] The Government Pleader for the Crown.

SCOTT, C. J. :—The petitioner, with eight other persons, was charged with rioting and causing hurt to the complainant under sections 147, 323 and 325 of the Indian Penal Code, in the Court of the Second Class Magistrate of Yeola, and was convicted under sections 147 and 325 of the Code and sentenced to simple imprisonment for fifteen days.

The petitioner then appealed to the First Class Magistrate, who altered the conviction to one under section 323 and reduced the sentence to five days' simple imprisonment and under section 106 of the Criminal Procedure Code directed that the appellant should execute a bond of Rs. 100 to keep the peace for one year.

The petitioner now applies to us in revision to set aside the order for execution of a bond contending that the Court had no jurisdiction to add such an order to the sentence of the Second Class Magistrate.

We cannot accept that contention. Section 106 of the Criminal Procedure Code authorises such an order whenever any person is convicted of an assault by the Court of a Magistrate of the First Class and such Court is of opinion that it is necessary to require the execution of such a bond. Both conditions are fulfilled in the present case, for the order of conviction under section 323 was passed by the First Class Magistrate and his opinion was that the bond was necessary.

It has however been contended that such an order cannot be made in appeal and in support of that contention the following cases have been cited : *Mahmudi Sheikh v. Aji Sheikh* (1); *Muthiah Chetti v. Emperor* (2) and *Paramasiva Pillai v. Emperor* (3).

We are not prepared to accept the construction placed upon section 106 in those cases. We think that clause 3 makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The clause runs :—"An order under this section may *also* be [35] made by an appellate Court or by the High Court when exercising its powers of revision," the "*also*" plainly implying that it may be independently made by those Courts as well as by the original Courts specified in the first clause ; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. In support of this view we may refer to the judgment reported in the case of *Dorasami Naidu v. Emperor* (4), which throws doubt upon the correctness of the decisions above mentioned. We may say that we entirely concur in the reasoning of the latter part of that judgment.

For these reasons we dismiss the application.

(1) (1894) 21 Cal. 622.  
(2) (1905) 29 Mad. 190.

(3) (1906) 30 Mad. 48.  
(4) (1906) 30 Mad. 182.



33 B. 35 (=1 I. C. 456=10 Bom. L. R. 768).

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaulal.

NATHU PIRAJI MARWADI (Original Plaintiff), Appellant v.  
UMEDMAL GADUMAL (Original Defendant), Respondent.\*

[22nd July, 1908.]

1908  
JULY 22.

APPELLATE  
CIVIL.

33 B. 35=1  
I. C. 456=10  
Bom. L. R.  
768.

*Practice—Allegations by parties at trial—Case determined on those allegations—Making a new case in appeal.*

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

[Ref. 78 I. C. 194; 83 I. C. 360; 66 I. C. 755.]

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree passed by B. R. Mehendale, Joint Subordinate Judge at Nasik.

Suit for declaration that defendant was not entitled to possession of land.

The land belonged originally to one Piraji Marwadi, who died leaving a widow Gangabai. In 1887 Gangabai sold the property to one Dewrao, who sold it to Balvantrao in 1893. Balvantrao in 1893 and 1895 mortgaged it to Gadumal, the defendant.

Meanwhile, Nathu Piraji was adopted by Gangabai in 1884.

[36] In 1897, Nathu Piraji (plaintiff) sued Balvantrao to recover possession of the property. Gadumal was not a party to that litigation. Nathu Piraji got a decree in 1903 against Balvantrao, in attempting to execute which he was obstructed by Gadumal. Nathu Piraji filed this suit to recover possession from Gadumal, alleging that the property was his ancestral property.

The defendant denied that he was bound by the former proceedings; and contended that his equitable right to retain possession had matured, and that the debt due to the defendant must be paid off before plaintiff could recover.

The Subordinate Judge held that the mortgage was proved, that the defendant was not barred by the former suit, that the claim was not barred, and that the plaintiff was entitled to recover possession with mesne profits for the period he had been dispossessed by defendant.

On appeal, the District Judge remanded the case to the Subordinate Judge for the determination of the following issues:—

1. "Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?"

2. If not, what is due on the mortgage?"

The Court on remand found the first issue in the negative and found that Rs. 7,266 were due.

These findings were certified to the District Judge who reversed the decree and dismissed the suit, on grounds which were expressed as follows:—

"From the facts of the present case and from the position of the parties it is clear that what was required was that the plaintiff should show that he was the adopted son

\* Second Appeal No. 227 of 1907.



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JULY 22.  
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APPELLATE  
CIVIL.  
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33 B. 35=1  
I. C. 456=10  
Bom. L. R.  
768.

of Piraji and that the property in suit was part of Piraji's estate and that it was part of the estate dealt with by the guardianship order of 1885. Until these facts were made out the case of the plaintiff against the present defendant was not in my opinion established. It did not occur to me that anything more than the merest formal proof of these facts would be necessary or indeed that they would be seriously contradicted and my sole reason for remanding the case was that there might be some proof of these points which the lower Court had in my opinion wrongly held to be proved by the judgments in the cases between the present plaintiff on the one hand and Dewrao and Balvantrao on the other. No such formal proof has however been adduced and accordingly it is not shown that plaintiff was the adopted son of Piraji, and that the property in suit could not be dealt with effectively by Gangabai. . .

[37] In the absence of any evidence I must hold that plaintiff has not shown that he is entitled to recovery from the present defendant. But I note that assuming the judgments referred to, to be admissible as proving the status of plaintiff, I should hold on them that Nathu was the adopted son of Piraji, that the property in suit was dealt with by the guardianship order and that Gangabai's alienation to Dewrao and consequently the subsequent transfer to the present defendant were ineffective, and that accordingly the plaintiff is entitled to recover.

Meanwhile I must reverse the order of the lower Court and dismiss the suit with costs."

The plaintiff appealed to the High Court.

*Inverarity*, with *R. R. Desai* for the appellant.

*Robertson*, with *S. S. Patkar*, for the respondent.

BATCHELOR, J.:—The first question raised in this appeal turns upon the manner in which the case was dealt with by the lower appellate Court, and to appreciate the point, it will be necessary to refer to the pleadings and issues.

The suit was one to obtain possession of certain land, and in the first paragraph of the plaint, the property is claimed by the plaintiff as being his ancestral property. Reference is then made to certain proceedings in a previous litigation before the High Court to which it was said that the defendant, had been a party.

The defendant's written statement contains nine paragraphs which traverse various allegations made in the plaint. But upon a fair reading of its written statement, we do not find that the ownership of the plaintiff is anywhere contested. It is true that there is a reference to the High Court proceedings in the appeal of 1902, but that reference, we think, was merely to rebut an inference which the plaint had suggested that these earlier proceedings were binding upon the defendant, in the matter of the validity of the alienation. This view is supported by the fifth paragraph of the written statement in which the defendant's case is put upon adverse possession, and it is admitted that the lands in suit were formerly in the plaintiff's family.

Turning to the issues, we find that there is no issue which clearly raises the question of title, and that was the opinion formed of the pleadings and issues by the learned Subordinate Judge who tried the case in the first instance. We think, therefore, that no question of title was ever raised in the first Court.

[38] When the case came before the District Judge on appeal, the District Judge remanded it for decision on this issue:—

Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

Now that was an issue raising a point which had never been raised before, and of which the plaintiff had consequently no notice. But the matter unfortunately does not rest there, for, when the Court of first instance makes its return to this order of remand, the District Judge



proceeds to discuss and interpret his order in a particular manner, which, we think, must have taken the parties by surprise. It was, he says, the object of this issue to raise the questions whether the plaintiff was the adopted son of Piraji, whether the property in suit was part of Piraji's estate and whether it was part of estate dealt with by the guardianship certificate. All these are points which no doubt might have been taken in defence but which never had been taken and should, therefore, not have been allowed to be raised at the final stage of the appeal. We do not think that the District Judge was justified in exposing the plaintiff after he had obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. A litigating party can only succeed *secundum allegata et probata*, and the Court should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

It was endeavoured then to support the decree upon the point of limitation. But here we have the concurrent findings of both the Courts that the mortgagee's possession was not continuous for twelve years, but had suffered an interruption for at least two years.

The result, therefore, is that the decree of the District Judge must be reversed and the decree of the Subordinate Judge restored, and the plaintiff must have his costs throughout.

Decree reversed.

33 B. 39 (10 Bom. L. R. 939=1 I. C. 459.).

### [39] APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Heaton.*

SHIVRAM DHONDU PUJARA (*Original Defendant 14*), Appellant, v.  
SAKHARAM KRISHNA KULKARNI (*Original Plaintiff*), Respondent.\*  
[30th July, 1908.]

*Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), sections 234, 244, 252—Limitation Act (XV of 1877), Schedule II, Article 179.*

A money decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882).

*Umed Hathising v. Goman Bhaiji* (1) followed.

There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882.)

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

[Ref: 14 C. L. J. 337=11 I. C. 280 ; 53 I. C. 187=21 Bom. L. R. 861=44 Bom. 34 ; 62 I. C. 905=6 P. L. J. 451.]

\* Second Appeal No. 222 of 1908.

(1) (1895) 20 Bom., 985.

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33 B. 35=1  
I. C. 456=10  
Bom. L. R.  
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1903  
JULY 20.  
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APPELLATE  
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83 B 39=10  
Bom. L. R.  
939=1 I. C.  
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SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, confirming the order of K. K. Sunavala, Subordinate Judge of Malvan, in an execution proceeding.

The plaintiff brought a suit against one Dhondu Lala, his two brothers and other co-sharers, for the recovery of Rs. 1,275-5-6 [40] due under two money bonds executed by Dhondu Lala alone. The plaintiff wanted a decree against all the defendants alleging that Dhondu was the manager of the family and that the debt was contracted by him for the joint purposes of the whole family. At an early stage of the suit Dhondu Lala died and his sons were brought on the record as defendants 13, 14 and 15. The Court, on the 31st March 1903, gave a decree to the plaintiff against the assets of Dhondu Lala and dismissed the suit against the other defendants. The plaintiff appealed against that part of the decree which dismissed the suit against the other co-parceners. But his appeal was dismissed. Dhondu Lala's representatives, defendants 13, 14 and 15 did not appeal against the decree against the assets of the deceased. The plaintiff having in the year 1906 that is, within three years of the date of the appellate decree and more than three years after the date of the first decree, presented a darkhast for the execution of the decree, defendant 14 contended that Dhondu Lala and defendants 13, 14 and 15 were joint and that the said defendants being the survivors were the sole owners of the property. He further contended that the darkhast was time-barred.

The Subordinate Judge found that the darkhast was in time, that the decree-holder was entitled to execute his decree against the interest of Dhondu Lala in the properties mentioned in the darkhast, that the said interest included the shares of defendants 13, 14, and 15 and that the decretal debt was of such a nature that the said defendants were bound to pay it. He, therefore, ordered that execution should proceed according to the darkhast.

Against the said order defendant 14 appealed and the Assistant Judge confirmed the decree.

Defendant 14 preferred a second appeal.

*M. R. Bodas*, for the appellant (defendant 14):—Our father who was defendant 1 died before decree and we and our brothers were brought on the record as legal representatives of the deceased. As the decree was passed against the estate of our father, the execution of the decree cannot now proceed against us. At the [41] time the decree was passed our father had no subsisting interest as it had already passed to us by survivorship.

Next, the plaintiff applied for execution more than three years after the decree of the Court of first instance. The application was therefore not within time. It was an error to compute the period of limitation from the date of the appellate decree to which we were not a party. The parties to the appeal were the plaintiff and the other defendants. Therefore clause 2 of the third column of article 179, schedule II of the Limitation Act cannot apply.

*K. N. Koyaji*, for the respondent (plaintiff):—The liability of the sons in execution proceedings is settled by the ruling in *Umed Hathising v. Goman Bhaiji* (1).

[SCOTT, C. J. referred to *Amar Chandra Kundu v. Sebak Chand Chowdhury* (2).]

(1) (1895) 20 Bom. 385.

(2) (1907) 34 Cal. 642.



That decision entirely supports our case. The liability of the sons taking ancestral property by survivorship can be determined in execution proceedings. A separate suit for the purpose is not necessary and such a suit will not lie.

As to limitation the plain words of clause 2 of the third column of article 179, schedule II of the Limitation Act, must be strictly followed. That is now the settled rule of the three High Courts in India. *Lakshman Ramchandra v. Satyabhamabai* (1), *Kanti Chunder Goswami v. Bisheswar Goswami* (2), *Kristnama Chariar v. Mangammal* (3). In *Mashiat-Un-Nissa v. Rani* (4), two of the five Judges held the same view, and the case was distinguishable in some respects as pointed out in *Kanti Chunder Goswami v. Bisheswar Goswami* (2).

SCOTT, C. J.—The opponents in these execution proceedings are Hindus governed by the Mitakshara law. The original first defendant, their father, died before decree. On his death the opponents were placed on the record as defendants as his legal [42] representatives. The plaintiff has obtained a simple money decree against them as such legal representatives for Rs. 1,271-5-6 and costs to be recovered from the estate of the deceased. He has attached various properties mentioned in the application for execution which with a few trifling exceptions are ancestral properties which devolved exclusively upon the opponents by right of survivorship on their father's death. They claim that the ancestral properties formed no part of the estate of their father at the date of the decree and consequently are not liable to attachment. It is no doubt correct that at the date of decree the properties in question formed no part of the estate of the deceased. It has however been decided by this Court in *Umel Hathising v. Goman Bhaiji* (5), that a money decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality and illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality he can do so under section 244 of the Civil Procedure Code. That was a case in which the decree was sought to be executed against the son as legal representative under section 234 of the Code. The present is a case in which execution is sought against the sons added as legal representatives before decree, a situation dealt with in section 252.

There is however no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under section 234. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244. We, therefore, must follow the decision above referred to and we hold that it was open to the opponents to dispute in this proceeding the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality [43] or illegality. They cannot insist on the plaintiff resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of these properties because the

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(1) (1877) 2 Bom. 494.  
(2) (1898) 25 Cal. 585.  
(3) (1902) 26 Mad. 91.

(4) (1889) 13 All. 1.  
(5) (1895) 20 Bom. 385.



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APPELLATE  
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question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of section 244.

As the opponents have not impeached their father's debt on the ground either of immorality or illegality the decree-holder is entitled to execute his decree against all the attached properties unless his right to do so is, as contended by the opponents, barred by the law of limitation under Article 179 of the 2nd schedule to the Limitation Act. It is contended on their behalf that the words of clause 2 in the third column of that article should not be taken literally and that as the opponents did not appeal against the original decree, although other defendants did, the date of the final decree of the appellate Court which was passed within three years from the initiation of these proceedings is a date which does not concern the opponents as the original decree which was final so far as they were concerned was passed more than three years before. We, however, are not disposed thus to disregard the plain words of clause 2. There was an appeal and the final decree of the appellate Court was passed less than three years before plaintiff's application. That application is therefore within time. We confirm the judgment of the lower Court and dismiss the appeal with costs.

*Decree confirmed.*

33 B. 44 (=10 Bom. L. R. 943 =1 I. C. 464).

[44] APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Chandavarkar.*

RANU BIN SHIVJI BARATE (*Original Defendant 5*), Appellant, v.  
LAXMANRAO KRISHNA LIMAYE AND ANOTHER (*Original  
Plaintiff and Defendant 1*).<sup>\*</sup>  
[14th August, 1908.]

*Transfer of property Act (IV of 1882), section 59—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 63 (A) (1)—Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*

A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882).

<sup>\*</sup> Second Appeal No. 42 of 1908.

(1) Section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

63 A. *Mode of execution by agriculturists of instruments required to be registered under Act III of 1877.*—(1) When an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, 1877, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate and the Sub-Registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it, and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village Registrar by sections 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877.

(2) An instrument to which sub-section (1) applies shall not be effectual for any purpose referred to in section 49 of the Act last mentioned unless it has been written, executed and attested in the manner provided in that sub-section.



Held, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness."

*Burdett v. Spilsbury* (1), followed.

[Fol: 85 All. 254; 44 Bom. 405; Ref: 35 Mad. 607; 41 Mad. 535; 37 Cal. 526.]

[45] SECOND appeal from the decision of R. D. Nagarkar, Joint First Class Subordinate Judge of Poona, with appellate powers, reversing the decree of T. N. Sanjana, Second Class Subordinate Judge of Haveli at Poona.

Suit for a declaration that a certain deed was a valid mortgage or charge upon property.

The plaintiff alleged that the property in suit was mortgaged to him by defendants 2, 3 and 4 to secure repayment of Rs. 1,400 at 10 per cent. under a deed dated the 8th September 1893, and that Rs. 2,800 were due to him under the said deed on the date of the suit; that in execution of a decree obtained by defendant 1 the mortgaged property was attached; that the plaintiff thereupon presented an application praying that the attached property be sold subject to his mortgage encumbrance, but the Court dismissed the application on the 17th August 1904, holding that the mortgage-deed, not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882), was invalid and ineffectual to create a mortgage or a charge. The plaintiff, therefore, brought the present suit for a declaration that the mortgage-deed effected a valid mortgage or charge upon the property and that he was entitled to hold the property as security for the payment of the amount due thereunder.

Defendant 1 denied the plaintiff's mortgage or his charge upon the property and contended, *inter alia*, that the document relied on by the plaintiff was illegal, without consideration, invalid and ineffectual.

Defendants 2, 3 and 4 were absent.

Defendant 5, the execution purchaser who was joined as co-defendant after the institution of the suit, raised substantially the same defence as defendant 1.

The Subordinate Judge found that the mortgage-bond sued on was not proved according to law and it could not be used as evidence and that it was not effectual to create a valid mortgage of the property described therein, and failing to operate as a mortgage, it could not be used as creating a charge. The [46] Subordinate Judge, therefore, dismissed the suit observing as follows:—

The mortgage-deed (exhibit 31) has been written under the provisions of the Dekkhan Agriculturists' Relief Act. The writer thereof (exhibit 30) swears that the defendant Govind Rangnath signed it for himself and as the Mukhtyar of the defendant Balkrishna Rangnath and that the defendant Waman signed it himself in his presence. The bond bears no attestation excepting that of the Sub-Registrar. The Sub-Registrar has been examined on commission (exhibit 39), but he simply admits the attestation and his other signatures on the bond to be in his handwriting. But he was not put a single question regarding execution and his evidence does not prove execution. Section 68 of the Evidence Act provides: "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." In this case the document being a mortgage-deed is required by section 59 of the Transfer of

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(1) (1849) 10 C. & F. 340.



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Property Act to be attested by at least two witnesses. It has been attested by one witness only, viz., the Sub-Registrar, but although his evidence has been given, it has not been given for the purpose of proving the execution of the document. Consequently under section 68 of the Evidence Act, the document cannot be used as evidence of the mortgage transaction which can be effected by an attested document only. I cannot therefore hold the execution of the document as a mortgage-bond proved.

Even holding it proved, I find that the deed, having been passed after the Transfer of Property Act was extended to this Presidency, is invalid and ineffectual to create a mortgage not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The learned pleader for the plaintiff contends that the deed was executed under section 63A of the Dekkhan Agriculturists' Relief Act which requires the document to be attested by the Registrar alone which has been done in this case; that it is only when the executant is unable to read the instrument that this section requires the document to be further attested and that in this case the executants knew to read and write and so further attestation was unnecessary. I think the argument is not correct. Beyond doubt the document has been properly executed in accordance with the provisions of the section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property, such as mortgage, can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by law to be attested or not. To ensure the genuineness of a document and to further prevent any fraud being committed against an agriculturist, it requires all documents to be executed by agriculturists whether required by law to be attested or not to be attested by the Sub-Registrar and where the executant is illiterate to be further attested by other persons. It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage. A valid mortgage for Rs 100 and upwards could only be effected under the above section by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the mortgagor is an agriculturist the further precautions laid down in section 63 A of the Dekkhan Agriculturists' Relief Act have to be followed and the document has to be written by or under the superintendence of the Sub-Registrar and to be attested by him. That does not do away with the necessity of two attestations required by section 59 of the Transfer of Property Act to effect the mortgage itself. I therefore find that the document relied on by the plaintiff is invalid and ineffectual to create a valid mortgage; nor can the failure to comply with the provision for attestation contained in section 59 of the Transfer of Property Act convert a mortgage transaction into a charge (see *Narain Babaji v. Lakshmandas*, 7 Bombay Law Reporter, p. 984). The plaintiff's suit must therefore be dismissed.

On appeal by the plaintiff the Subordinate Judge's decree was reversed and the suit was allowed on the following grounds:—

The lower Court thinks that the mortgage deed (exhibit 31) is a document which is required by law to be attested (section 59 of the Transfer of Property Act) and that therefore it cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution (section 68 of the Evidence Act). The writer of the deed (exhibit 30) was called as a witness for the purpose of proving its execution and has deposed to its execution by the obligors. The only question is whether he can be treated as an attesting witness. "The evidence of the writer of the deed, who has signed his name, though not explicitly as an attesting witness, on the margin, and has been present when the deed was executed, is admissible under this section (section 59 of the Transfer of Property Act) as of an attesting witness." (Gour's *Radha Kishen v. Patch An*, I. L. R. 20 All. 532 and other cases given in the footnote No. 6 on page 605. In the present case the writer has signed his name on the deed and according to his evidence he was present when the deed was executed. His evidence is therefore admissible as of an attesting witness and the provisions of section 68 of the Evidence Act are sufficiently complied with.

In the next place it is possible to treat the evidence of the Sub Registrar (exhibit 39) as proving execution. He states on oath on reading the endorsement on the mortgage-bond (exhibit 31) that it was registered according to the provisions of the Dekkhan Agriculturists' Relief Act. Section 63A of the Act requires him to attest a document



like the mortgage-deed (exhibit 31) and he [48] has further admitted on oath his five signatures on the document. The first endorsement at the foot of the document, which is signed by him in his official capacity, shows that he saw the executants sign the document. Though no direct question was asked to him, as to the fact of execution by the obligors, the effect of his evidence, in my opinion, is that he proves execution by the obligors. Even assuming that that is not its effect, the document is, I think, sufficiently proved by the evidence of the writer (exhibit 30), which can be treated as the evidence of an attesting witness for the purposes of section 68 of the Evidence Act.

Defendant 5 preferred a second appeal.

*D. A. Khare*, for the appellant (defendant 5).

*G. S. Rao*, for respondent 1 (plaintiff).

*N. M. Patvarathan* for respondent 2 (defendant 1).

SCOTT, C. J.—The deed upon which the plaintiff relies being a mortgage-deed to secure repayment of Rs. 1,400 must, in order to be effective, be attested by two witnesses (see section 59 of the Transfer of Property Act). Assuming that we may take the signature of the Sub-Registrar who was bound to attest under the provisions of section 63A of the Dekkhan Agriculturists' Relief Act as that of an attesting witness, there is no one else whose name appears on the document who purports to sign as an attesting witness. But it is argued that the writer of the deed who, in concluding the writing of the body of the document, states that it is written by him, can be treated as an attesting witness. It was not suggested in the first Court that he could be regarded in this light, but the appellate Court relying upon a passage in Gour's Transfer of Property Act and upon the case of *Radha Kishen v. Fateh Ali Ram* (1) has held that his evidence was admissible as that of an attesting witness and that the provisions of section 68 of the Evidence Act had been sufficiently complied with. We cannot gather from the report in *Radha Kishen v. Fateh Ali Ram* (1) in what manner or place the scribe in that case affixed his name to the deed; we are however of opinion that the name of the writer in the case now before us cannot be held to be an attestation. It occurs before the names of the executing parties and forms part of the body of the document. In *Burdett v. Spilsbury* (2) Lord Campbell said: [49] "What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness." This, we think, is the meaning of attesting witness in section 68 of the Evidence Act and we therefore hold that the writer in the circumstances of this case cannot be treated as an attesting witness.

It has, however, been argued that the Dekkhan Agriculturists' Relief Act is a special enactment which is not affected by the Transfer of Property Act and that the latter Act has no application to this case. The answer to this argument is given by the Subordinate Judge in the original Court. He says: "Beyond doubt the document has been properly executed in accordance with the provisions of section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property such as a mortgage can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by the law to be attested or not. . . . It does not in

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33 B. 44=10  
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943=1 I. C.  
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(1) (1898) 20 All. 582.

(2) (1843) 10 C. & F. 340 at p. 417.



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83 B. 44=10  
Bom. L. R.  
943=1 I. C.  
464.

any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage."

We allow the appeal. We set aside the decree and dismiss the suit with costs throughout on the plaintiff. Separate sets of costs between the appellant (defendant No. 5) and defendant No. 1.

*Decree reversed.*

33 Bom. 50 (=1 I. C. 466=10 B. L. R. 770.)

[50] APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

DATTATRAYA WAMAN TILLU (*Original Defendant No. 1*),  
*Appellant*, v. RUKHMABAI KOM PANDURANG DAMODUR  
TILLU (*Original Plaintiff*), *Respondent*.  
[31st July, 1908.]

*Hindu widow—Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.*

The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

*Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A. P., at Thana, reversing the decree passed by M. H. Wagle, Subordinate Judge at Alibag.

Suit for a declaration to recover maintenance and for arrears of maintenance.

The plaintiff's husband Pandurang and his brother Waman (father of defendants) formed a joint family. Pandurang died in March 1897; and Waman died on the 25th November 1900.

Soon after Pandurang's death, his widow Rukhmabai drew Rs. 937-3-7, which were deposited in her husband's name in the Postal Savings Bank.

The present suit was brought on the 9th February 1904 to obtain a declaration that the plaintiff was entitled to get from the family estate, in the hands of the defendant, maintenance at the rate of Rs. 120 a year, and for Rs. 360 being the amount of the arrears of three years' maintenance.

The defendants contended *inter alia* that the income of the money she had withdrawn from the Savings Bank was enough to support her, and that she was entitled to Rs. 6 a month for maintenance.

[51] The Subordinate Judge held that Rs. 6 per month were sufficient for plaintiff's maintenance, but that her suit was premature. His reasons were as follows:—

"The plaintiff admits that she withdrew the amount of Rs. 937-3-7 from her husband's account in the Post Office Savings Bank. . . . Assuming that it was the plaintiff's husband's property she cannot sue for maintenance, so long as she has that money in her hand (*Bai Kanku v. Bai Parvati*, P. J. 1890, 182). In her deposition taken on commission the plaintiff has stated that she paid to her brother Rs. 800

\* Second Appeal No. 368 of 1907.



as the fooding charges for five years. The deposition was taken in February 1905, and the suit was filed on the 9th February 1904. If the plaintiff had money to pay the boarding charges for five years, what was the necessity of claiming arrears of maintenance? If no arrears could be claimed, and if she had money that would last her for some time more, she had no cause of action. She does not say that she got the money after the institution of the suit. She has given an account of how she spent the balance of the money. She says that she spent some money for the expenses of this suit, yet she has claimed the costs of the suit. If she had money to spend on the suit, why did she not apply the same for maintenance? The other alleged expenditure is unjustifiable. She cannot spend her husband's money in any way she pleases and then ask for maintenance from the family property; or rather she cannot claim maintenance while she has her husband's money in her hands. The suit is therefore brought without any cause, and hence it must be held to be premature."

On appeal, the lower appellate Court held that the plaintiff should be awarded maintenance at Rs. 100 a year, and that though she had withdrawn Rs. 937-3-7 from the Savings Bank, and that though the present suit was not therefore premature or unsustainable, yet the amount together with his interest should be taken into consideration and first applied towards the maintenance expenses of the plaintiffs, and that the balance, if any, should be returned to defendant No 1. The decree passed was that the plaintiff was declared entitled to a maintenance allowance of Rs. 8-5-4 a month, that her claim for arrears be dismissed, and that she should pay Rs. 184 to defendant No. 1 and in default should not be allowed to recover her monthly allowance till the 9th January 1909.

The defendant No. 1 appealed to the High Court.

*N. V. Gokhale*, for the appellant.

*P. P. Khare*, for the respondent.

[52] **BATCHELOR, J.** :—This was a suit for maintenance brought by a Hindu widow. The Judge of first instance dismissed the suit on this among other grounds that it was premature. The learned Judge in the Court of Appeal differing from that view allowed the suit and gave the plaintiff a decree for maintenance at the rate of Rs. 100 a year.

The only question raised in this appeal is whether the cause of action had accrued to the plaintiff when this suit was filed in February 1904. At that time the findings of the Court show that the plaintiff was in possession of a fund belonging to her husband's family estate, which fund was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court. And in this state of the facts, we are of opinion that no cause of action had accrued to the plaintiff. In 1904 the Court was not in a position to forecast events or to anticipate the position of affairs five years later. In other words it was not in a position to make a decree for maintenance; and no liability to provide maintenance could in the then existing circumstances attach to the appellant.

It is urged that the Court might have made a mere declaratory decree affirming the plaintiff's abstract right to maintenance. But assuming that such an abstract prayer was competent, it was not a prayer put forward by the plaintiff; her prayer was for maintenance at the rate of Rs. 120 a year. We think, therefore, that the Subordinate Judge of first instance was right in the view which he took upon this point and we must reverse the decree under appeal and dismiss the suit with costs throughout.

We may add that Mr. Khare has attempted to enlist our sympathy in favour of his client. But upon that point we need only say that whatever the sympathies of the Court may be worth, they do not range themselves on the side of the plaintiff.

*Decree reversed.*

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83 B. 50=1  
I. C. 466=10  
Bom. L. R.  
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33 B. 53 (=1 I. C. 614=10 Bom L. R. 403).

[53] ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K. C. I. E., Chief Justice, and  
Mr. Justice Batchelor.

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CIVIL.

33 B. 53=1  
I. C. 614=10  
Bom. L. R.  
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TEHILRAM GIRDHARIDAS, Plaintiff and Appellant, v. KASHIBAI,  
WIDOW, Defendant and Respondent.\*  
[25th February, 1908.]

*Transfer of Property Act (IV of 1882), section 55, clause (4) (b), clause (6)—Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of 1872), section 115.*

In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property.

*Held*, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds.

*Per Batchelor, J.*—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

ONE Mahomedali mortgaged to the plaintiff, by a registered deed dated 7th April 1904, a chawl for securing in trust for the person or persons who had accepted or discounted or would thereafter accept or discount at the plaintiff's request hundis, notes, etc., drawn or payable by the mortgagor for the aggregate sum not exceeding at any time the amount of Rs. 7,000.

The mortgagor handed to the plaintiff deeds and muniments of title relating to the said property including a registered deed of sale from the defendant to the mortgagor, dated 3rd April 1903. At the foot of this deed it was endorsed that the sum of [54] Rs. 9,000 had been paid as consideration money by the mortgagor and received by the defendant in full.

The plaintiff demanded on the 12th May 1905 from the mortgagor the sum of Rs. 6,455-3-6 for principal, interest and costs due by him and in default of payment gave notice that the plaintiff would exercise the power of sale reserved to him. No answer having been received from the mortgagor the plaintiff caused the chawl to be put up for sale by auction to be held on the 16th September 1905.

On 13th September 1905 the defendant for the first time intimated to the plaintiff that Rs. 4,000 out of the consideration money still remained unpaid to her by the mortgagor and therefore called upon the plaintiff not to put up the said chawl for sale as the plaintiff's mortgage could not affect the defendant's rights and interests in the property.

The plaintiff alleged that he was a *bona fide* mortgagee for value without notice of the defendant's alleged lien and entitled to possession of the chawl under the mortgage-deed; and that as the defendant knowing that the amount of the purchase money had not been received by her in full caused it to be falsely stated otherwise in the sale-deed and had also

\* Suit No. 422 of 1906; Appeal No. 1506.



parted with all other title-deeds relating to the said chawl, she was estopped from setting up her lien if any.

The plaintiff prayed for a declaration that he was entitled to sell the chawl under the mortgage-deed free from any lien of the defendant; and for an order directing the defendant to deliver possession to the plaintiff of the said chawl including the four rooms therein in her personal occupation.

The defendant contended that the mortgage was a sham transaction; that the sale-deed was not explained to her; that the vendee (the mortgagor) by a writing of even date agreed to pay to her the balance of the purchase-money; that she was in possession of the chawl in exercise of her right of lien as unpaid vendor, and the plaintiff was aware of her possession, that she had obtained a High Court decree against the mortgagor for the amount of Rs. 3,444 due to her; that she was fraudulently induced to part with her title-deeds by the mortgagor alleging that they [55] were necessary for the preparation of the deed of sale; that the suit was bad in law as under the mortgage deed the plaintiff was appointed a trustee on behalf of an uncertain class and the plaintiff had not obtained the leave of the Court to sue on behalf of that class; that the mortgagor was a necessary party to the suit. The defendant by way of counterclaim sought for a declaration that she as unpaid vendor had a lien on the chawl for the balance of the purchase-money and that she was entitled to enforce her right by the sale of the said premises.

The Court (Macleod, J.) passed a decree in the defendant's favour and dismissed the suit with costs.

The plaintiff appealed.

*Strangman* (with *Raikes*) for the appellant.

Macleod, J., decided case on two points: (i) that the so-called mortgage was not a mortgage and the plaintiff did not take under the mortgage, (ii) that the plaintiff had notice of the defendant's lien for unpaid purchase-money. See mortgage deed which says "in respect of hundis, bills or advances made *through* him the said Multani Tehilram Girdharidas." On this Macleod, J., has held that plaintiff was only a volunteer and not a secured creditor. The learned Judge relied on *Wallwyn v. Coutts* (1) and *Garrard v. Lord Lauderdale* (2) but the facts in these two cases are different from those here. Plaintiff is himself interested in the mortgage deed and is also liable to others and is not a mere volunteer. See *Siggers v. Evans* (3) "*Through him*" would include loans made by the plaintiff, the plaintiff guarantees the payment back of the loans.

The plaintiff had no notice of lien as required by Transfer of Property Act, section 55, cl. 4 (b). *Webb v. Macpherson* (4), which is relied on by them, is not applicable because the question of estoppel arises. See *Kennedy v. Green* (5).

Macleod, J., has held that defendant's possession of the mortgaged property was in itself constructive notice to the plaintiff [56] of defendant's claim. This is not so: see *White v. Wakefield* (6). She might have been in possession as a tenant of the purchaser, possession in such a case would mean nothing. This story about notice is never set up in correspondence before we come to Court. See Lord Cain's judgment in *Shropshire Union Railways and Canal Company v. The Queen* (7).

(1) (1815) 3 Mer. 707.

(2) (1830) 3 Sim. 1.

(3) (1855) 5 El. & Bl. 867.

(4) (1908) L. R. 90 I. A. 288.

(5) (1834) 3 Myl. & K. 699.

(6) (1895) 7 Sim. 401.

(7) (1875) L. R. 7 H. L. 496 at p. 510.

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*Mirza (Setalvad with him) for the respondent.*

The plaintiff is a trustee on behalf of the creditors. The assignee cannot stand in a better position than the assignor, none of the creditors of the mortgagors were privy to the mortgage deed: see *Johns v. James* (1).

On the question of notice we say the plaintiff had constructive notice of our lien: see *Wigram, V. C.*, in *Jones v. Smith* (4), *Alderson B.* in *Whitbread v. Jordan* (3), *West v. Reid* (4), *Doorga Narain Sen v. Baney Madhub Mozoomdar* (5), *Gobind Chunder Mookerjee v. Doorgapersaud Baboo* (6).

Possession has the effect of notice: *Kondiba v. Nana* (7). If there is notice no question of estoppel can arise.

*Raikes in reply.*

JENKINS, C. J.—On the 7th of April 1904 Mahomedali Abdul Husein Goriawalla executed in favour of the plaintiff a mortgage of immoveable property in Bombay, and the purpose of this suit is to restrain the defendant from interfering with the exercise by the plaintiff of the power of sale contained in the mortgage deed. The interference is admitted, and is sought to be justified by the defendant on the ground that she has a charge on the mortgaged property under section 55 (4) (b) of the Transfer of Property Act.

Macleod, J., has passed a decree in the defendant's favour and dismissed the suit with costs. The plaintiff now appeals from that decree. The charge claimed by the defendant is in respect of unpaid purchase money due under an instrument of transfer [57] executed by her in favour of Mahomedali, the plaintiff's mortgagor, on the 3rd of April 1903, whereby the ownership of the mortgaged property passed to Mahomedali as the buyer.

The actual consideration named in the instrument of transfer was Rs. 9,000, but of this only Rs. 4,000 was paid at the time. By an agreement of even date Mahomedali agreed to pay the balance within one year, and it was thereby provided as follows: "In case I" (that is Mahomedali) "or my heirs sell the said premises in question and mentioned in the said conveyance the said vendor should at once attach the sale-proceeds of the said premises and recover the balance out of it." A part of this balance is still unpaid.

The points urged by the defendant are, first that she has a charge under section 55 of the Transfer of Property Act: secondly, that under the mortgage deed the plaintiff has no right to sell the property: and, thirdly, that if he has that right, it is subject to the charge in the defendant's favour.

I will first consider whether the plaintiff has a right to sell the property under the mortgage deed.

The circumstances that led up to the mortgage are indicated in the recitals, which run as follows:—

This indenture made the 7th day of April in the Christian year one thousand nine hundred and four between Mahomedali Abdul Husein Goriawalla of Bombay Vorah Mahomedan inhabitant of the one part and Multani Tabilram Girdharidas of Bombay Hindu inhabitant of the other part whereas the said Mahomedali Abdul Husein Goriawalla is seized of or otherwise well and sufficiently entitled to the hereditaments and premises hereinafter more particularly described and intended to be hereby granted for an estate of inheritance in fee simple in possession free from incumbrances and whereas the said Multani Tabilram Girdharidas is a broker and has been for some time past procuring loans of money from several persons to the said Mahomedali Abdul Husein

(1) (1878) 8 Ch. D. 744.

(2) (1841) 1 Ha. 48.

(3) (1885) 1 Y. & Coll. 903 at p. 328.

(4) (1843) 2 Ha. 249.

(5) (1881) 7 Cal. 199.

(6) (1874) 22 W. R. (Civ. Rul.) 248.

(7) (1908) 27 Bom. 408.



Goriawalla hundis drawn or payable by him and other negotiable instruments and on personal security' and whereas the said Multani Tahilram Girdharidas has up to the date of these presents procured various loans of money to him the said Mahomedali Abdul Husein Goriawalla from different persons some of which have been paid off by the said Mahomedali Abdul Husein Goriawalla and that a balance of Rs. 6,200 now remains due and owing by the said Mahomedali Abdul Husein Goriawalla on account thereof and whereas it has been agreed by and between the parties hereto that in consideration of the said [58] Multani Tahilram Girdharidas procuring such loans from time to time which loans shall not in any case exceed in aggregate Rs. 1,000 at any time the said Mahomedali Abdul Husein Goriawalla should as a security for such loans execute a mortgage of the said hereditaments and premises for the said sum of Rs. 7,000 to the said Multani Tahilram Girdharidas for the use and benefit of the person or persons who have already been or may or shall hereafter be procured by him the said Multani Tahilram Girdharidas to make such loans to him the said Mahomedali Abdul Husein Goriawalla to the extent of the said sum and in manner hereinafter appearing now this indenture witnesseth that in pursuance of the said agreement and consideration of the premises the said Mahomedali Abdul Husein Goriawalla doth hereby for himself his heirs executors and administrators covenant with the said Multani Tahilram Girdharidas his heirs executors administrators and assigns that he the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators will on demand made to him or them or left at the place of his or their business pay to the said Multani Tahilram Girdharidas his heirs executors administrators or assigns the balance which shall for the time being be owing by him the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators in respect of hundis bills, notes or drafts accepted paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest commission or otherwise in trust for the person or persons his or their heirs executors administrator and assigns who have hitherto accepted paid or discounted or may or shall hereafter accept pay or discount such hundis, bills, notes or drafts or who have made or may or shall thereafter make such loans credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct.

Then Mahomedali covenanted to pay to the plaintiff the balance for the time being owing by him, Mahomedali, "in respect of hundis, bills, notes or drafts accepted, paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest, commission or otherwise in trust for the person or persons, his or their heirs, executors, administrators and assigns who have hitherto accepted, paid or discounted or may or shall hereafter accept, pay or discount such hundis, bills, notes or drafts or who have made or may or shall thereafter make such loans, credits, or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct."

[59] The transfer of the property is expressed to be to the plaintiff "in trust for the person or persons his or their heirs, executors and assigns who have hitherto accepted or paid or discounted or may or shall hereafter accept or pay or discount the said hundis, bills or notes or drafts or who have made or may or shall hereafter make the loans credits or advances through the said Multani Tahilram Girdharidas as aforesaid and whichever moneys shall for the time being remain due and owing in respect thereof."

And then the trusts of the sale-proceeds are expressed to be after payment of costs and expenses to pay and satisfy the money then owing on the security of the mortgage-deed.

The defendant contends that the deed is voluntary, and that there is no one who can claim the benefit of it.

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The plaintiff on the other hand claims that he is entitled to the benefit of the security created by the mortgage-deed, and he makes out his claim as follows.

He says that at the institution of the suit there was, and that there still is, a sum of Rs. 5,700 with interest due on the security of the deed. This amount is made up of Rs. 3,700 and Rs. 2,000. The sum of Rs. 3,700 represents two notes for Rs. 2,500 and Rs. 1,200 and the sum of Rs. 2,000 represents two hundis for Rs. 1,000 apiece, all discounted through the plaintiff as contemplated by the mortgage-deed. These notes and hundis were not met by Mahomedali at maturity, and the holders were paid by the plaintiff, who took from Mahomedali promissory notes for the amounts paid by him.

But if the notes and hundis paid by the plaintiff come within the terms of the mortgage-deed, then the plaintiff can in my opinion claim the benefit of the security. The evidence shows that the notes and hundis were discounted on the plaintiff's assurance and the conclusion to which I come is that he guaranteed repayment. The notes and hundis have been produced by him and there can (in my opinion) be no doubt that he held them by way of security for the amount paid by him. Moreover, it appears that by the cancellation of the special [60] endorsements two of these instruments are endorsed in blank and are so held by the plaintiff.

The conclusion to which I come is that the plaintiff on the payments made by him became entitled to the benefit of the security created by the mortgage-deed, and that by taking promissory notes from Mahomedali for the amounts paid by him he did not intend to abandon and in fact did not give up this security.

The learned Judge considered that *Wallwyn v. Coutts* (1) and *Garrard v. Lord Lauderdale* (2) furnished an answer to the plaintiff's claim, but in my opinion they do not in any way govern the present case, and it cannot be said that the mortgage-deed was a voluntary trust-deed. The recitals show what the consideration was: loans were procured, by the plaintiff in accordance with what was contemplated, and one of those by whom money was paid has stated in evidence that the plaintiff told him that he had got a deed.

Moreover, the fact as to the Rs. 6,200 mentioned in the recitals show that the deed was not even in its inception voluntary. There can be no doubt that it was intended to secure this sum. But of this amount Rs. 3,400 had actually been paid at that date by the plaintiff in respect of hundis or notes on which Mahomedali was liable, and of this Mahomedali must have been aware inasmuch as he had given the plaintiff a note for the amount.

This also serves to show that it was the intention of the parties that the plaintiff was to have the benefit of the security for all amounts subsequently to be paid by him in discharge of Mahomedali's liability to those who had discounted notes or hundis for him through the plaintiff.

If the plaintiff is, as I hold, entitled to the benefit of the mortgage it is not disputed that the power of sale is exercisable, so it only remains for me to deal with the defendant's contention that the power can only be exercised subject to the charge in her favour in respect of unpaid purchase money.

(1) (1815) 8 Mer. 707.

(2) (1880) 8 Sim. 1.



[61] Section 55 (4) (b), on which the defendant relies, is in these terms: —

“The seller is entitled—where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.”

Notwithstanding the difference between the language of this sub-section and that of sub-section 6, I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb v. Macpherson* (1) did not turn on the special circumstances of that case.

But is not the defendant estopped from relying on the facts necessary to the establishment of her charge?

Section 115 of the Evidence Act provides that:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

In the instrument of transfer of the 3rd of April 1903 executed by the defendant to Mahomedali it is stated that the consideration of Rs. 9,000 had been paid on or before the execution of the instrument, and endorsed on it was a receipt for this amount signed by the defendant, and the title-deeds in the defendant's possession were delivered to the buyer.

The plaintiff has sworn that if he had known the purchase-money of the property had not been fully paid up he would not have taken the mortgage, and in the mortgage it is recited that Mahomedali was seized of the property free from incumbrances.

Why then should not the defendant be estopped by the statement in the deed and the endorsement and her act of handing over the title-deeds?

[62] If the plaintiff knew the true facts then he would not be entitled to rely on section 115, but on the evidence I hold it is not proved that in fact he had such knowledge. In the correspondence before suit it is distinctly said that the first intimation to the plaintiff of the defendant's claim was her attorney's letter of the 13th of September 1905 (see letter of the 16th September 1905), and this statement was not questioned.

The plaintiff in his evidence by implication denies knowledge of non-payment of the purchase-money, and the learned Judge does not find that he had this knowledge. All he does hold is that the defendant was aware of circumstances in connection with the defendant's claim which put him on inquiry before the mortgage was executed to ascertain whether Mahomedali was in possession or not and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of her claim. What these circumstances are does not appear from the judgment but all it comes to is that he ought to have made enquiries as to the mortgagor's possession, and failure in this respect deprives him of saying that he is a mortgagee without notice of her claim. It is argued that the learned Judge has found that the plaintiff had notice within the definition contained in section 3 of the Transfer of Property Act. But that does not appear from his judgment: the issue on which the defendant relies is the 20th, but that falls short of the requirements of the section, and I can discover nothing in any part of the judgment which amounts to a finding

(1) (1903) L. R. 30 I. A. 238 at p. 244; 5 Bom. L. R. 838.

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of actual knowledge, wilful abstention or gross negligence as required by section 3.

And on a consideration of the evidence I hold that no case within that section has been established, so that it is unnecessary to consider whether anything short of actual knowledge would disentitle the plaintiff from relying on section 115 of the Evidence Act.

Much reliance has been placed on the evidence of Moreswar Yeshwant, N. F. Creado and Anandrao Ramchandra. Moreswar's evidence is directed to showing that the plaintiff must have learnt of the claim on the 28th of February 1904, about five weeks before the execution of the mortgage.

[63] One naturally asks how could he in September 1907 have remembered that the plaintiff was present at a conversation between him and Madomedali on the 28th of February 1904 over three and half years before. The date was evidently obtained from the endorsement of payment, and the witness' version in examination-in-chief was that the plaintiff had found the money. If that had been true there would have been a reason for the witness' recollection of the circumstance. But the plaintiff denies the incident, and it was not suggested to him that he had made any entry of the Rs. 130 said to have been found by him on that occasion. Before us the plaintiff's books were produced for examination by the defendant's advisers with the result that no trace could be found in them of any such payment having been made. I do not believe that the Rs. 130 was found by the plaintiff, and that being so I am unable to attach any value to Moreswar's story of the 28th of February.

Creado too speaks to this same day, but I am equally unable to believe his story. He is more cautious than Moreswar, because he does not commit himself to the statement that the plaintiff found the money. But how he comes to remember the plaintiff's presence on that occasion I cannot understand and it would not be safe to rely on his evidence for the purpose of bringing home to the plaintiff knowledge that the purchase-money had not been paid.

Anandrao's evidence, if it means anything, means that the plaintiff had actual knowledge, a comment which applies to the evidence of the two witnesses I have already discussed. But it is clear that the learned Judge did not believe actual knowledge was brought home to the plaintiff; the furthest he goes is to hold that the plaintiff was aware of circumstances in connection with Kashibai's claim which put him on inquiry to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of the claim. This appears to me to mean that he ought to have made enquiry, and if he had done so, then he would have had actual knowledge. I think the learned Judge went to the furthest limit possible, and I certainly will go no further; for Anandrao's evidence as well as that of [64] Moreswar and Creado fails to convince me that the plaintiff knew that the facts-stated in the receipt and implied by delivery of the title-deeds were untrue.

No reliance has been placed on the other evidence of knowledge which has been disbelieved by Macleod J.; therefore, I need not discuss it.

Then Mr. Mirza has urged on behalf of the defendant that the learned Judge has found against estoppel; and we therefore, ought not to disturb his finding.

The issue framed on this point is "whether the allegations in para. 7 of the plaint are true." The case of estoppel is made in that para. and



the finding of the learned Judge is in the negative. But nowhere does he discuss the matters to which I have referred and I am unable to see that he has come to any definite finding on the facts necessary to the determination of this question.

The conclusion to which I come is that the defendant by her declarations as to receipt of the whole purchase money and her act in delivering to the buyer the title-deeds intentionally caused the plaintiff to believe it to be true as recited in the mortgage that Mahomedali was seized of the property in fee simple in possession free from incumbrances so far as she was concerned, and that the plaintiff acted on that belief.

It follows, therefore, that the defendant cannot be allowed in this suit to deny the truth of this.

The decree of the first Court must, therefore, be reversed and a decree must be passed making a declaration in the terms of prayer (a) to the plaintiff, granting an injunction restraining the defendant from asserting, continuing or insisting on her objection so as to prejudice the exercise by the plaintiff of his power of sale and from interfering with the plaintiff's exercise of his power of sale contained in the mortgage deed.

There will also be a decree for possession in the terms of prayer (c) and the respondent must pay the plaintiff his costs of the suit and appeal and the plaintiff will be entitled as against the defendant to add his costs to the mortgage security.

[65] Interest on the mortgage must be calculated for the purpose of this decree at six per cent.

BACHELOR, J.:—On 3rd April 1903 the property in suit was sold by the defendant to one Mahomedali Abdul Husein for Rs. 9,000 and a receipt for the full sum was endorsed on the deed by the defendant. In fact, however, only Rs. 5,000 had been paid and the balance of Rs. 4,000 remained due by Mahomedali to the defendant. On 7th April 1904 the property was conveyed by Mahomedali under an instrument which the plaintiff describes as a mortgage-deed in his favour. Thus the present controversy is between the plaintiff as mortgagee and the defendant as mortgagor's vendor. The learned Judge below has dismissed the plaintiff's suit upon two grounds, namely, first, that the plaintiff was affected with notice of the defendant's charge as unpaid vendor, and, secondly, that the so-called mortgage-deed was a mere voluntary instrument of trust in favour of unspecified creditors and gave the plaintiff no beneficial interest. The plaintiff appeals, and the judgment of the Court below is attacked on both the grounds on which it was based.

Dealing first with the character of the deed of 7th April 1904, Exhibit B, we find that the learned Judge was of opinion that it fell within the class of instruments discussed in *Wallwyn v. Coutts* (1) and *Garrard v. Lord Lauderdale*, (2) being merely a revocable settlement in favour of creditors. I am inclined to doubt whether decided cases are of very much direct assistance in this appeal, which must be determined in accordance with the true meaning of the particular deed Exhibit B, but if reference to authorities be desirable, it seems to me that the deed here approximates more closely to that considered in *Siggers v. Evans* (3) than to that dealt with in *Garrard v. Lord Lauderdale* (2).

But I think that this deed should be construed upon its own terms in the light of the actual relation there shown to have been existing

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(1) (1815) 3 Mer. 707.

(2) (1830) 3 Sim. 1.

(3) (1855) 5 El. & Bl. 367.



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between the parties, and it may be well to recall the direction of the Privy Council in *Hunoomanpersaud's* case (1) [66] that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Now the deed on its face purports to be a deed of mortgage for the purpose of securing a sum of Rs. 6,200 due on loans already procured by the plaintiff and any further sum up to a limit of Rs. 7,000 which the plaintiff may procure as advances to the mortgagor. It is true that the plaintiff is not referred to as the person *by* whom, but only as the person *through* whom the moneys are to be advanced; but it is proved, though proof was hardly needed beyond the internal evidence, that the deed was drawn by an inexperienced clerk, and it appears further that the Rs. 6,200 were then treated as owing to the plaintiff, partly on outstanding *hundis* and partly on promissory notes executed by Mahomedali. It is the fact that this particular sum of Rs. 6,200 has since been paid off, but a further liability of Rs. 5,700 has been incurred by Mahomedali towards the plaintiff in respect of *hundis* which the plaintiff has met on behalf of Mahomedali who has given promissory notes for the amount. The deed purports to be a security for all persons who may accept, pay or discount any *hundis*, bills, notes or drafts or make loans, credits or advances to Mahomedali. I agree with Mr. Raikes that it would be a harsh construction to exclude the plaintiff who was the only creditor when the deed was executed and who is a creditor still in respect of such payments as the mortgage contemplated. Unless the deed be read with an abstract technicality which in my opinion would be inappropriate, there is nothing in it which debars the plaintiff from making the advances himself, and, having done so, from claiming the benefit of the security. There was ample consideration moving from the plaintiff, and the deed was clearly not one which it lay within Mahomedali's power to revoke. I am of opinion that the plaintiff as creditor is entitled to claim the benefit of this security. Though promissory notes were taken from Mahomedali, there is nothing to suggest that the plaintiff intended to abandon the security of the mortgage; indeed the evidence shows that he had no such intention.

[67] The same result follows if we have regard to the plaintiff's position as surety under section 141 of the Indian Contract Act. For the evidence shows that the *hundis* now in question were paid by the firms of Wadhuram and Ussarali on the assurance of the plaintiff, and that, upon their being dishonoured subsequently the plaintiff made good the amounts to the holders on behalf of Mahomedali. If, then, these holders would be entitled to the benefit of the security furnished by Exhibit B—and that, I understand, is not denied—the plaintiff, who has paid them off, becomes similarly entitled in their place. I may add that, despite certain phrases to which Mr. Mirza has called our attention in the account entries Exhibits J and K, I am of opinion on the evidence that these moneys were paid by the plaintiff, who is shown to have referred at least in the presence of one of the shroffs, to the mortgage-deed as his security. It is suggested that the plaintiff put forward no claim as surety in the Court below, but the judgment of Macleod, J., clearly indicates that the point was mentioned and discussed before him.

Then there is the question whether the plaintiff's claim under the mortgage should be postponed to the charge over the property which is given by sub-section (4) (b) of section 55 of the Transfer of Property Act.

(1) (1856) 6 Moo. I. A. 393 at p. 411.



The section gives the charge over the property "in the hands of the buyer," but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb v. Macpherson* (1) it was intended to decide that the charge was extended to persons claiming through the buyer. Even upon this construction the defendant is not, I think, entitled to rely upon her charge as against the plaintiff, for she is estopped from doing so under section 115 of the Evidence Act by reason of the receipt for the full purchase-money which she endorsed upon the deed of sale. That was a declaration by the defendant which intentionally caused the plaintiff to believe that the entire price had been paid and to act upon that belief. The declaration was made "intentionally" within the meaning of the section, as the word has been explained in *Sarat Chunder Dey v. Gopal Chunder Laha* (2), that is, the declaration was so made that a [68] reasonable man would take it to be true and believe that it was meant that he should act on it; and the evidence proves that in fact the plaintiff did believe the representation to be true and did act upon it. In my opinion, therefore, the defendant is estopped from relying upon this charge. Though the statutory charge given to the seller in India differs from the unpaid vendor's lien under English Law, it may be observed that the conclusion I have reached as to the effect of estoppel is consistent with the English decisions which have held that a vendor of immovable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. See *Rice v. Rice* (3). And as against a clear estoppel, such as we have here, I can see no reason to suppose that the statutory charge occupies any higher position than the unpaid vendor's equitable lien in England.

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As to the argument that the plaintiff should be affected with notice of the defendant's charge, I am clearly of opinion that it must fail.

Under section 3 of the Transfer of Property Act the plaintiff can be said to have had notice only if he had actual knowledge, or if he wilfully abstained from inquiry or if he was guilty of gross negligence. It is plain from the evidence that actual knowledge of the defendant's charge cannot be said to have been possessed by the plaintiff and that apparently is the finding of the learned Judge. But the Judge has held that plaintiff was aware of circumstances which should have put him on inquiry and that, since he made no inquiry, he must be affected with notice. But, in the first place, it seems to me that the plaintiff was not bound to make inquiry, but was entitled to rely upon the representation in the sale-deed: see *Redgrave v. Hurd* (4). Then I find difficulty in ascertaining how far the learned Judge did in fact believe the witnesses called for the defendant on this point. He says plainly that in his opinion it is quite possible that they have made additions to their story which are not founded upon facts, but in the main he finds that they were [69] telling the truth. But it is in the main that he has disbelieved them, for the point of their story is that the defendant had actual knowledge. If that be disbelieved, I think it is impossible to give effect to the other vague evidence given after a lapse of over three years by witnesses who had no special reason to recollect the commonplace events in question and who are not free from

(1) (1903) L. R. 30 I. A. 238; 5 Bom. L. R. 838.

(2) (1892) 20 Cal. 296.

(3) (1853) 2. Drew. 73.

(4) (1881) 20 Ch. D. 1.



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the imputation of being interested in the cause. It should be observed further that the allegation now under consideration was not made against the plaintiff until a very late stage, and the evidence on which it is now sought to be supported is, in my opinion, insufficient. I, therefore, come to the conclusion that it cannot be said that the plaintiff was guilty either of wilful abstention from inquiry or of gross negligence. It follows that his claim under the mortgage is not subject to the defendant's charge. The decree of the Court below must, therefore, be reversed and there must be a decree in the terms stated by the Chief Justice.

*Decree reversed.*

Attorneys for the appellant: Messrs. Jehangir, Gulabbhai and Bilimoria.

Attorneys for the respondent: Messrs. Mirza, Mirza & Mangaldas.

33 B. 69 (=1 I. C. 622=10 Bom. L. R. 366).

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*Before Mr. Justice Beaman.*

RUKHANBAI, Plaintiff, v. ADAMJI SHAIK RAJBHAI AND OTHERS,  
Defendants.\*  
[3rd April, 1908.]

*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1894), s. 375—Adjustment of suits, what is—Written submission necessary.*

The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision,

*Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

\* Suit No. 77 of 1906.



*Samibai v. Premji Pragji* (1) and *Pragdas v. Girdhardas* (2) considered and distinguished.

[Ref. 12 M. L. T. 133=23 M. L. J. 290=1912 M. W. N. 1091=16 I. C. 478; 38 Bom. 687; 36 Mad. 353; Fol. 37 Mad. 408; Ref. 8 L. W. 470=1918 M. W. N. 746; 59 I. C. 33=45 Bom. 245; 67 I. C. 123=3 L. L. J. 162; Ref. 47 All. 637 (F. B.).]

THE facts of this case appear sufficiently from the headnote and judgment.

*Strangman* for plaintiff.

*Davar* for defendant 2.

*Chamier* for defendants 1 and 6.

BEAMAN, J.—This was an administration suit : a decretal order was passed referring it to the Commissioner to take the usual accounts. When the matter came before the Assistant Commissioner Mr. Modi, it appears from his notes (the substantial correctness of all the facts contained in which is not disputed) that [71] with the object of saving parties considerable delay and expense, he proposed that they should leave the settlement of all matters in dispute between them in his hands. All the parties consented. From Mr. Modi's record, it is clear that they then agreed unreservedly and without any qualification to allow him to deal summarily with all the disputed matters and to draft (as he calls it) a decree by which they were to be finally bound. He says he fully explained every term of this proposal to the parties and in particular impressed upon the defendants that even should his decree award them no more than a rupee they were to be bound by it. To these terms all the parties assented. Thereupon Mr. Modi made what he calls a draft decree. Mr. Strangman for the plaintiff and defendant No. 4 now moves the Court to confirm this report and give a decree in its terms. Defendant No. 6 represented by Mr. Chamier objects on the ground, as I understand him, that the principle upon which Mr. Modi has arrived at his conclusion is incorrect and not a principle upon which he (the sixth defendant) thought he would act. When the motion came on, Mr. Strangman asked the Court to record Mr. Modi's report as an adjustment, compromise or satisfaction of the suit under and within the meaning of section 375 of the Civil Procedure Code and thereon pass a decree in accordance therewith. To this Mr. Chamier objected that he had received no notice of any such application, that he was entitled to notice ; and that not having been given notice, this application could not now be proceeded with.

It appears, however, that the suit was down on the board for passing a final decree in terms of the Assistant Commissioner's report, and I am not disposed to defer my decision upon what is substantially in issue in order to give effect to this technical objection. Mr. Strangman for the plaintiff strongly relies on the cases of *Samibai v. Premji Pragji* (1) and *Pragdas v. Girdhardas* (2). The latter case was decided in appeal by Sir Lawrence Jenkins, C. J., and Starling, J. There the suit was for dissolution of partnership and accounts. The suit was called on for hearing on the 24th February 1899 and by consent a decretal order [72] was made referring it to the Commissioner to take the accounts. On the 31st March 1899 before any accounts were brought into the Commissioner's office, the parties referred the subject matter of the suit to arbitration and on the 28th of June 1900 the arbitrators made their award. On the 7th December 1900 the plaintiffs gave notice that they would move in Court,

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(1) (1895) 20 Bom. 804.

(2) (1901) 26 Bom. 76.



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that the agreement and the award be recorded under section 375 of the Civil Procedure Code. A decree was passed accordingly on the 13th December 1900 in which the submission and the award were recorded under the said section and the terms of the award were embodied in it. The Appeal Court held that the reference and the award constituted an adjustment of the suit by a lawful agreement or compromise and upon that ground upheld the decree of the Court below. Their Lordships referred with approval to the case of *Samibai v. Premji Pragji* (1) which had been decided in the same way and upon the same principle by Starling, J., on the Original Side of the High Court. It is certainly not easy to distinguish the principle of those decisions from the principle upon which Mr. Strangman now asks me to act. And were I satisfied that no distinction could be drawn, notwithstanding that in some points the conditions of those cases and this case are different, I should feel myself bound by those decisions. After having carefully studied not only those cases but many others dealing with the same question decided in the other High Courts, while I must admit that the weight of authority is heavily on the plaintiff's side I feel very grave doubts as to some parts at least of the reasoning upon which many of those decisions rest. Reference was made in *Pragdas v. Girdhardas* (2) to the Full Bench case of *Brojodurlabh Sinha v. Ramanath Ghose* (3), where although the decisions of the majority were substantially in accord with the view taken by Starling, J., in *Samibai v. Premji Pragji* (1) O'Kinealy, J., in a dissenting judgment, doubted the correctness of that decision. For my own part, speaking with all respect to the eminent Judges who have adopted the contrary opinion, I think that that Judge's doubt was well founded. Again Jenkins, [73] C. J. says "that the decisions in *Samibai v. Premji Pragji* (1) has met with the approval of Farran, C. J., in *Ghellaibhai v. Nandubai* (4)". The passage referred to however is merely an *obiter dictum*. So, too, in the case of *Lakshmana Chetti v. Chinnathambi* (5) in which Sir Lawrence Jenkins says that Mr. Justice Starling's view, if not affirmed, certainly was not rejected, the most that can be said is that the Judges there in an *obiter dictum* seem to have approved of it. It is perhaps worth noting that the submission to arbitration in *Pragdas v. Girdhardas* (2) was made before the Indian Arbitration Act had come into force. I do not myself think that the circumstance materially affects what seems to me the fundamental principle of the decision. The learned Chief Justice says: "First it is said that Chapter 37 of the Civil Procedure Code, 1882, is an exhaustive exposition of the power to refer to arbitration pending a suit. I can find nothing, however, in Chapter 37 which invalidates a proceeding not in accordance with its provisions beyond the result that non-compliance deprives a party of a right to claim the consequences the Chapter prescribes." And I apprehend that the same process of reasoning would apply to any submission to arbitration which does not comply with the requirements either of Chapter 37 of the Civil Procedure Code or of the Indian Arbitration Act IX of 1899. But it seems to me that where a special procedure is provided for extraordinary extra-judicial methods of settling disputed claims, it must have been the intention of the legislature that that procedure and no other was to be followed. To say that Chapter 37 was not, before the passing of the Indian Arbitration Act, an exhaus-

(1) (1895) 20 Bom. 304.  
(2) (1901) 26 Bom. 76.  
(3) (1897) 24 Cal. 908.

(4) (1896) 21 Bom. 335.  
(5) (1900) 24 Mad. 826.



tive exposition of the powers to refer to arbitration and that a reference to arbitration not made in accordance with its provisions might nevertheless be given much more speedy and peremptory effect to by bringing it in under section 375 for the reason that "non-compliance deprives a party of a right to claim the consequence the chapter prescribes"—seems to me, speaking with the greatest respect, a questionable proposition. Because the reason advanced to support it will, when closely examined, become, I think, quite inadequate. What is [74] implied in it is that by not complying with the statutory provisions regulating submission to arbitration, the worst that can befall a party so failing to comply is the loss of some advantage that he would have gained by compliance. But if notwithstanding that he can take the benefit of section 375 so far from being in a worse he is in a much better position than if he had been bound by the provisions either of the Indian Arbitration Act or of Chapter 37. In both the latter cases a party, who, after making a proper submission, is dissatisfied with the award, has a right of challenging it before it can be converted into a decree or any further action taken upon it. Whereas under the principle of *Pragdas v. Girdhardas* (1) no sooner has a party made an irregular submission, on which an award, no matter how full of defects, has been passed, than the other party can bring it in under section 375 and, without having any objections investigated, get a final decree upon it. This appears to me, speaking with all proper respect, one fatal objection to the principle upon which the plaintiff here relies. Another objection which I myself feel very strongly, though I cannot deny that this does seem to have been present to the mind of other more learned and eminent Judges who have nevertheless no difficulty in overcoming it, is that a mere agreement to refer a matter to arbitration, cannot logically and without unduly straining language, be fairly called an adjustment of a suit. Nor do I think that that difficulty is removed by the fact that an award is made. No doubt if the parties accept the award, then the agreement to refer plus the award which they had accepted would constitute an adjustment of the suit by a lawful agreement. But mere submission to arbitration cannot, I think, be carried further than a step towards the adjustment of a suit. This difficulty is dealt with in *Pragdas v. Girdhardas* (1). The learned Chief Justice, relying upon *Lievesley v. Gilmore* (2), says: "But every submission to arbitration implies an obligation to perform the award of the arbitrator; so that here there was an agreement to perform the award in adjustment of the suit, and that is an adjustment of the suit by agreement." One obvious [75] objection to that reasoning is that it does away at once with the necessity for all the special procedure prescribed in the Indian Arbitration Act and Chapter 37 of the Civil Procedure Code. For if that principle be uniformly sound and accepted, parties submitting to arbitration would be under an implied promise to accept the award, whatever be its nature and however it has been arrived at. That is in fact what they are obliged to do by applying the principle in the same manner in which it has been applied in those cases, so as to enable a party wishing to enforce the award to do so directly under section 375. It would be easy to pursue this analysis further by way of explaining and justifying the doubts I feel about the correctness of the decision in *Pragdas v. Girdhardas* (3). But, as I have said, unless I can distinguish that from the present case I

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(1) (1901) 26 Bom. 76 at p. 78.

(3) (1901) 26 Bom. 76.

(2) (1866) L. R. 1 Q. P. 570.



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should undoubtedly feel myself bound to follow it. There is, however, one passage in the learned Chief Justice's judgment, which does, I think, warrant me in saying that this is a different case. He says: "it is conceded, and I must assume correctly, that under the special circumstances of the case the submission is valid." I will not pause, as I might do, to amplify the implication contained in these words beyond saying that notwithstanding what has preceded, the learned Chief Justice evidently thought that a submission to arbitration, before it can be treated as an adjustment of the suit, must be "valid," that is to say, made in conformity with the law governing arbitration proceedings. I need not further dwell upon the difficulty which an accurate analysis of what is herein implied might introduce in logically and consistently interpreting the whole judgment. It is enough for my present purpose to point out that had the learned Chief Justice felt any doubt as to the validity of the submission, it is at least fairly arguable whether he would have come to the conclusion he did. In that case, as indeed in all the other cases to which it refers, there was a written submission. It is true that, at that time, the Indian Arbitration Act was not in force, and that presumably as this submission was held not to fall within the scope of Chapter 37, there was no statutory need for a written [76] submission. Now, however, section 4 of the Indian Arbitration Act requires that wherever that Act is in force, submission to arbitration must be in writing. In the present case there has been no such written reference or submission. I am not denying that this is a technical rather than a substantial distinction because, from Mr. Modi's record, it is quite clear that what he wrote down in the present case fairly and fully expressed all the wishes and intentions of the parties, and had they signed his notes there would have been, to all intents and purposes, a written submission of the kind required by law. As the facts stand, there has been no legal and valid reference to arbitration at all. Mr. Modi's award therefore, (for it really is an award and nothing else) has no legal foundation, and can, therefore, have no legal consequences. That, I think, is sufficient, in the view I take of section 375 and of the decisions upon it, to relieve me from the necessity of following against my own judgment the majority of those decisions. As, then, there has been no reference to arbitration and no award, what adjustment of the suit can there be to which I am asked to give effect under section 375? It appears to me that there can be absolutely none. I come to this conclusion with great reluctance because it is clear that all the merits are on the plaintiff's side. There can be no question that all the parties did authorise Mr. Modi to settle their disputes and did agree to accept his decision as finally binding upon them. When, however, that decision came to be known, the defendant repudiated it. He has thus gone back upon his own distinct undertaking and I cannot pretend that I feel the least sympathy with him because he has succeeded upon a highly technical point. Indeed I feel so strongly in this matter that although he is here nominally successful, I shall order him to pay all costs which may have been incurred from the date on which all parties, including himself, agreed before Mr. Modi, that he should finally decide their disputes, up to the date of the final order upon this motion.

Upon these terms I direct that the motion be dismissed and that the matter be referred back to Mr. Modi to take it up as and from the date upon which the parties agreed to make him their sole arbitrator.



[77] Special Commissioner to pay the cost of the other parties out of the share of defendant 6.

Attorneys for the plaintiff : *Messrs. Jehangir and Seervai.*

Attorney for defendants 1 and 6 : *Mr. N. B. Vakil.*

Attorneys for defendant 2 : *Messrs. Mehta and Shomji.*

Attorneys for defendant 4 : *Messrs. Jehangir and Seervai.*

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33 B. 77 (=1 I. C. 641=10 Bom. L. R. 801=8 Cr. L. J. 272).

### APPELLATE CRIMINAL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. TRIBHOVANDAS PURSHOTTAMDAS MANGROLEWALLA.\*

[17th August, 1908.]

*Criminal Procedure Code (Act V of 1898), sections 225, 233, 234, 235, 236, and 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sections 124A, 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes.*

The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

*Held*, further that the trial was not bad as there had been no misjoinder of charges.

*Per Chandavarkar, J.*—It is true that the Magistrate framed two charges one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the [78] Indian Penal Code, so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure.

There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same, the joinder of the charges, under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

*Per Heaton, J.*—Section 234 of the Criminal Procedure Code does not say that at most, a trial must be limited to three charges : it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of two articles on two different dates. These two offences were, as charged, punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind. The word "section" in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the

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operation of section 234 of the Code, an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in section 235 (clause 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge.

[Ref: 10 Bom. L. R. 973; 19 M. L. J. 81=5 M. L. T. 24.]

APPEAL from convictions and sentences passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was the editor, publisher and proprietor of a newspaper called the *Hind Swarajya* published in the Gujarati language. He was charged with two offences punishable under sections 124A and 153A of the Indian Penal Code, with respect to an article entitled "Englishmen afraid of the pen" which appeared in an issue of his newspaper dated the 4th April 1908; and also with reference to another article entitled "A grave warning" which appeared on the 11th idem in his newspaper.

[79] He was tried by the Chief Presidency Magistrate of Bombay where he was charged as follows:—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolavalla, as follows:—

"That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code.

"2ndly:—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

At the trial, the prosecution tendered into evidence the declaration made by the accused under the Press Act before the Chief Presidency Magistrate of Bombay, as the printer and publisher of the "*Hind Swarajya*." And there were two witnesses on behalf of the prosecution, the Oriental Translator to the Government of Bombay and a clerk in his office, who deposed to having received the copies of the newspaper in Bombay in their capacity as Government servants.

The Magistrate convicted the accused on both the charges, and sentenced the accused to two years' rigorous imprisonment on the first charge and to one year's rigorous imprisonment on the second charge: the sentences to run consecutively.

The accused appealed to the High Court.

[80] *Baptista* for the accused:—There is no evidence of publication of the newspaper in Bombay. The declaration by the accused under the



Press Act is no evidence of publication : nor would publication be proved by depositions of two witnesses who received copies of the newspaper in Bombay merely as and in their capacity of Government servants.

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Secondly, the trial is bad on the score of misjoinder of charges. The accused is charged with both under section 124A and section 153A of the Indian Penal Code in respect of each of the two articles that appeared in his newspaper on the 4th and 11th April 1908, respectively. The offence under section 124A is distinct from the one under section 153A : and a separate charge for each of them should have been framed. The Criminal Procedure Code positively enacts that two charges are necessary, this is an illegality and not an irregularity which could be cured under section 537 of the Code. See *Emperor v. Fattu* (1) ; *Subrahmaniam Ayyar v. King-Emperor* (2) ; *Sukh Lal Sheikh v. Tara Chand Ta* (3) ; *Thomas v. Emperor* (4) ; and *Queen-Empress v. Anant Puranik* (5).

The forms of charges in the schedule to the Criminal Procedure Code distinctly indicate that there ought to be separate counts for separate offences ; and even a separate head of charge for each offence under the same section in the same transaction. See the form regarding the substantive offence and the attempt under section 241 of the Indian Penal Code. Furthermore, the form prescribes three heads of charge for section 382 of the Indian Penal Code. This is a clear indication that legislature requires that the charges should be very specific, definite and distinct for each offence.

Assuming that the magistrate has complied with the provision of section 233 so far as charges are concerned, then the particulars as required by section 225 are not given. He ought to have pointed out the passages in the first article that came within the purview of section 124A and those that came under section 153A.

[81] Section 233 of the Criminal Procedure Code says that each charge shall be tried separately. In this case there are four offences and two charges. Section 234 is an exception to section 233. But offences under sections 124A and 153A of the Indian Penal Code are not offences of the same kind, and the articles of the 4th and 11th April are not parts of the same transaction within the meaning of section 235 of the Criminal Procedure Code.

*Branson* (acting Advocate General) for the Crown :—Sections 234, 235, 236 and 239 of the Criminal Procedure Code are exceptions to section 233 of the Code. Section 235 is put after section 234 to meet with those cases where facts alleged show that they come under two or more different sections of the Indian Penal Code. There is therefore no irregularity in joining section 153A read with section 124A in the charge.

CHANDAVARKAR, J :—This is an appeal from the judgment of the Chief Presidency Magistrate of Bombay, convicting the appellant of two offences one under section 124A and the other under section 153A of the Indian Penal Code arising out of each of two articles, published in a Gujarati newspaper called the *Hind Swarajya*. Several points of law have been urged by the appellant's Counsel, Mr. Baptista. The first of them is that the learned Chief Presidency Magistrate had no jurisdiction to try the case. This objection to jurisdiction is based upon the ground that there is upon the record no evidence of the publication of the newspaper in Bombay. But three witnesses examined for the Crown state

(1) (1903) 26 All. 195.

(2) (1901) 25 Mad. 61.

(3) (1905) 33 Cal. 68 at p. 72.

(4) (1906) 29 Mad. 558.

(5) (1900) 25 Bom. 90.



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that they received the newspaper in Bombay; and there is the declaration made by the appellant himself under the Press Act. The mere fact that two of the witnesses are servants of Government, who received the newspaper as its agents, cannot in law render their evidence inadmissible on the question of publication.

The second and the third point urged by Mr. Baptista have hardly any substance. It is contended that the trial is rendered illegal because the learned Magistrate did not frame a separate charge for every distinct offence, as required by the first part of section 233 of the Code of Criminal Procedure. It is true that [82] the Magistrate framed two charges—one in respect of the article of the 4th of April and the other in respect of the article of the 11th of April, 1908. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A, so that the appellant had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure. It is further contended that the trial is illegal because the particulars in respect of each of the charges were not given by the Magistrate by the specification in the charge sheet of the passages in each of the articles, which, according to the case for the Crown, brought those articles within sections 124A and 153A of the Penal Code. But the case for the Crown was in the Court below, as it is here, that each of the two articles taken as a whole brought the act of the appellant within each of these sections. Under those circumstances no specification of any particular passages was called for.

I pass on now to Mr. Baptista's argument that the trial is illegal on the ground of misjoinder of charges. The misjoinder complained of is that the offence charged under section 124A of the Indian Penal Code, arising out of the article of the 4th of April, being distinct from, and not an offence of the same kind as, the offence charged under section 153A of the same Code, arising out of the article of the 11th of April, and that the offence charged under section 153A as arising out of the former article being distinct from and not an offence of the same kind as the offence charged under section 124A as arising out of the latter article, the learned Magistrate ought not to have tried these charges together at one trial. It is admitted by Mr. Baptista that the charge for the offence under section 124A of the Penal Code in respect of one of the two articles in question could be legally joined to the charge for the offence under the same section in respect of the other article. And in such a case it is equally clear from sections 236 and 237 of the Code of Criminal Procedure that, if in respect of each of the articles the evidence recorded substantiated the offence under section 153A, instead of the offence [83] under section 124A, the accused could be legally convicted of the former offence, even though it did not form the subject-matter of the charge. That being the case, the addition of the offences under that section in the charge sheet cannot be held to be illegal. On the other hand, it was an advantage to the appellant in that he had notice of the additional offence charged, of which he could have been under the Code convicted without any notice in the charge sheet. It is true that, as urged by Mr. Baptista, the offence under section 124A of the Penal Code is not an offence of the same kind as an offence under section 153A of the Code. And the Criminal Procedure Code no doubt provides that those two offences cannot be



tried together. But there is nothing in the Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

Mr. Baptista has not denied the seditious character of the article of the 4th of April. On the other hand, he has candidly admitted before us that he cannot defend the article in question so far as the offence under section 124A of the Penal Code is concerned. The other article, that of the 11th of April, he contends, is a mere republication of what came into the appellant's hands from outside, and was published by the appellant with remarks showing that he did not approve of the sentiments in the article. It is clear, however, from the evidence of surrounding circumstances that the so-called disapproval was feigned and ironical and that the appellant published the article in question because it gave him an opportunity of bringing the established Government of the land into hatred and contempt.

Under these circumstances it is unnecessary to consider whether either of the articles can rightly come under section 153A of the Penal Code.

[84] We affirm the conviction under section 124 A, and as to the sentences we decline to interfere on the ground that they cannot be considered too severe.

HEATON, J. :—Mr. Baptista's first argument was that publication in Bombay was not proved. There is no substance in that.

His main arguments were directed to the charge and were to the effect that as the charge was contrary to law the trial was illegal: a general proposition which he sought to make good by the authority of the Privy Council judgment in *Subrahmanya Ayyar's* case (1).

In order to understand the argument it is necessary to set out the charge. It reads as follows:—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolewalla as follows :—That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian or European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code

"2ndly :—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

(1) (1901) 25 Mad. 61.

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[85] First, it is said that this charge is unlawful because it does not follow the form given in Schedule V to the Criminal Procedure Code for charges with two or more heads, but instead of doing so combines in one whole in each case the charges under sections 124A and 153A. The defect is a very formal one, and is cured by section 225 of the Code which says:—"No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice." The Privy Council case referred to is not an authority for saying that such an error in the charge is an illegality vitiating the trial. It is only necessary to read the judgment in that case to see that their Lordships of the Privy Council were dealing with a grossly illegal trial; and there is apparent throughout that judgment as strict an adherence as possible to the facts of that particular case; and as little generalization as is compatible with a true presentment of their reasons.

Mr. Baptista's next objection was that though it was not illegal to charge the appellant on the articles as a whole, yet when charged in respect of each article under sections 124A and 153A, he was prejudiced as he did not have notice of the particular passages in each article on which the prosecution relied to bring it first under section 124A and secondly under section 153A. To this the answer is that as regards these charges the prosecution did not proceed on separate passages but on the articles as a whole. But Mr. Baptista argues in effect that his client ought to have had notice, before he was required to enter on his defence, of the process of reasoning by which the prosecution brought each article under section 124A and also under section 153A of the Penal Code. Whatever application such an argument may have to cases in general, it fails in its application to this case, because the process of reasoning which the prosecution followed, was to deal with the articles as a whole and not with particular passages and the accused had notice that he was charged under section 124A and under section 153A in respect of each article as a whole.

[86] The last of Mr. Baptista's technical arguments was that the joinder of the charges relating to the two publications of the 4th and 11th April, was illegal and vitiated the trial. He assumes for the purpose of this argument that there were four charges, two relating to each article; and he urges that as each of the four charges did not relate to an offence of the same kind, they could not be tried together. He bases his argument mainly on sections 233 and 234 of the Code of Criminal Procedure which run as follows:—

"233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

"234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

"(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law."

Section 234 does not say that at most a trial must be limited to three charges: it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the



Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of the 4th April and the publication of the 11th April. These two offences were, as charged, punishable under the same sections of the Indian Penal Code and were, therefore, it seems to me, offences of the same kind. If the word "section" in the second clause of section 234 be read as incapable of meaning "sections," that is, if it be read as invariably singular, then Mr. Baptista's argument is good, not otherwise. But I do not think it is the intention of the Code, either expressed or implied to exclude from the operation of section 234 an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code is a proceeding provided for in section 235 (cl. 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code which [87] says: "where anything is an offence falling within two or more separate definitions. . . . the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences." You may charge an offence twice over under two different sections but by so doing you cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge. Therefore I do not think the joinder of charges in this case was contrary either to the express words or the principle of the law.

On the merits there is little to be said. A careful perusal of the article of the 4th April shows a deliberate design to excite feelings of disaffection towards the Government established by law in British India, or to bring that Government into hatred and contempt. The nature and tone of the article or letter of the 11th; the general character of *Hind Swarajya* as evidenced by its own publications; the circumstance that the letter said to be received from outside was translated into Gujarati; and the introductory words printed before the translation, taken together, convince me that the publication of the 11th also was deliberately designed to do the same. It is not very material to consider whether the offences also fell under section 153 A of the Indian Penal Code. The convictions are, in my opinion, good under section 124 A; and the sentences, I consider, are not too severe. So I concur in the order confirming the conviction and sentences.

*Conviction and sentence confirmed.*

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33 B. 88 (=1 I. C. 647=10 Bom. L.R. 1029).

[88] APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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RAMAKRISHNA *alias* RAMASWAMI BIN KUPPUSWAMI (*Original Plaintiff*), Appellant, v. TRIPURABAI KOM KUPPUSWAMI MODLIAR (*Original Defendant*), Respondent.\*  
[9th September, 1908.]

*Hindu law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.*

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption since 'it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

*Lakshman v. Radhabai* (1) and *Moro v. Balaji* (2) followed. *Sreeramulu v. Kristamma* (3), not followed.

[Not. fol: 39 Mad. 1035; Ref: (1911) 2 M. W. N. 589=22 M. L. J. 85; (1911) M. W. N. 82=8 I. C. 269; 67 I. C. 210=34 C. L. J. 323; 48 Bom. 654; Fol: 26 Bom. L. R. 830; Cf: 84 I. C. 374.]

SECOND appeal from the decision of T. D. Fry, District Judge, Dharwar confirming the decree passed by V. V. Phadke, First Class Subordinate Judge at Dharwar.

Suit for a declaration that the plaintiff was the owner of certain property.

The property in dispute belonged to one Kuppuswami, who died leaving him surviving his widow Tripurabai (defendant No. 1). She went into possession of the property; and mortgaged the same with the defendant No. 2 for Rs. 400. The mortgagee (defendant No. 2) obtained a decree on his mortgage: the property was sold in execution of the decree and purchased by defendant No. 3.

[89] After this, Tripurabai adopted the plaintiff on the 28th January 1905.

On the 10th March 1905, the plaintiff as the adopted son of Kuppuswami brought a suit, to obtain a declaration that he was the owner of the property.

The Subordinate Judge held that the transaction entered into by Tripurabai was for good consideration and valid, and was binding on the plaintiff. His reasons were as follows:—

"Almost at the close of the trial the defendants produced a certified copy of a decision of the Bombay High Court *Bhaudixit v. Ishwardixit* (4)), wherein it has been held that an adopted son of a Hindu widow has no right during her life-time to question the validity of alienations effected by the widow before his adoption. It

\*Second appeal No. 870 of 1907.

(1) (1887) 11 Bom. 609.  
(2) (1894) 19 Bom. 890.

(3) (1902) 26 Mad. 148.  
(4) S. A. No 146 of 1905 (Unrep.).



is clear that this decision will bar the present suit. This Court is bound to follow a decision of the High Court but I have got my own misgivings owing to the fact that the decision has not been reported even in the Bombay Law Reporter. These cases are likely to go before the High Court where the decision now relied on by the defendants may be reconsidered."

On appeal, this decree was confirmed by the District Judge on the following grounds:—

"I have before me the decision of the Bombay High Court in the unreported case referred to by the Subordinate Judge. It does not, however, seem necessary for me to discuss the propriety of following an unreported judgment as I propose to follow the Madras judgment in *Sreeramulu v. Kristamma* (26 Mad. 143), which appears to conclude the question at issue.

It is urged on the other side that this ruling is opposed to the Bombay rulings in *Laxman v. Radhabai* (11 Bom. 609) and *Moro v. Balaji* (19 Bom. 809).

If this were so, I should, of course, follow the Bombay rulings, but it seems clear that the Madras case raises and decides the point for the first time.

On Page 148 of the Madras judgment occurs the following passage:—

"In the few reported cases in which a son adopted by a widow brought a suit during her life-time to set aside alienations made by her prior to the adoption, the decision proceeded on the assumption that he would be entitled to recover possession of the property alienated, unless the alienation were made for a purpose which would be binding upon a reversionary heir. In all the cases in which the alienation was set aside at the instance of the adopted son, the decision proceeded only on the ground that the widow exceeded her lawful power in making the alienation. In none of them was the question distinctly [90] raised and considered, whether the vendee would not in any event be entitled to retain possession during her life-time as the widow of her deceased husband."

The point is then considered at length and the suit brought by the adopted son is dismissed as premature.

I thus have excellent authority for holding that this decision is not opposed to any former decision.

That being the case it is clearly my duty to follow this judgment unless and until it is dissented from by the Bombay High Court. More especially is that course incumbent on me when I find it remarked on page 155 that the rule "is not only sound in principle but is in consonance with justice and equity."

The plaintiff appealed to the High Court.

A. G. Desai for the appellant:—The decision in *Sreeramulu v. Kristamma* (1) is no doubt against me; but it is opposed to the rulings of this Court in *Lakshman v. Radhabai* (2); *Moro v. Balaji* (3), which should be followed here.

G. S. Mulgaonkar for the respondent:—The question raised in this appeal was argued in *Bhaudixit v. Ishwardixit* (4), where the Madras case is followed. It has, however, not been followed in *Raoji Nana v. Kesu Nana* (5).

CHANDAVARKAR, J.:—The District Judge has rejected the appellant's claim, holding, on the authority of *Sreeramulu v. Kristamma* (1), that where a Hindu widow, who has inherited her husband's immoveable property, alienates part of it and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood, even though the alienation was not for a proper or necessary purpose, justified by Hindu law. This Madras ruling is directly opposed to the decisions of this Court in *Lakshman v. Radhabai* (2) and *Moro v. Balaji* (3), which the District Judge has misread in thinking that they are not conclusive on the point. There is an earlier decision of this Court

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(1) (1902) 26 Mad. 143.

(2) (1887) 11 Bom. 609.

(3) (1894) 19 Bom. 809.

(4) S. A. No 146 of 1905 (Unrep.).

(5) S. A. No. 682 of 1907 (Unrep.).



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(*Nathaji Krishnaji v. Hari Jagoji*) (1), which is equally conclusive. (See page 73 of that report.) Besides, these decisions have been followed in this Court except in one case (*Bhandixit bin Bhaskardixit v. Ishwardixit bin Bhaskardixit*) (2) in which Russell and Batty, JJ., followed the [91] Madras decision. It does not appear to have been brought to the notice of those learned Judges that the law enunciated in *Nathaji Krishnaji v. Hari Jagoji* (1) and the other two decisions. (*Lakshman v. Radhabai*) (3) and *Moro v. Balaji* (4), has been followed in this Court in a number of unreported decisions and has been understood to be well established in this Presidency since the year 1871.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death, with this difference that, after the adoption, she has a right of maintenance against the adopted son during the rest of her life, but that right, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. These are indisputable propositions of law, and indeed they are admitted in the Madras judgment on the authority of the Privy Council ruling in *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (5)

If the widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

But in support of their view the learned Judges who delivered the judgment in *Sreeramulu v. Kristamma* (6), rely on those decisions of the Privy Council and of our High Courts, in which it has been held that a Hindu widow has "an absolute right to the fullest beneficial interest in husband's property for her life," that is, "during the term of her widowhood." Now, as a general proposition of Hindu law, that is true. But the cases in which it has been so held and which are cited in the [92] Madras judgment, were cases in none of which was any question of an adoption by the widow and the effect it has on her estate as heir of her husband, involved. It is straining the language of those decisions, particularly the words "during her widowhood," to apply them to a state of facts not contemplated or covered by those decisions. That general proposition is qualified by the proposition laid down in other cases that such an adoption puts an end to that estate and divests her of it, though her widowhood continues.

The Madras judgment proceeds upon the analogy of an adoption made by a Hindu father after he has alienated any portion of his ancestral property. Now, it is true that the adopted son in such a case cannot question the alienation and that he becomes joint owner with the father only as to such ancestral property as the father was possessed of at the date of the adoption. But there can be no analogy between such a case and a widow making an adoption to her husband. In the case of the father, at

(1) (1871) 8 Bom. H. C. R. A. C. J. 67.

(2) S. A. No. 146 of 1905 (Unrep.).

(3) (1887) 11 Bom. 609.

(4) (1891) 19 Bom. 809.

(5) (1813) 3 Moo. L. A. 229 at p. 242.

(6) (1902) 20 Mad 143.



the date of the alienation he was full proprietor of the property—he could do what he liked with it so long as there was then no son to restrict his right of alienation to purposes defined by Hindu law. The alienee takes the property absolutely and the subsequent adoption cannot affect it: *Rambhat v. Lakshman Chintaman* (1). It is otherwise with a widow. Though she represents the estate as heir at the date of an alienation by her, her right is of a limited character and she has no absolute right over it except in certain cases defined by law. She can confer an absolute right on her alienee only in those cases; otherwise the alienation has effect only during the time that her widow's estate lasts. That estate, according to Hindu law, comes to an end either when she dies or when she makes an adoption. The alienee takes the property from her subject to that law, provided the alienation was not for a proper or necessary purpose according to Hindu law. It is difficult to see how the case of a father can supply any analogy to the case of a widow, which rests on different principles.

[93] But the learned Judges in the Madras judgment rely on certain observations of the Privy Council in the well-known case of *Moniram Kolita v. Kerry Kolitany* (2) as having "an important bearing on the question now under consideration" and as lending support to their view. The observations are:—

"But, further, the widow has a right to sell or mortgage her own interest in the estate.... If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage."

Laying emphasis on the word "prior," the learned Judges in their judgment remark:—

"It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life-interest in the estate, would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it had been subsequent thereto (3)."

The observations of the Privy Council must be read by the light of the context in which they occur. The question in *Moniram Kolita's* case (1) was whether unchastity in a widow causes forfeiture of the property which she has inherited from her husband, where such unchastity is subsequent to the inheritance. After dealing with the texts in the Hindu law books on the subject, and concluding on the strength of those texts that such unchastity does not cause forfeiture, their Lordships proceed to refer to Mr. Justice Jackson's judgment as pointing out "the mischief, uncertainty and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly, in the present constitution of Hindu society and the relaxation of so many of the precepts relating [94] to Hindu widows." It is in this latter connection that the observations in question occur in the judgment of the Privy Council. First, their Lordships point out that if unchastity in a widow

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(1) (1881) 5 Bom. 680.

(2) (1902) 28 Mad. 143 at p. 153.

(3) (1880) L. R. 7 I. A. 115 at p. 155.



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were held to involve the consequence of forfeiture of her estate, the reversionary heir of her husband, if he happened to be her husband's brother, might lead her into temptation and thus accelerate the succession in his own favour. That is one mischief. Next it is pointed out that a person who had taken a purchase or mortgage from her after her unchastity might suffer. The hardship, uncertainty and confusion, in such a case is obvious. The purchaser of mortgage might not know of the unchastity at the time of the alienation in his favour, and to be deprived of the estate because the unchastity is subsequently *proved*, is hard upon the alienee, because, in that event, he must be treated as a trespasser *ab initio* having taken the transfer without any title. These considerations do not exist in the case of a purchase or mortgage before the act of unchastity. There the purchaser or mortgagee takes a good title, subject to the condition that it will last until the widow's estate as heir is terminated in any of the modes recognised by Hindu law. Upon the hypothesis that unchastity is one of those modes, the purchaser or mortgagee, who takes the property subject to that condition, cannot complain of hardship, if subsequently the widow turns out to be unchaste, because till then he has the right to the estate. It is in this light that the Privy Council would seem to have made the observations above cited.

There is nothing in the judgment of the Privy Council to warrant the inference that their Lordships intended the observations in question as more than mere "*argumentum ab inconvenienti*," or to convey more than they have said expressly by way of illustration. The inference drawn from them by the Madras High Court is directly opposed to the decision of the Privy Council in *Bamundoss Mookerjee v. Mussamut Tarinee* (1) in which they entirely adopted the following *dictum* of the Bengal Sadar Divani Adalat: "In that case, the son, when adopted, became the undoubted heir; and it was of course the [95] correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Article 125 of the second schedule to the Limitation Act 1877 is also invoked by the learned Judges in the Madras judgment in support of their view. That Act, being a law of procedure, should not be presumed to have effected any change in the rights of parties given by the substantive Hindu law. Article 125 applies only to a reversionary heir which indeed a son adopted by a widow is not. But Articles 118 and 119 specially provide for the case of such a son; and where those Articles do not apply, the case must fall within Article 144: see *Moro v. Balaji* (2).

It is to be remarked that the judgment of the Madras High Court in *Sreeramulu v. Kristamma* (3) throughout confines the principle of its decision to a case where the alienation by a Hindu widow made before the adoption of a son by her, is of only a portion of the property inherited by her from her husband. If the principle is sound, there is no intelligible reason why it should not equally apply to a case where the widow has alienated the whole and not merely a portion of the property. The distinction made throughout the judgment in that respect is purely arbitrary. No authority is cited for it and it rests on no principle derived from texts or decided cases. After this, it is not necessary to follow the judgment in

(1) (1859) 7 Moo I. A. 169 at p. 180.

(2) (1894) 19 Bom. 809.

(3) (1902) 26 Mad. 148.



the consideration of the question whether its ruling is "in consonance with justice and equity." Notions of justice and equity vary and the considerations on that head noticed at the conclusion of the judgment may well be counterbalanced by others equally, if not more weighty. Most of those considerations are inapplicable to the law of adoption in this Presidency, where a widow is entitled to adopt a son, unless her husband has prohibited it, whereas in the Presidency of Madras she has to obtain the consent of her husband's *sapindas* to such adoption. In any case, such considerations as are pointed out in the judgment cannot outweigh the established principles of Hindu law.

[96] For these reasons we adhere to the decisions of this Court in *Lakshman v. Radhabai* (1) and *Moro v. Balaji* (2) not only on the ground of *stare decisis*, but also as being sound Hindu law. Reversing the decree of the lower appellate Court we remand the appeal for disposal according to law on the merits. Costs shall abide the result.

*Decree reversed.*

33 B. 96 (=1 I. C. 654=10 Bom. L. R. 1190.)

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Chandavarkar.*

KAVERIAMMA AND ANOTHER (*Original Plaintiffs*), *Appellants*, v.  
LINGAPPA BIN RAMA AND OTHERS (*Original Defendants*),  
*Respondents*.\*

[6th October, 1908.]

*Transfer of Property Act (IV of 1882), section 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.*

On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let-out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramakrishna. Ramakrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramakrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

*Held*, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

[97] SECOND appeal against the decision of C. C. Boyd, District Judge of Kanara, confirming the decree of E. F. Rego, Subordinate Judge of Honavar.

The plaintiffs alleged as follows:—Plaintiff 1's father Parameshwar Bhat died possessed of landed estate the khata of which stood in his name in the revenue records. He died leaving him surviving two sons, Subraya

\* Second Appeal No. 576 of 1906.

(1) (1887) 11 Bom. 609.

(2) (1884) 19 Bom. 809.



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and Ramkrishna, and a daughter, plaintiff 1. Ramkrishna was a minor and he lived in union with Subraya. On Parameshwar Bhat's death the khata of the lands was transferred to Subraya's name. Subsequently Subraya died leaving a widow Gowri. On Subraya's death the khata was transferred to the name of Ramkrishna. Thereafter Ramkrishna also died unmarried and issueless. Plaintiff 1 was thus entitled to the property as heir, she being the sister of Ramkrishna. While Subraya was alive the three defendants and their two brothers executed to him a mortgage-deed of the lands in dispute for Rs. 800. The mortgage was with possession and was dated the 14th December 1895 and on the same day defendant 1 took up the lands on a Chalgeni lease for twelve years and passed a kabulayat to Subraya. The plaintiffs, therefore, brought the present suit against the tenant, defendant 1 and his two brothers, defendants 2 and 3, who were all in possession of the mortgaged property to recover arrears of rent for the years 1902 and 1903. Plaintiff 2 was joined as a party because he had purchased from plaintiff 1 a moiety of her interest in the estate.

Defendant 1 answered *inter alia* that the suit was untenable, that he had no privity of contract or privity of estate with the plaintiffs who were not the lawful owners of the lands, that the lands belonged to his family and were mortgaged with possession to Subraya from whom the defendant alone took them on a lease and paid rent to Subraya and after his death to his widow Gowri, that he had no sort of *vinculum juris* with the plaintiffs, that Ramkrishna had no interest and he was not Ramkrishna's tenant, that defendants 2 and 3 lived separate and they had nothing to do with the leaseholds, that he had paid the rent in suit to Gowri and had taken receipts from her, that he was not aware of the purchase by plaintiff 2 from plaintiff 1, that the purchase was invalid and that the suit was collusive and vexatious.

[98] Defendant 2 was absent.

Defendant 3 stated that the mortgage-debt which they had contracted was the family money of Subraya and Ramkrishna but the bond was passed to Subraya alone, that Subraya and Ramkrishna lived in union, that he was willing to pay the mortgage-debt to a rightful heir declared by the Court and that he was not liable to pay the rent in suit as the lease was taken by defendant 1 alone.

The Subordinate Judge found that the Chalgeni lease alleged by the plaintiffs was proved, that their title to recover the arrears of rent was not proved, that the payment alleged by defendant 1 was proved, that the payment was binding upon the plaintiffs, that Subraya and Ramkrishna lived in union but the sum advanced for the mortgage-debt was the self-acquisition of Subraya and that the plaintiff was not entitled to recover the arrears of rent claimed. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge raised the following issues :—

- (1) Was plaintiff's evidence wrongly excluded?
- (2) Was the mortgage amount the self-acquired property of Subraya or the joint family property of Subraya and Ramkrishna?
- (3) Can plaintiffs recover the rent sought?
- (4) Do the payments of rent by defendants to Gowri bind plaintiffs?

The findings on the said issues were :—

- (1) No.
- (2) Self-acquired property of Subraya.
- (3) No.



(4) No finding necessary.

The District Judge, therefore, confirmed the Subordinate Judge's decree.

The plaintiffs preferred a second appeal.

*N. A. Shiveshvarkar* for the appellants (plaintiffs).

*S. S. Patkar* for the respondents (defendants).

[99] The second appeal was heard by Chandavarkar and Heaton, JJ., who, on the 19th July 1907, delivered the following interlocutory judgments :—

CHANDAVARKAR, J. :—There are two points urged before us in support of this second appeal. First it is contended that the evidence of the appellants was wrongly excluded by the Subordinate Judge. The exclusion complained of was under the following circumstances. It appears that the Subordinate Judge and also the parties to the suit were under the impression that the onus lay in the first instance upon the defendants. Accordingly the plaintiff's pleader put in an application on 8th September 1904 praying that the plaintiff's witnesses might be summoned after the defendants' witnesses had been examined. Now, the order passed by the Subordinate Judge which is in Kanarese is clearly to the effect that as prayed by the plaintiffs their application should be brought before him at the conclusion of the defendants' evidence for the purpose of ordering summonses to issue to the plaintiff's witnesses. That meant that the prayer was granted. We think that it was a wrong order to pass. Such an order is calculated to create unnecessary delay in the disposal of cases. However that be, here the plaintiffs were led by the Subordinate Judge's order to believe that their witnesses would be summoned after the defendants' witnesses had been examined : and therefore they were entitled to the summonses when the event contemplated occurred. But the Subordinate Judge declined to issue summonses *then*, because one of the plaintiffs had not come into Court and gone into the witness box though summoned by the defendants. What happened was the defendants wanted to examine one of the plaintiffs ; the plaintiff would not come forward and for some reason or other stayed away. But that might be a reason for drawing a presumption against her case on the merits. It is not sufficient to deprive the plaintiffs of the right they had secured under the Subordinate Judge's order. The learned District Judge has treated the refusal by the Subordinate Judge to issue summonses as a matter of discretion. But the previous order of the Subordinate Judge left him no discretion at all. We think therefore that the first point must be decided in favour of the plaintiffs.

[100] Secondly, the point urged in support of this appeal is that the District Judge has decided the case under the erroneous impression that there is no evidence that Subrao and his brother had any joint property : the appellants' pleader Mr. Nilkanth has read out to us the deposition of defendant No. 1 in which he says that the two brothers not only lived jointly but he (defendant No. 1) has seen their field and their house. This could only mean that there was a house which Subrao held jointly with his brother. There is also evidence to that effect in the depositions, Exhibits 34 and 35. We also notice that in Exhibit 5 defendant No. 3 says "we borrowed family money of Subrao and Ramchandra" which clearly means that Subrao and Ramchandra had some nucleus of joint property from which the money came. If all this evidence is believed,

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then Subrao and Ramchandra must be regarded as having been the members of an undivided Hindu family and in that case, Subrao having predeceased Ramchandra, on Ramchandra's death the first plaintiff as his sister and therefore *gotraja sapinda* would be entitled to the property.

The appeal must go back to the District Judge who will remit the case to the Subordinate Judge.

The Subordinate Judge should resume the suit from the point where the defendants' evidence having closed, the plaintiffs had to begin their case. The defendants' witnesses should be summoned and examined. The Subordinate Judge will then remit the record to the District Judge who will after hearing the parties record his findings on the issues already raised and submit them to this Court.

The findings upon the issues must be returned within four months.

HEATON, J.:—I concur in the order proposed. The case was disposed of by the Subordinate Judge after refusing to grant an adjournment. I am exceedingly reluctant to interfere with the discretion which Chapter III of the Civil Procedure Code confers upon Judges in granting or refusing adjournments. The law gives to them the power and it is not for us in any way to limit it, but in this particular case the Subordinate Judge gave what [101] from the record appears to have been practically an undertaking that the plaintiffs' witnesses should be summoned after the defendants' witnesses had been examined. It seems to me that in so doing he made a grievous mistake; but having done so, he had of himself limited the discretion which the law gave him as to adjournments and when the time came and the plaintiff requested an adjournment to enable him, in fulfilment of the Subordinate Judge's own undertaking to obtain the attendance of the witnesses; I consider the Subordinate Judge was bound to grant it.

The first issue raised by the District Court being disposed of by the High Court, the Judge after the remand found upon the remaining issues as follows:—

(2) The mortgage amount was the joint family property of Subraya and Ramkrishna.

(3) The plaintiffs can recover the rent sought from defendant 1.

(4) The payments of rent by defendant 1 to Gowri did not bind the plaintiffs.

After the said findings were certified to the High Court, they were objected to by the respondents (defendants).

The appeal was heard by Scott, C. J., and Chandavarkar, J.

S. S. Patkar for the respondents (defendants):—We object to the findings arrived at by the Judge. He has found in the plaintiffs' favour on the question of title having come to the conclusion that the mortgage-debt advanced to the defendants was the joint family property of Subraya and Ramkrishna and they having died, plaintiff 1, their sister, was entitled to the property as heir. But in this case Subraya's widow Gowri, to whose name the *khata* of the lands was transferred in the revenue records is not a party and a suit for the declaration of right is now pending between her and the plaintiff. We have already paid rent of the years in suit to Gowri and taken receipts from her. We should not be compelled to pay it twice over. The property was mortgaged with possession to Subraya for a period of twelve years on the 14th December 1905 and defendant 1 took possession of the property under a lease for the same period. Subsequently Subraya and Ramkrishna died and [102] Gowri took up the management of the property and the lands were transferred to her *khata*. She, as the



widow of Subraya, was the apparent owner and the lands also being transferred to her name, we, in good faith, paid the rents to her and took from her receipts for the same. We had no knowledge that plaintiff 1 was the heir. As tenants we were estopped from denying the title of our landlord Subraya and his widow Gowri.

We further rely on section 50 of the Transfer of Property Act. The ruling in *Jamsedji Sorabji v. Lakshmiram Rajaram* (1) supports our contention. It lays down that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive rent or to sue in ejectment.

*N. A. Shiveshvarkar* for the appellants (plaintiffs):—On the bases of the fresh evidence recorded after the remand the Judge came to the correct conclusion that our title was proved and that the defendants were liable to pay us the rent claimed. From the beginning the case has been fought out on the question of title. At first it was found that we had not proved our title and consequently the suit was dismissed. Now that the finding on the question of title has been returned in our favour, it is not open to the defendant, at this late stage, to set up *bona fides* on his part which he did not set up before.

Section 50 of the Transfer of Property Act does not apply. It cannot be made applicable as observed by the Judge "without unduly straining the meaning of the words used". The illustration to the section indicates the class of cases contemplated by the section.

Defendant 1 held the lands as the tenant of Subraya and any payment made to him in good faith would exonerate the defendant from liability to the rightful heir. But directly Subraya died, the defendant could not claim the protection of the section. It was his duty to inquire and to ascertain what persons were entitled to the rent.

*Patkar*, in reply.

SCOTT, C. J.:—This suit was brought by the plaintiffs to recover rent from the first defendant on the ground that he [103] was the lessee of certain property to which the first plaintiff had become entitled as heir of her deceased brothers.

The property had come into the possession of the first plaintiff's family by a deed of mortgage, dated the 14th of December 1895, which was executed with possession in favour of Subraya although the mortgage money was advanced by Subraya on behalf of himself and his younger brother. On the same date, the 14th December 1895, Subraya in his own name granted a lease of the property for 12 years to the first defendant. Subraya after some years died, his interest as mortgagee surviving to his younger brother Ramkrishna. Ramkrishna thereafter died and the person who became entitled as his heir was the first plaintiff. The first plaintiff, however, did not live with her brothers and upon the death of Ramkrishna the property was taken possession of and managed by Subraya's widow Gowri, who, after Ramkrishna's death in the year 1901, got her name placed on the *khata* as the owner of the property. While she was thus the apparent owner of the property she demanded rent from the first defendant and he paid her rent for the year 1902 and the year 1903. It is for these years that the plaintiffs now seek to recover rent from the first defendant on the ground that Gowri had no authority to receive rent and give a discharge for the same.

(1) (1888) 13 Bom. 323.

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At the time that the first defendant paid these rents to Gowri the tenancy was still continuing and he was, therefore, estopped as against Subraya, the nominal lessor, and Subraya's heir Gowri from disputing their right as landlords. He could not have defended a suit for rent brought against him by Gowri.

It is also apparent from the findings of the District Judge that the defendant in making the payment to Gowri was acting in good faith. He had no notice of the plaintiffs' interest in the property. We think that it is a case calling for the application of section 50 of the Transfer of Property Act which runs as follows :—

No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

[104] It has been contended on behalf of the plaintiffs that section 50 has no application to a case in which there has not been an assignment by the lessor during the tenancy.

The section, however, is not in terms limited to such cases, and, we think, its language is general enough to cover the case before us. We must therefore hold that the first defendant is not chargeable with the rents sued for, and we therefore confirm the decree of the lower Court and dismiss the suit.

The defendant in the course of the suit raised contentions as to the right of the plaintiff as heir of her brother Ramkrishna and it became necessary to investigate closely the rights of Subraya and Ramkrishna with reference to the property in question. In those contentions the defendant has failed. For these reasons we think that the proper order as to costs will be that each party do bear her or his own costs throughout.

*Decree confirmed.*

33 B. 104 (=1 I. C. 657=10 Bom. L. R. 1037).

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

BAI MANI AND ANOTHER (Original Plaintiffs—Petitioners),  
Appellants, v. KHIMCHAND GOKALDAS (Original  
Defendant 1—Opponent), Respondent.\*  
[7th October, 1908.]

*Civil Procedure Code (Act XIV of 1882), sections 503, 505 and 588—Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal.*

A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

[105] Held that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588.

*Birajan Koor v. Ram Churn Lall Mahata* (1), followed.

\* Miscellaneous Appeal No. 16 of 1908.

(1) (1881) 7 Cal. 719.



APPEAL against an order passed by W. Baker, District Judge of Surat, in Miscellaneous Application No. 33 of 1908.

One Savaichand Ichhachand died on the 27th July 1902 leaving him surviving a widow Bai Mani and a minor son Khimchand. Bai Mani being an illiterate woman and being unable to manage the property which included a sum of Rs. 23,000 of her minor son, appointed four trustees to manage the property. The name of one of the trustees was Khimchand Gokaldas. Subsequently Bai Mani for herself and as next friend of her minor son brought a suit, No. 35 of 1907, against Khimchand Gokaldas and the other trustees in the Court of the First Class Subordinate Judge of Surat, for an account and for carrying out the trusts under the deed by which the defendants had been appointed trustees. Before the suit came on for hearing Bai Mani applied under section 503 of the Civil Procedure Code (Act XIV of 1882), for the appointment of a receiver. The Subordinate Judge after hearing both the parties nominated defendant Khimchand Gokaldas himself as the receiver and in case of his not consenting to accept the office, appointed the Nazir of his Court to be the receiver and submitted the nomination to the District Judge under section 505 of the Code.

The District Judge declined to make the appointment holding that there was no necessity for the appointment and that "to appoint a receiver is to commit the Court to the view that the plaintiff's interpretation of the document and not the defendant's interpretation is correct."

Against the said order Bai Mani and her minor son appealed.

*Setalvad* (with *Manubhai Nanabhai* and *N. K. Mehta*) for the appellants (plaintiffs—petitioners).

*Branson* (with *K. N. Koyaji* and *M. M. Karbhari*) for the respondent (defendant 1—opponent):—We raise a preliminary [106] objection that the order of the District Judge is not appealable. The order was passed under section 505 of the Civil Procedure Code and section 588 of the Code does not provide for an appeal against such order.

*Setalvad* for the appellant:—The governing section is 503 of the Code. It is the substantial section in the Chapter in which it occurs. Section 505 only extends the powers given by section 503 to Subordinate Judges. Looking to the policy of the Code it allows an appeal against an order appointing a receiver. Therefore there is greater reason that an appeal should be allowed against an order refusing to appoint a receiver. Again when an order is passed by a competent Court under section 503 either appointing or refusing to appoint a receiver, an appeal will lie against that order. Necessarily then an appeal will lie from an order refusing to appoint a receiver on the recommendation of the Subordinate Judge under section 505. The District Judge in the present instance really acted under section 503 and the order passed by him is appealable: *Venkatasami v. Stridavamma* (1), *Sangappa v. Shivbasawa* (2), *Boidya Nath Adya v. Makhan Lal Adya* (3), *Khagendra Narain Singh v. Shashadhar Jha* (4).

*Branson*, in reply, referred to *Birajan Koer v. Ram Churn Lall Mahata* (5).

SCOTT, C. J.:—This is an appeal from an order of the District Judge of Surat in Miscellaneous Application No. 33 of 1908 of the District file. That application was one in which the District Judge considered the recommendation of the First Class Subordinate Judge of Surat that the

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(1) (1836) 10 Mad. 179.

(2) (1899) 24 Bom. 38.

(3) (1890) 17 Cal. 680 at p. 682.

(4) (1904) 31 Cal. 495.

(5) (1881) 7 Cal. 719.



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defendant Khimchand should be appointed a receiver in a suit No. 35 of 1907, and, in case of the recommendation not being accepted, that the Nazir of his Court should be appointed.

The District Judge having considered the recommendations refused to authorise the Judge to appoint either of the persons so recommended.

[107] The application was made to him under the proviso to section 505 of the Civil Procedure Code, and under that section he had power to authorise the Subordinate Judge to appoint one of the persons recommended and he had also power to pass any other order. The order which he decided to pass was to refuse to allow the appointment of any receiver at all.

We are of opinion that that was an order passed under section 505, and not under section 503. It is, therefore, an order which is not appealable not being specified in the list of orders in section 588. We are supported in this conclusion by the decision of *Birajan Koor v. Ram Churn Lall Mihata* (1).

We, therefore, think, that the preliminary objection which has been taken that no appeal lies is a good one, and we dismiss the appeal with costs.

*Appeal dismissed.*

33 B. 107 (=1 I. C. 659=10 B. L. R. 1134).

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Heaton.*

PUTLABAI KOM SADASHIV (*Original Defendant*), Appellant, v.  
MAHADU VALAD SADASHIV (*Original Plaintiff*), Respondent.\*

[9th October, 1908.]

*Hindu widow—Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), sections 2, 3, 4 and 5.*

According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

*Punchappa v. Sanganbasawa* (2), considered.

[Ref. 38 Cal. 852; 62 I. C. 318=23 Bom. L. R. 482; 79 I. C. 142=20 N. L. R. 57; cf. A. I. R. 1925 Nag. 1 (F. B.)]

[108] APPEAL against the decision of Pandurang Shridhar Pathak, First Class Subordinate Judge of Dhulia in the Khandesh District, in Suit No. 467 of 1907.

The plaintiff, who was a minor represented by his next friend Vitthal Naroba Shimpi, sued for a declaration that he was the legally adopted son of his maternal grandfather Sadashiv and for a perpetual injunction restraining the defendant from doing any acts prejudicial to the plaintiff's interest and inconsistent with his rights of ownership over Sadashiv's property. The plaintiff alleged that his natural mother Bhagi was the only

\* Second Appeal No. 205 of 1907.

(1) (1881) 7 Cal. 719.

(2) (1899) 24 Bom. 59.



child of Sadashiv and that she and her husband Anna lived with Sadashiv and the plaintiff was born in Sadashiv's house, that Sadashiv brought up the plaintiff as his son after obtaining the consent of the plaintiff's parents for his adoption, that the plaintiff's father had authorized before his death his wife, that is plaintiff's mother, to perform the ceremony of adoption whenever Sadashiv wished to do so, that after Sadashiv's death his divided brother Balu having laid claim to his property, the claim was resisted by Putli who was the fourth wife of Sadashiv, that the litigation between them went up to the High Court and Putli succeeded in securing the property from Balu, that the plaintiff was adopted by Putli as son to Sadashiv on the 21st April 1906 under a registered deed of adoption and he was given in adoption by his mother Bhagi and that Putli having subsequently denied the legality of the plaintiff's adoption, he brought the present suit.

The defendant having failed to file a written statement, she was examined by the Court and she made a statement denying the *factum* of adoption and the execution of the deed of adoption. At the hearing it was contended on her behalf that though the plaintiff's adoption was proved, it was illegal inasmuch as the plaintiff's mother Bhagi had re-married a second husband before the adoption, the plaintiff was at the time of the adoption an orphan and so incapable of being taken or given in adoption.

The Subordinate Judge found that the plaintiff was adopted by the defendant and the adoption was legal, that the deed of adoption was proved and that the plaintiff was entitled to the reliefs claimed. He, therefore, made a declaration that [109] the minor plaintiff was the legally adopted son of Sadashiv and granted a perpetual injunction prohibiting and restraining the defendant from doing any act in connection with her husband's estate that would in any way interfere with the plaintiff's right as the adopted son of the deceased Sadashiv. In his judgment the Subordinate Judge made the following observations:—

I shall now address myself to the consideration of the contention seriously pressed by Mr. Chandorkar for the defence. His contention is that, although the adoption is proved, it is illegal inasmuch as the boy—the plaintiff—was an orphan at the date of the adoption and so incapable of being legally taken or given in adoption. In connection with this argument it must be borne in mind that the natural mother of the plaintiff had contracted a *mohotur* or *pat* marriage with Vithal before she gave the plaintiff in adoption to the defendant. It is argued that by her re-marriage Bhagi lost all her rights in her late husband's (*i. e.*, plaintiff's natural father's) family and had consequently no disposing power left in her and the minor plaintiff must be treated as an orphan. The Hindu Law as well as the Statute Law (Act XV of 1856, sections 2 and 3) bearing on the point have been discussed by the Bombay High Court in *Panchappa v. Sanganbasawa* (I. L. R. 24 Bom p. 89) wherein earlier authorities on the same question have all been considered. It is held by the High Court that a Hindu widow has no power—after her re-marriage—to give in adoption her son by her first husband, unless he has expressly authorized her to do so. It is remarked by Ranade, J., at page 94 that if “she (Hindu widow) cannot take in adoption she cannot for the same reason give a son in adoption after re-marriage. It is true section 5 of the Act reserves to the widow certain rights of inheritance not covered by the exceptions in clauses 2, 3 and 4. It cannot, however, be contended that the right of giving a son in adoption is of the nature of a right reserved to her by section 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both of which rights are excepted by name in sections 2 and 3 of the Act..... The right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and, being a part of the rights and interests she acquires as a widow, it is included within the provisions of sections 2 and 3 of the Act, and is not a reservation which the Act concedes to the widow.” The adoption of the plaintiff would, no doubt, be illegal on the authority of this case. The case under consideration is,

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however, distinguishable from the one quoted above in two or more important particulars. In the first place there is evidence in the case to show that Bhagi was authorized by her first husband Nana (Anna?) to give the boy in adoption. The authority is, no doubt, not in writing; but as already remarked I am not prepared to disbelieve the oral evidence on the point. It is the evidence of Bhagi herself. In the second place, it seems quite clear from the evidence furnished by extracts from the school registers that the boy was [110] treated by Sadashiv himself as his son as long since as 1901, *i.e.*, long before the death of plaintiff's natural father Narayan (Anna?). Thirdly in Panchappa's case the adoption was disputed, not by the person who made the adoption as is the case in the present case, but by the sister of the person to whom the adoption was made. In this case it was the defendant who made the adoption under competent legal advice. She is in my opinion legally estopped from disputing the validity or legality of the adoption. The reversioners of the deceased Sadashiv may do so, but the defendant cannot. Fourthly, it must be noted that, even apart from adoption, it is the plaintiff who is the legal heir of the deceased Sadashiv and is as much entitled to inherit his estate, unless of course the defendant made a valid adoption, in which the inheritance would go to the boy adopted. However, as I hold that Bhagi had authority from her first husband to give the boy in adoption, and that the adoption is therefore legal and valid, the contingency of second adoption by the defendant cannot arise.

The defendant appealed.

*M. V. Bhat* for the appellant (defendant):—We do not contest the *factum* of adoption but we impeach it as illegal. The plaintiff's mother Bhagi had taken a second husband before his adoption by the defendant. Therefore at the time of the adoption the plaintiff was an orphan. At that time Bhagi was no longer the widow of the plaintiff's father. By her second marriage she lost all her rights in the first husband's family and had consequently no disposing power left in her in that family. Three things are essential to a valid adoption, namely (1) the capacity to take in adoption, (2) the capacity to give in adoption, (3) the capacity to be validly taken in adoption, that is, the capacity of the adoptive mother to take, the capacity of the natural mother to give and the capacity of the boy to be adopted. The Hindu Law as well as the Statute Law, namely, the Hindu Widow Re-marriage Act, and earlier authorities bearing on the point involved in the present case have been fully discussed in *Panchappa v. Sangambasawa* (1) and the observations of Ranade, J., fully support our contention. Owing to Bhagi's re-marriage she ceased to be the widow of her first husband and so far as the plaintiff was concerned, she became a mother civilly dead. Therefore there was no capacity in her to give the plaintiff in adoption when he was adopted by Putli.

[111] *S. R. Gokhale* for the respondent (plaintiff):—The *factum* of adoption being admitted, the only important question to be considered is whether the plaintiff's adoption was, as held by the lower Court, legal. First of all the evidence in the case clearly shows that the plaintiff's mother Bhagi was authorized by her first husband, that is, the plaintiff's father, to give the plaintiff in adoption to Sadashiv and that Sadashiv all along treated the plaintiff as his son. Only the ceremony of adoption was not performed during Sadashiv's life-time and it was performed subsequently by his widow. It is true that at the time of the adoption Bhagi, plaintiff's mother, had taken a second husband but by her re-marriage she did not cease to be the plaintiff's mother and that being so, she as mother had full authority to give the plaintiff in adoption to Putli. The Hindu Widow Re-marriage Act disqualifies a re-married woman from claiming certain rights in her first husband's family, but it does not affect blood relationship. It has been held that a re-married woman is entitled to succeed as

(1) (1899) 24 Bom. 89.



heir to her son by the first husband: *Chamar Haru v. Kashi* (1); *Basappa v. Rayava* (2).

Certain observations of Ranade, J., in *Panchappa v. Sangambasawa* (3) were relied on for the appellant, but the point involved in that case was similar to the one now under consideration and it was therein held that the adoption was invalid for absence of authority from the first husband, while such authority has been proved in the present case. Therefore that ruling supports our contention.

It has been held that conversion to Mahomedanism does not debar the convert father from sanctioning the adoption of his Hindu son: *Shamsing v. Santabai* (4). Though such a convert cannot himself go through the ceremony of giving the son in adoption, he can sanction the adoption and get the ceremony performed by some one else. Therefore giving the plaintiff in adoption by Bhagi being sanctioned by her first husband, the act of giving was merely a continuation of the sanction.

*Bhat* in reply.

[112] SCOTT, C. J.:—The question in this appeal is whether the plaintiff has been validly adopted as a son to his deceased maternal grandfather Sadashiv. The question has been answered in the affirmative in the lower Court.

The material facts are as follow:—

The plaintiff is the natural son of Anna and Bhagi. Bhagi is the daughter of Sadashiv. Anna, Bhagi and the plaintiff lived with Sadashiv. Bhagi says that her father intended from the first to adopt the plaintiff, that her husband asked him to do so and when attacked with plague told Sadashiv that the boy was given to him. This story is highly probable for Sadashiv was a well-to-do man possessed of property worth Rs. 25,000 or 30,000 while Anna had no property whatever. At intervals of a few months the deaths occurred of, first, Anna, then, Sadashiv and lastly, Bhowani, Bhagi's mother. Sadashiv had another wife Putli, the defendant in this suit. After Sadashiv's death Putli and Bhagi and the plaintiff lived together in Sadashiv's house until they were driven out by Balu, the divided brother of Sadashiv. Balu's action led to litigation between him and Putli in which Putli eventually secured from him all Sadashiv's property. For about 3 years Putli continued to treat the plaintiff as before as the son of Sadashiv. She also in April 1906 went through a formal adoption ceremony in which the plaintiff was given by Bhagi and taken by Putli as son to Sadashiv. A deed of adoption was then executed by Putli in the plaintiff's favour.

At this time Bhagi was no longer the widow of Anna having re-married about a year previously. In August 1906 previously Putli denied the validity of the adoption and this suit was then filed on behalf of the plaintiff to establish it.

The plaintiff's adoption is challenged by the defendant on the ground that he was owing to his mother's re-marriage an orphan in the eye of the law at the time of the adoption ceremony, without any parent capable of giving him in adoption.

We will first consider the right of a mother to give her son in adoption according to the Hindu Law.

[113] According to the texts the right of the female parent to give her son in adoption results from the maternal relation and is not derived

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(1) (1902) 26 Bom. 388.

(2) (1904) 29 Bom. 91.

(3) (1899) 24 Bom. 89.

(4) (1901) 25 Bom. 551.



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by delegation from her husband. Thus Manu IX 168 'that (boy) equal by caste whom his mother or his father affectionately gives with water in time of distress as son must be considered as an adopted son'.

Yajnavalkya II 130 'the son whom his father or mother gives becomes Dattaka.' Vashista XV. 1, 2 'man formed of uterine blood and virile seed proceeds from his mother and his father as effect from cause, therefore the father and the mother have power to give, to sell and to abandon their sons.' The Mitakshara which is the paramount authority in that part of the country to which the parties belong has the following comment—Bk. 1, Section XI, 9 and 10 :—' 9. He who is given by his mother with her husband's consent while her husband is absent or incapable though present or without his assent after her husband's decease or who is given by his father or by both being of the same class with the person to whom he is given becomes his given son ; so Manu declares " He is called a son given whom his father or mother affectionately gives as a son being alike by class and in a time of distress confirming the gift with water." 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver, not the taker.'

Thus apart from the effect of special legislation which we will next consider, the maternal relationship of Bhagi justified the gift in adoption.

In Mandlik's Hindu Law p. 468 we find the following passage which accords with the conclusion at which we have arrived. " The widow's power of giving in her own right has, by some, been questioned, but, as it seems to me, on very insufficient grounds. In point of fact, even the texts by themselves are more clearly in favour of her competency to give, than her ability to take, and all the Digests held authoritative on this side of India, are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's text being express in favour of the mother or the father being able to give, the widow has the right to give."

[114] It has however been argued before us that the effect of the Hindu Widow Re-marriage Act XV of 1856 is to deprive a re-married widow of all rights resulting from her first marriage and even of the right to act as guardian of her child. We are unable to agree with this contention.

Section 3 of the Act is as follows :—

On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother :

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.



It is to be observed first that the proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children: secondly that even where there is a property of the children the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother.

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Her right as mother to act as guardian of children not possessed of property is therefore but slightly affected by the Act.

Assuming that the mother has by Hindu Law a right to give her son in adoption, we do not think that the Act affords any indication that the legislature intended to deprive her of it. [115] Section 5 says that a widow, except as in the three preceding sections is provided, shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled. Accordingly a re-married woman has been held entitled to succeed as heir to her son by her first husband: see *Chamar Haru v. Kashi* (1) and *Basappa v. Rayara* (2).

The right of guardianship which under the provisions of section 3 (one of the sections excepted in section 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

It is however contended that the matter is not open to argument because it has been held by a Bench of this Court in *Panchappa v. Sangambasawa* (3) that a Hindu widow has no power after her re-marriage to give in adoption her son by her first husband unless he has expressly authorised her to do so. These are the terms of the head note and appear to express the opinion of Parsons, J., one of the Judges who decided that case.

In our opinion the evidence to which we have referred in the earlier part of the judgment is good evidence of an express authority from Anna to Bhagi to give the plaintiff in adoption to Sadashiv. The adoption would therefore according to the opinion of Parsons, J., be valid.

For the above reasons we dismiss the appeal with costs.

*Appeal dismissed with costs.*

33 B. 116 (=1 I. C. 663=10 Bom. L. R. 1128).

[116] APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Heaton.*

ADAM UMAR SALE (Original Defendant No. 1), Appellant, v.

BAPU BAWAJI AND OTHERS (Original Plaintiff and

Defendants Nos. 2—8), Respondents.\*

[15th October, 1908.]

*Bhagdari Act (Bombay Act V of 1862) sec. 3—Bhag—Unrecognised sub-division of a bhag—Alienation—Suit to set aside the alienation—Limitation.*

\* Second Appeal No. 112 of 1908.

(1) (1902) 26 Bom. 388.

(3) (1899) 24 Bom. 89.

(2) (1904) 29 Bom. 91.



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Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

*Dala v. Parag* (1) and *Jethabhai v. Nathabhai* (2), distinguished.

[Ref. 39 Bom. 358; 64 I. C. 328=1921 M. W. N. 385=41 M. L. J. 194=13 L. W. 635=40 Mad. 946; 77 I. C. 952=24 Bom. L. R. 1315; 79 I. C. 117.]

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by K. V. Desai, Subordinate Judge of Broach.

Suit to recover possession of land.

The piece of land in dispute formed an unrecognised sub-division of a *bhag*. The ancestors of the plaintiff sold it to the ancestors of defendants Nos. 1, 2 and 3 in the year 1863, that is, after the introduction of the Bombay Bhagdari Act in 1862. The sale was opposed to the spirit of section 3 of the Act.

The plaintiff filed this suit in 1905, to recover the possession of the land from the defendants, alleging that the sale having been void under section 3 of the Act could confer no right or title on the defendants.

The Subordinate Judge decreed the plaintiff's claim. It was upheld on appeal by the District Judge on grounds which he stated as follows:—

As to the plea of adverse possession, it is to be observed that the defendants raised no such issue in the lower Court. The plaint itself no doubt states that [117] defendant No. 1 has been in the possession since the sale, that is considerably over twelve years prior to the suit. But there is no clear issue nor evidence as to how far this possession was adverse to plaintiff, apart from any presumption that may be made from plaintiff's ancestor being one of the vendors.

Further, it is now settled law that adverse possession for however long a period is no bar to ejectment by the Collector under section 3 of the Bhagdari Act: *Collector of Broach v. Rajaram*, I. L. R. 7 Bom 542, 546; *Bai Dala v. Parag*, 4 Bom. L. R. 797; *Jethabai v. Nathabhai*, I. L. R. 28 Bom. 399.

But the English rule 'Prescription runneth not against the Crown' does not hold good in India; in point of limitation, except where specially protected by law, the Crown and its officers stand on the same footing as any other parties.

There is no such special exemption in the Bhagdari Act: the words 'whenever he shall, upon due inquiry' &c., can hardly be said to extend the period of limitation. In the cases cited above, the *ratio decidendi* was really the fact that the legislature for special reasons of policy, had absolutely made illegal and invalid *ab initio* all alienations of unrecognised sub-divisions; so that possession under such alienations by a stranger non-bhagdar could never by mere lapse of time be recognised by the Courts as legal possession. If so, there seems no clear reason why the plaintiff instead of moving the Collector to take action and, if action were taken in his favour, of leaving the appellant to apply to the Court to set aside the Collector's order should not himself directly apply to the Court to reinstate him in possession; or, when he so applies, why possession of itself should bar his remedy direct any more than it does so indirectly through the Collector. The point of adverse possession cannot thus really arise in the case. To use the words of Chandavarkar, J., in *Jethabhai v. Nathabhai*, I. L. R. 28 Bom. 407: 'It is of the essence of adverse possession that it must relate to some property which is recognised by law. But here there is no such property, since the legislature has prescribed the kind of property on which the plaintiffs seek to found their title by adverse possession.' In respect of the resulting hardship, if any, to defendants, one can but quote the words of Jenkins, C. J., in *Dala v. Parag* (4 Bom. L. R. 799): 'Great hardship may possibly arise from time to time by the exercise of those powers, but this is not an unfrequent result of legislation of this class and we cannot on this ground help the plaintiff, for "Courts must look at hardships in the face rather than break down rules of law".'

(1) (1902) 4 Bom. L. R. 797.

(2) (1904) 28 Bom 399; 6 Bom L. R. 428.



*L. A. Shah*, for the appellant (defendant No. 1) :—It has been found as a fact that the sale took place in the year, 1863 A. D., and ever since the possession has been with the defendant. The present suit, which is brought more than forty years after that date, is therefore time-barred (see section 28 and Article 144 of the Limitation Act), unless there is something in the Bhagdari Act (Bombay Act V of 1862) to exclude the operation of the provisions of the Limitation Act, 1877.

[118] We submit there is nothing in the Bhagdari Act, 1862, to exclude the operation. The cases of *Dala v. Parag* (1) and *Jethabhai v. Nathabhai* (2) are distinguishable from the present case inasmuch as there the Collector had initiated the proceedings and the question was whether his action was subject to any provisions of the Limitation Act, 1877. In the case of *The Collector of Broach v. Desai Raghunath* (3), the proceedings were under section 2 of the Bhagdari Act (Bombay Act V of 1862). In *Dala v. Parag* (1) the learned Chief Justice relied upon the expression "whenever it shall appear" in section 3 of the Bhagdari Act, and held that the plea of adverse possession could not prevail against the Collector's order. In the case of *Jethabhai v. Nathabhai* (2) also the Collector had passed the order and the plaintiff was seeking to get rid of the effect of that order. The general remarks of Chandavarkar, J., must be taken with reference to the facts of the case, the point arising in this appeal not having been argued in that case.

*G. N. Thakore* (for *M. N. Mehta*), for the respondent :—The Limitation Act does not control the transactions in question in contravention of the Bhagdari Act : see *The Collector of Broach v. Desai Raghunath* (3), where the Collector's action fell under section 2 of the Bhagdari Act. In *Dala v. Parag* (1) and *Jethabhai v. Nathabhai* (2) the Collector's action fell under section 3 of the Act. These cases are not distinguishable from the present case on the ground that the Collector's action intervened in each of them; while in the present case there is no order of the Collector. Besides, the remarks of Chandavarkar, J., which form part of the decision of the case, are clearly in favour of the view that the policy of the Act is to make the transaction contravening its provisions unlawful, and null and void in law. I strongly rely on the said remarks.

BATCHELOR, J. :—This appeal raises a question as to the construction of the Bhagdari Act (Bombay Act V of 1862). The plaintiff sued to recover possession of a parcel of land alleging that it formed part of a *bhag* which was his ancestral property, [119] and that in 1863 it and some other land were sold, in contravention of the Bhagdari Act, by his ancestors and those of defendants 4 and 5 to the ancestors of others of the defendants. It is admitted that the land in suit is an unrecognised subdivision of a *bhag*, and it is found as a fact by the Court below that the sale to the defendants' predecessors took place in 1863, that is, after the coming into force of the Bhagdari Act.

The learned District Judge has allowed the plaintiff's claim on the grounds that the sale of 1863 was void under section 3 of the Bhagdari Act, and that no adverse possession of the land could be acquired by the first defendant so as to bar the suit under the law of limitation. Though other questions have been slightly discussed before us on behalf of the first defendant, who is the appellant here, it appears to me that the only point of substance is that which has reference to the Limitation Act.

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(1) (1902) 4 Bom. L. R. 797.

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(2) (1904) 28 Bom. 399 : 6 Bom. L. R.

(3) (1883) 7 Bom. 546.



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It is common ground that the sale of 1863 was void under section 3 of the Bhagdari Act, and upon a consideration of the pleadings and the general conduct of the suit I am satisfied that the suit must be held to be barred by limitation unless it can be saved by virtue of the special provisions of the Bhagdari Act. Though no issue as to limitation was raised in the trying Court, the point was taken in the first defendant's written statement, and has been discussed by the Judge below; having regard to these circumstances and to section 4 of the Limitation Act, I think that Mr. Shah is entitled to argue the question of limitation in this appeal.

Now the argument which found favour with the lower appeal Court, and which accordingly the appellant has now to displace, is that possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act can never become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest. This argument is grounded upon the general scheme and policy of the Act, and upon certain judicial decisions.

As to the scheme of the Act, it is apparent from the title, the preamble and the sections that the Act is a special or exceptional piece of legislation designed with the view to prevent the dismemberment of Bhagdari tenures. To give effect to this policy [120] the legislature directs in section 1 of the Act that no portion of a *bhag*, other than a recognised sub-division of such *bhag*, shall be liable to seizure under the process of any Civil Court. Then by section 2 it is provided that on the issue of any such process for the seizure of any unrecognised portion of a *bhag*, the Collector may move the Court to set aside the process, and if the Court finds that the case falls within the Act, "it shall set aside or quash such process, and cause the provisions of this Act to be put in force." Then follows section 3, with which we are more immediately concerned in this appeal. It begins by reciting that "it shall not be lawful" to alienate or encumber any portion of a *bhag* other than a recognised sub-division of such *bhag*; and the second paragraph enacts that any alienation contrary to the provisions of the section "shall be null and void; and it shall be lawful for the Collector.....whenever he shall, upon due inquiry, find that any person is in possession of any portion of any *bhag*.....other than a recognised sub-division of such *bhag* in violation of any of the provisions of this section, summarily to remove him from such possession, and to restore the possession to the person whom the Collector shall deem to be entitled thereto." Then by the third paragraph it is laid down that any suit brought to try the validity of any order made by the Collector in the exercise of the above powers must be brought within three months after the execution of such order.

It has been held by this Court in decisions which are binding upon us that under section 3 of the Act the Collector may take action at any time; that his action is not subject to the law of limitation; and that the plea of adverse possession cannot prevail against any order which he may make: see *Dala v. Parag* (1) and *Jethabhai v. Nathabhai* (2). A reference to the former case will show how this principle is deduced from the general scheme of the Act and from the particular words authorising the Collector to take action whenever he shall find any person in apparently unlawful possession. But in this case no action has been taken by the Collector. It is the plaintiff himself who now seeks to disturb a posses-

(1) (1902) 4 Bom. L. R. 797.

(2) (1904) 28 Bom. 899 : 6 Bom. L. R. 428.



sion extending over 40 years ; and the question [121] is whether the immunity from limitation, afforded to the Collector under the Act, should be extended also to a private party. I can find no warrant in the Act for that opinion ; on the contrary, the policy of the Act, as I read the sections which I have endeavoured to summarise, is to vest in the Collector alone the special powers of interference conferred, leaving private parties to the operation of the ordinary law. And this view derives support from the consideration that the Collector is in a better position than the Civil Court to carry out the special objects of this particular Act with due regard to the aims of the Government as well as to any equities which may exist between the parties. But there is, I think, nothing to indicate that the exceptional position conferred on the Collector can be acquired by a party who after standing by for 40 years comes direct to the Court instead of availing himself of the special remedy provided by the Act. Reliance was placed by Mr. Thakore upon a passage in Chandavarkar, J.'s judgment in *Jethabhai's* case (1) where it was said that, on principle, such a title as the plaintiff's in that suit claimed to have acquired, could not be acquired by adverse possession. But this passage, as the following sentences clearly show, had reference to the particular claim advanced by the then plaintiffs who professed to hold the land as forming part of a *narva* holding and as subject to all the incidents of the tenure. No such claim is put forward here and the passage is therefore inapplicable to the present facts.

Then it was said that the possession obtained by the first defendant's predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void. That is undoubtedly so, but it supplies no reason for supposing that such possession would not be adverse to the rightful owner. On the contrary, it is just such possession as this, that is, possession originating without colour of title, which is contemplated by the law of limitation : so, in the *President and Governors of Magdalen Hospital v. Knotts* (2) possession obtained under void leases was held to be adverse. It is important to distinguish between the sale and the possession. The sale, no [122] doubt, was void, and the law allowed the vendors ample time in which to have it set aside. But the appellant does not rest upon the sale ; he takes his stand on the long possession following the sale, and the effect of that possession is not displaced by reference to its origin. So far as I can discover, the Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

For these reasons I am of opinion that the appeal should be allowed and that the suit should be dismissed with costs throughout.

*Appeal allowed.*

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(1) (1904) 28 Bom. 399 : 6 Bom. L. R. 428.

(2) (1879) 4 App. Cas. 324.



33 B. 122 (=10 Bom. L. R. 417=1 I. C. 834).

ORIGINAL CIVIL.

Before Mr. Justice Davar.

JAMSHEDJI CURSETJEE TARACHAND, *Plaintiff*, v. SOONABAI  
AND OTHERS, *Defendants*.\*

[2nd December, 1907.]

*Trusts to perform Muktaḍ ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktaḍ Ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.*

Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktaḍ, Baj, Yejushni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktaḍ ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

The performance of the Muktaḍ ceremonies is a religious duty imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thansgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the sovereign, for [123] good government by him, and for victory to him over all his enemies. The Muktaḍ ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

The monies paid to the priests for the performance of the Muktaḍ ceremonies form a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktaḍ ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktaḍ ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow, another Judge's findings of fact based on the evidence recorded by him, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

*Limji Nawroji Banaji v. Bapuji Ruttonji Limbwalla* (1), not followed.  
[Ref: 33 Bom. 469.]

DINBAI, widow of Jehangir Cursetji Likimna, otherwise known as Tarachand, a Parsee, on the 21st day of December 1871 made a settlement of certain moveable and immoveable properties belonging to her, and appointed her sons Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand and her son-in-law Sorabji Hormusji Bottlewala, all since deceased, the trustees thereof. The deed of settlement provided inter

\* O. C. J. Suit No. 341 of 1907.

(1) (1887) 11 Bom. 441.



*alia* that the trustees and the survivors or survivor of them and the executors and administrators of such survivors should stand possessed of and interested in all the immoveable and moveable properties therein more particularly mentioned and thereby settled upon certain trusts, that is to say, "in trust to receive the interest and income thereof and to pay the same to Dinbai during her life, and after her death upon trust to purchase or set apart out of the [124] said trust funds promissory notes of the Government of India for the sum of Rs. 15,000 bearing interest at 4 per cent. per annum and to pay the annual income thereof to each of them the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Hormusji Sorabji Bottlewalla and after the death of any of them to his or their executors or administrators alternately in regular rotation every third year in the order named above to enable him or them to defray the expenses of annual Muktaḍ ceremonies of the dead members of the family in both sects of Shanshaya and Kadmi".

The deed of settlement made provision for the payment of certain sums of money to the persons and for the purposes therein mentioned and then proceeded "and to pay and divide the net residue thereof unto and between the said Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand, their executors, administrators and assigns in equal shares".

Cursetji Jehangir Tarachand died on the 15th of December 1887 at Bombay leaving a will, dated the 17th January 1887, whereby he appointed his wife Bai Meherbai Cursetji Tarachand the sole executrix thereof. As this will was after the death of the testator lost or mislaid, the High Court of Bombay granted on the 15th March 1888 probate of the draft thereof to Bai Meherbai until the original will was produced.

Bai Meherbai died at Bombay on the 16th February 1900 without fully administering the assets belonging to the estate of Cursetji Jehangir Tarachand. On the 3rd August 1900 letters of administration with the said draft will annexed of the un-administered property, property and credits of Cursetji Jehangir Tarachand were granted by the High Court at Bombay to the plaintiff as one of the sons and one of the two surviving residuary legatees named in the will of the said deceased limited until the original will was produced.

The settlor Bai Dinbai died on the 5th March 1889. At the time of her death Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand were living and after her death they continued to manage the moveable and immoveable properties mentioned in the deed of settlement. In the course of such management they, in pursuance of the terms of the settlement, [125] set apart out of the trust-properties in their hands Government promissory notes of the value of Rs. 15,000 for the purposes of the Muktaḍ ceremonies in the settlement directed to be performed.

Bai Dinbai left a will dated 15th July 1886 whereby she appointed the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla executors. As the said Cursetji had predeceased the executrix the will was proved by the surviving executors on the 18th May 1899. After the death of Bai Dinbai, the said Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand, as the surviving trustees of the settlement, went on paying the interest of the said Government promissory notes of Rs. 15,000, alternately each year to (1) Bai Meherbai, the executrix of the will of Cursetji Jehangir Tarachand, until her death in the year 1900 and after that with the implied consent of the

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plaintiff as administrator to Bai Ratanbai, the eldest daughter of Cursetji Jehangir Tarachand; (2) to Sorabji Hormusji Bottlewalla until his death, which took place on the 31st August 1902, and after his death to his executors; and (3) to Merwanji Jehangir Tarachand until his death, which took place on 15th March 1905.

Since the death of Merwanji Jehangir Tarachand his executors, who held the said Government promissory notes, have not paid the income thereof to any one, as they entertained doubts as to the validity of the trust declared in respect of the said notes.

About the end of the year 1890 the whole of the estate of Bai Dinbai was administered and the whole trust properties under the deed of settlement were properly distributed except the Government promissory notes which were set apart according to the deed of settlement. By an Indenture dated 16th April 1891, Merwanji Jehangir Tarachand, Meherbai widow and executrix of Cursetji Jehangir Tarachand, and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th defendants hereto passed a release in favour of Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla, the executors and trustees abovenamed, with the proviso at the end thereof excluding the Government promissory notes of Rs. 15,000 from the operation of the release, in the event of the trusts being found or declared to be inoperative or void.

[126] The 1st and 2nd defendants were the executrix and executor, respectively, of the last will and testament of Merwanji Jehangir Tarachand. The 3rd, 4th and 5th defendants were the daughters of Bai Maneckbai, the eldest daughter of the deceased settlor Bai Dinbai. Defendants 6, 7, 8, and 9 were the daughters of Bai Bachubai, the youngest daughter of Bai Dinbai. Defendants 10 and 11 were the surviving executors of the last will and testament of Sorabji Hormusji Bottlewalla. The 12th defendant was the Advocate General.

The plaintiff therefore filed this suit and obtained an originating summons on the 18th April 1907 for the determination of the following questions:—

(1) Whether the trusts declared in respect of Government promissory notes for Rs. 15,000 mentioned in the plaint are valid?

(2) If the trusts abovenamed are valid, who are the persons entitled to get the interest on the said notes and to perform the Mukta ceremonies?

(3) If the trusts abovenamed are void, who are the persons entitled to the Government promissory notes for Rs. 15,000 and the interest which has accrued and will accrue due thereon.

(4) Whether the agreement embodied in the release of the 16th December 1891 and referred to in paragraph 12 of the plaint is not binding on all the parties hereto?

(5) Whether in the event of the said trusts being held to be void the first and second defendants herein are not liable to account for the promissory notes of Rs. 15,000 and the interest thereon?

*J. K. Tarachand*, for the plaintiff.

*Kanga*, for the defendants 1 and 2.

*Bahadurji*, for defendants 10 and 11.

The summons was argued in chambers on 29th June 1907, when the learned Judge (Davar, J.) adjourned it into Court for further evidence and argument and made the Advocate General a party.



[127] *J. K. Tarachand*, for the plaintiff:—Muktad ceremonies are ceremonies for the benefit of the dead. I refer the Court to the following cases:—

*Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (1); *Cowasji N. Pochkhanawalla v. R. D. Setna* (2); *Dhunbaiji v. Nawroji Bomanji* (3); *Cowasji Byramji Gorewalla v. Perrozbai* (4); *Maneckji Edulji Allbless v. Sir Dinsha Maneckji Petit* (5); *Dadina v. The Advocate General* (6). These are all the cases, and they decide that trusts in favour of Muktad ceremonies are void all creating perpetuities.

See also *Dady v. Advocate General* (7).

I say that the trust is void on the basis of these cases as offending against the law of perpetuities.

[Davar, J.—Show me that this rule applies to Parsis.]

We must refer to 43 Eliz., ch. 4, to see what bequests are charitable.

*Naoroji Beramji v. Rogers* (8) decides that the rule against perpetuities applies to Parsis.

[Davar, J.—In order to prove your case you must prove that the English law applies to Muktad. The Rule of Perpetuity is English Law; so far as succession goes it may apply to Parsis, but can you say that it applies to foreign religious institutions?]

The common law applies to India and there are certain exceptions with regard to Hindus and Mahomedans, but there is nothing to exempt the Parsis, see *Yeap Cheah Neo v. Ong Cheng Neo* (9). This is enough to shift the onus on to the other side. If they allege any custom I shall be allowed to call evidence to contradict that custom.

*Kanga*, for defendants 1 and 2:—I represent the trustees, the executrix and executor of Merwanji Tarachand. There is no dispute as to the facts, the trustees are willing to carry out the [128] trust and place themselves in the hands of the Court. The Parsi law has been in an undecided state since the decision of *Naoroji Beramji v. Rogers* (8); which applies English law to Parsis. In Bombay Parsis are governed by the Charter, in the Mofussil they are governed by Bombay Regulation IV of 1827. There are four cases in which the English law has not been applied to Parsis. These cases are:—*Dhanjibhai Bomanji v. Navazbai* (10) where the law of advancement was held not applicable to Parsis. *Peshotam Hormasji Dastoor v. Meherbai* (11) where infant marriage though not valid in English law was held by Scott, J., to be valid among Parsis, *Mithibai v. Limji Nowroji Banaji* (12) where Bayley, J., held that the rule in Shelly's case does not apply to Parsis, and *Byramji Bhimjibhai v. Jamsetji Nowroji Kapadia* (13). It is rather difficult to say what is the law and by what law Parsis are governed. Jardine, J., is not supportable when we consider the literature of the community. The Transfer of Property Act makes the Law of Perpetuity applicable to Parsis but not to Hindus and Mahomedans. Section 17 of that Act saves perpetuities for the advancement of religion and charity. In England all religious trusts have been regarded as charitable. There Roman Catholic and other religious trusts were forbidden on some State exigency. Before the Reformation trusts

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(1) (1887) 11 Bom. 441.

(2) (1895) 20 Bom. 511.

(3) (Unreported) Suit No. 565 of 1889.

(4) (Unreported) Suit No. 281 of 1892.

(5) (Unreported) Suit No. 96 of 1892.

(6) (Unreported) Suit No. 49 of 1895.

(7) (1905) 7 Bom. L. R. 324.

(8) (1867) 4 Bom. H. C. R. (O.C.J.) 1.

(9) (1875) L. R. 6 P. O. 381.

(10) (1877) 2 Bom. 75.

(11) (1888) 13 Bom. 302.

(12) (1881) 5 Bom. 506.

(13) (1892) 16 Bom. 630.



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for the souls of the dead were valid, but afterwards they were forbidden as being superstitious: see Statute 1 Ed. VI, Ch. 14. In England no religious trusts have been held void on the ground of perpetuity as being for superstitious purposes or for non-charitable objects.

Jardine, J., relies on *Cocks v. Manners* (1), but that case had nothing to do with religion. In the same case there is a bequest to certain sisters of charity and that was held valid. See *Colgan v. Administrator-General of Madras* (2). In England these gifts have been held valid not as religious but as gifts to certain voluntary association.

In *Yeap Cheah Neo v. Ong Cheng Neo* (3) it will be seen that the Judge had the idea of superstitious uses in his mind. [129] Trusts for masses are valid in Ireland but not in England. There are decisions to say that Judges are not to decide that one religion is better than another, *Mokoond Lal Singh v. Nobodip Chunder Singha* (4). In England trusts can be grouped under the following heads: (1) Forbidden Religious Trusts; (2) Superstitious Religious Trusts; (3) Valid Religious Trusts; (4) Gifts to Voluntary Associations; (5) Trusts for erecting, repairing or maintaining monuments or tombs.

(1) With Forbidden Religious Trusts we are not concerned, for the Proclamation of 1857 gives full liberty of religion.

(2) The doctrine of superstitious uses does not apply to India. *Advocate-General v. Vishvanath Atmaram* (5) 1 Ed. VI, Ch. XIV, only applied to trusts then created. Later trusts are void because of the invalidity due to that Statute. *Dominus Rex v. Lady Portington* (6) affords a clue as to what is meant by superstitious uses. *Attorney-General v. Calvert* (7) shows that the spirit of that statute was carried on after the Reformation. I rely on four lines at p. 260. On the question of masses the cases are very few, see *West v. Shuttleworth* (8), *In re Elliott* (9), *The Attorney-General v. The Fishmongers' Company* (10), *In re Fleetwood* (11), *Heath v. Chapman* (12), *In re Blundell's Trusts* (13), *West v. Shuttleworth* (8) and *Heath v. Chapman* (12) are doubted by the Master of Rolls in *In re Michel's Trust* (14) and see Snell's Equity, 12th Edition, pages 124-125. *Das Mercedes v. Cones* (15) is an authority showing that the doctrine of superstitious uses is not recognized in India. This is followed in *Andrews v. Joakim* (16), see also *Joseph Judah v. Aaron Judah* (17), *Khusalchand v. Mahadevgiri* (18), *Rupa Jagshet v. Krishnaji Govind* (19).

[130] (3) Valid Religious Trusts. These are trusts of Protestants. The cases are *Baker v. Sutton* (20), *Townsend v. Carus* (21), *Parbati Bibee v. Ram Barun Upadhyia* (22).

Section 17 of the Transfer of Property Act and 43 Eliz, c. IV both say that bequests to religion are valid.

A gift for the maintenance of religious ceremonies is a good gift: *Turner v. Ogden* (23). A legacy towards establishing a Bishop in His

- (1) (1871) L. R. 12 Eq. 574.
- (2) (1892) 15 Mad. 424.
- (3) (1875) L. R. 6 P. C. 381.
- (4) (1898) 25 Cal. 881.
- (5) (1895) 1 Bom. H. C. Appx. ix.
- (6) (1755) 1 Salkeld 162.
- (7) (1857) 23 Beav. 249.
- (8) (1835) 2 M. & K. 684.
- (9) (1891) 89 W. R. 297.
- (10) (1889) 2 Beav. 151.
- (11) (1880) 15 Ch. D. 594.
- (12) (1854) 2 Drew. 417.

- (13) (1861) 30 Beav. 360.
- (14) (1860) 28 Beav. 89.
- (15) (1864) 2 Hyde. 65.
- (16) (1869) 2 Ben. L. R. (O. C. J.) 148.
- (17) (1870) 5 Ben. L. R. (O. C. J.) 438.
- (18) (1875) 12 Bom. H. C. R. 214.
- (19) (1884) 9 Bom. 169.
- (20) (1836) 1 Keen 224.
- (21) (1844) 3 Hare 257.
- (22) (1904) 31 Cal. 895.
- (23) (1787) 1 Cox. Eq. C. 316.



Majesty's dominions in America was held good in *Attorney-General v. The Bishop of Chester* (1). In *Attorney-General v. Lawes* (2) a direction to pay into a certain bank a yearly sum of £ 100 for the maintenance and support of the Irvingites was held valid. In *Thornton v. Howe* (3) a trust for printing and circulating religious works was held to be valid.

*Straus v. Goldsmid* (4) is a case very like the present case. This decided that a bequest to enable persons professing the Jewish religion to observe its rites is good.

Trusts for all religions are valid charitable trusts provided they are not opposed to morality or positively harmful to the State. An instance of a trust held void as being contrary to the policy of the law is *De Themmines v. De Bonneval* (5).

(4) Gifts to Voluntary Associations in perpetuity are not valid, see *Cocks v. Manners* (6) which is relied on in *Limji Nowroji v. Bapuji Ruttonji Limbuwalla* (7). If the object of the association is private the trust is bad but where it is public it is good. *Carne v. Long* (8) decided that a gift to a public library is not charitable. See the *Encyclopaedia of Laws*, vol. XI, p. 314, under the head of "Roman Catholic" where all these cases are collected. *Pease v. Pattinson* (9) decided that trust for the relief of sufferers by a certain colliery accident is void. In *In re Sheratons Trusts* (10) a bequest to the Sassoon Mechanic Institute was held void. [131] *In re Clark's Trust* (11) decided that a bequest in aid of a society for raising funds for the benefit of persons in sickness was void.

*The Attorney-General v. The Haberdasher's Company* (12) relied on by Jardine, J., in *Limbuwalla's case* (7) is more a commercial case than a religious case.

(5) Gifts for erecting, repairing and maintaining tombs are not valid: see *Snell's Equity*, p. 113 (12th Edition). *In re Rickard* (13) laid down that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and his family, is void as a perpetuity. *Hoare v. Osborne* (14) decided a gift for the repair of a vault was void. See *Shephard, J.*, in *Colgan v. Administrator-General of Madras* (15), *Fisk v. Attorney-General* (16), *Fowler v. Fowler* (17), *Dawson v. Small* (18), *Tudor on Charities and Mortmain*, Ch. V, section 4, p. 131 (4th Edn.). These bequests are held void because they do not advance religion.

Indian legislation seems to include religious purposes in the word charity. This is borne out by section 17 of the *Transfer of Property Act*. In the *Act VI of 1890*, section 2, there is a definition of charity. In *Wilson's Mahomedan Law*, 2nd Edn., page 393, the distinction between religion and charity is explained. We have to distinguish the three Indian cases. *Colgan v. Administrator-General of Madras* (15) is a decision on Masses and proceeds on the principle of *West v. Shuttleworth* (19) and is therefore of very little use. As to what is a mass, see *Attorney-General v. Delaney* (20). In *Colgan v. Administrator-General of Madras* (15) *Shephard*,

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- (1) (1785) 1 Bro. Ch. Ca. 444.
- (2) (1849) 8 Hare 32.
- (3) (1862) 31 Beav. 14.
- (4) (1837) 8 Sim. 614.
- (5) (1828) 5 Russ. 288.
- (6) (1871) L. R. 12 Eq. 574.
- (7) (1887) 11 Bom. 441.
- (8) (1860) 2 De G. F. & J. 75.
- (9) (1886) 32 Ch. D. 154.
- (10) (1884) W. N. 174.

- (11) (1875) 1 Ch. D. 497.
- (12) (1834) 1 My. & K. 420.
- (13) (1862) 31 Beav. 244.
- (14) (1866) L. R. 1 Eq. 585.
- (15) (1892) 15 Mad. 424 at p. 436.
- (16) (1867) L. R. 4 Eq. 521.
- (17) (1864) 33 Beav. 616.
- (18) (1874) L. R. 18 Eq. 114.
- (19) (1835) 2 M. & K. 684.
- (20) (1875) L. R. 10 C. L. 104 at p. 107.



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J., was of opinion that trusts for masses should be held valid but he followed *Yeap Cheah Neo v. Ong Cheng Neo* (1) and held them void. *Yeap Cheah Neo v. Ong Cheng Neo* (1) can be distinguished. The question is are these religious ceremonies pious uses or [132] religious uses? In *Limbuwalla's* case (2) they are held to be pious uses.

*Bahadurji* for defendants 10 and 11, the surviving executors of Sorabji H. Bottlewalla, one of the three trustees of the original deed of settlement:—The suggestion in *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (2) that Parsis are governed by English law has no authority for its support. All the Judges who decided cases about Baj Rojgar trusts have worked from the Christian point of view and they could not dissociate themselves from the view of the pious ceremonies of the Christian Church. Toleration of religion is the basis of the English Rule here. (1780) 21 George III, ch. 70, sections 17 and 18, said that Courts in India should have regard to the religious usages and customs of the natives of India.

37 George III, ch. 142, section 12, is very similar. 4 George IV, c. 71, High Court Rules, page 13. The policy from the earliest time seems to be to grant entire freedom in respect of religion to the natives of India. Westropp, J., in *Naoroji Beramji v. Rogers* (3) says that the Parsis are governed by English law. I submit that law contemplates equality and freedom of religion, see Letters Patent, High Court Rules, page 67, cl. 19. Bombay Regulation IV of 1827, section 26, relates to the mofussil. According to these statutes the Parsis in the mofussil are governed by the law of India as to usage and custom but not the Parsis in Bombay who are governed by the English law, and he has only to step out of the jurisdiction of this Court to establish such a trust as is now in dispute as valid. If a trust does not come within the spirit of 43 Eliz., c. 4, it can be upheld as valid within the jurisdiction of this Court. I propose to cite a series of cases to show that the High Court here has not followed consistently the principle laid down in *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (2). Prior cases are the following:—*Ardaseer Cursetjee v. Perozeboye* (4) decided that so far as the ecclesiastical side of the Court was concerned the English law did not apply to Parsis. *Homabace v. Punjeabhace* [133] *Dosabhace* (5), *Modae Kaikhooscrow Hormusjee v. Cooverbhace* (6) laid down that there is the restraint upon the testamentary power of disposition by a Parsee, page 153 of Sorabjee Bengali's book on Parsee Acts. In *Mithibai v. Limji Nowroji Banaji* (7) a reference is made to *Gheesta's* case where an illegitimate son was held entitled to succeed to his father's share following the Hindu principle. *Mihirwanjee Nuoshirwanjee v. Awan Bace* (8) referred to in *Awabai v. Jamasji Jamshedji* (9).

There is another case *Mancharsha Ashpandiarji v. Kamrunisa Begam* (10) which decided that English law did not apply in its entirety to Parsis; and see Bayley, J.'s judgment in *Jivandas Keshavji v. Framji Nanabhai* (11). *Bai Maneckbai v. Bai Merbai* (12) decided that section 7 of the Statute of Frauds applies to Parsis. Fulton, J., in *Navroji Manockji Wadia v. Perozbai* (13) and in *Shapurji v. Dossabhoy* (14) Batchelor, J.,

(1) (1875) L. R. 6 P. O. 381.

(2) (1887) 11 Bom. 441.

(3) (1867) 4 Bom. H. C. R. (O. C. J.) 1.

(4) (1856) 6 Moo. I. A. 348.

(5) (1885) 5 Suth. W. R. p. o. 102.

(6) (1856) 6 Moo. I. A. 413.

(7) (1881) 5 Bom. 506.

(8) (1822) 2 Borr. Bom. Rep. 231.

(9) (1863) 3 Bom. H. C. R. (A. C. J.) 113.

(10) (1868) 5 Bom. H. C. R. (A. C. J.) 109 at p. 114.

(11) (1870) 7 Bom. H. C. R. (O. C. J.) 45.

(12) (1881) 6 Bom. 363.

(13) (1898) 23 Bom. 80 at p. 87.

(14) (1905) 30 Bom. 859 at p. 862.



said that the law governing the Parsis in the mofussil is the customary law of the Parsis modified by justice, equity and good conscience.

So far therefore as religion is concerned there is no established Church in India as there is in England and we have here perfect freedom of religion. I mean by "established Church" the Church as established and maintained by the State. The doctrines of the Established Church of England are always the considerations entered into whenever there is a contest on religious matters, but here there is no particular church maintained by the State. See Ilbert's Government of India, pp. 256—259, 53 Geo. III, clause 155, section 33, 3 and 4 Will. IV, ch. 85, sections 92—102 and see also West, J.'s observation in *Fatmabibi v. The Advocate-General of Bombay* (1).

As to the cases decided in the Bombay High Court the decree in the case of *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (2) was practically a consent decree. (Read at p. 447.) The [134] evidence I shall produce will show that the ceremonies are for the public benefit of all Zoroastrians. Benefit is derived by the whole community. If evidence had been given before Jardine, J., he would have been of the opinion that the bequests were not for the benefit of individuals or of families but of the whole community. In *Wadia's case* (3) there was not contest; it was a friendly suit. *Gorewalla's Case* (4), *Wadia's Case* (3), *Hodiwalla's Case* (5), *Allbless' Case* (6), *Marker's Case* (7), all followed *Limbuwalla's Case* (1). I refer to the Irish cases for the performance of Masses.

[DAVAR, J.:—I should like to know any case where English law applies to Parsis in respect of religion.]

The Statute of Mortmain does not apply to India; therefore if any question on religion arises it should be judged from the standpoint of the English law prior to the Reformation. See Tudor on Charities and Mortmain, 4th edition, p. 4, 23 Henry VIII Ch. 10, 1 Edward VI Ch. 14, 9 and 10 Vic. Ch. 5, 23 and 24 Vic. Ch. 134, section 1, Theobald on Wills, 6th edition, pp. 350—353. Gifts to perform Masses would be void as being superstitious. See Tudor, p. 8. 9 and 10 Vic. Ch. 59, referred to Jews, 1 Will. and Mary, Chapter 18, referred to Roman Catholics and Dissenters, 2 and 3 Will. IV, Ch. 115 and 23—24 Vic. Ch. 134, section 1 referred to Roman Catholics. A bequest to a Jew to observe the rites of that religion was held valid in *Straus v. Goldsmid* (8). This was before 9 and 10 Vic. 159. *In re Michel's Trust* (9). If the Parsis are not governed by English law then the rule against perpetuities does not apply so far as religious trusts are concerned. Once the religious liberty is granted then the rule against perpetuities has no application even if such religious trusts are not for the public benefit. If these trusts are for the public benefit then it matters little by what law we are governed, but even if they are not for the public benefit, then as the rule against perpetuities does not [135] apply the trusts are valid. Hindus and Mahomedans can make private religious trusts which are valid: *Mullick v. Mullick* (10), *Juggut Mohini Dossee v. Mussumat Sokheemoney Dossee* (11), *Fatmabibi v. The Advocate-*

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(1) (1881) 6 Bom. 42 at p. 50.

(2) (1887) 11 Bom. 441.

(3) Suit No. 565 of 1889.

(4) Suit No. 281 of 1892.

(5) Suit No. 267 of 1890.

(6) Suit, No. 96 of 1892.

(7) Suit No. 49 of 1895.

(8) (1837) 8 Sim. 614.

(9) (1860) 28 Beav. 99.

(10) (1829) 1 Knapp 245.

(11) (1871) 14 Moo. I. A. 289.



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*General of Bombay* (1), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2).

If I establish that the performance of Muktaḍ ceremonies amounts to an act of divine worship, then although if it is a perpetuity the trust would be good. I wish to establish five propositions: (1) The doctrines of the Zoroastrian religion enjoin the performance of Muktaḍ ceremonies. (2) The performance of these Muktaḍ ceremonies amounts to the performance of an act of religious or divine worship. (3) According to the doctrines of the Zoroastrian religion the performance of Muktaḍ ceremonies results in public benefit, either temporal or spiritual, and that it is believed to bring divine blessings not only on the party performing these ceremonies or his household but upon the whole community and on the world at large. (4) Muktaḍ ceremonies, or at all events the essential parts of such ceremonies, can only be performed by priests. (5) Payments received by the priests for the performance of such ceremonies form a portion of their ordinary income and means of livelihood.

A devise to charitable and pious uses generally was held good in *Attorney General v. Herrick* (3). In *Powerscourt v. Powerscourt* (4) a devise to trustees to lay out at their discretion £ 2,000 "in the service of my Lord and Master" was upheld. *Townsend v. Carus* (5) decided that a bequest for spiritual purposes was good. *Farquhar v. Darling* (6) upheld a devise "to the poor and the service of God." In *Turner v. Ogden* (7) it was held that a bequest for preaching a sermon on Ascension Day, for keeping the chimes of the Church in repair, and for a payment to be made to the singers in the gallery of the Church are all bequests to charitable uses within 43 Eliz.

[186] In *The Commissioners for Special purposes of Income Tax v. Pemsel* (8) Lord Macnaghten discussed the meaning of the word charity. Story's Equity, 2nd edition, page 790, section 1155.

Payments made to clergy for the performance of religious services have been held to be good gifts as tending to the advancement of religion: *Robb and Reid v. Dorrian* (9); *Thornber v. Wilson* (10).

Trusts for the performance of Muktaḍ ceremonies stand on the same footing as gifts for Masses for two reasons:—(i) All religions in India are on the same footing: *Das Mercus v. Cones* (11). This case was followed in *Andrews v. Joakim* (12) which decided that a bequest in a will of a sum of money for the performances of Masses in Calcutta was valid. *O'Hanlon v. Logue* (13) overruling *Attorney-General v. Delaney* (14) decided that a bequest for masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not. (ii) There is no application of the doctrine of superstitious uses in India just as there is no such application in Ireland: *Advocate-General v. Vishvanath* (15); Tudor on Charities and Mortmain, 4th edition, page 791, *Attorney-General v. Hall* (16).

Prior to the Reformation of 1823 bequests to perform Masses were held valid in England and Ireland, but since 1823 private and public

(1) (1881) 6 Bom. 42.

(2) (1868) 2 Ben. L. R. (O. C. J.) 11 at p. 47.

(3) (1772) 2 Amb. 712.

(4) (1824) 1 Molloy 616.

(5) (1844) 3 Hare 257.

(6) [1896] 1 Ch. 50.

(7) (1787) 1 Cox. Ch. Cas. 816.

(8) [1891] A. C. 531 at p. 588.

(9) (1877) I. R. 11 O. L. 292 at p. 297.

(10) (1855) 3 Drew. 245.

(11) (1864) 2 Hyde. 65 at p. 71.

(12) (1869) 2 Ben. L. R. (O. C. J.) 148.

(13) [1906] 1 I. R. 247.

(14) (1875) I. R. 10 O. L. 104.

(15) (1855) 1 Bom. H. C. Appx. ix.

(16) [1897] 2 I. R. 426 at p. 447.



masses were distinguished and bequests for private masses were held to be void. *The Commissioners of Charitable Donations and Bequests v. Walsh* (1) decided that trusts for Masses held in public or private were valid trusts. *Attorney-General v. Delaney* (2) decided that Masses in public were valid on the ground that they tended to the edification of the congregation but trusts for Masses held in private are void.

*Padsha*:—This was overruled thirty-one years after by the same Judge in *O'Hanlon v. Logue* (3).

[137] The performance of Masses amounts to an act of divine worship which is believed by those belonging to the faith to bring benefits and blessings, spiritual or temporal, to the public at large within the spirit of 43 Eliz. See Palles C. B.'s judgment in *O'Hanlon v. Logue* (3) at pages 274-276 and Fitz Gibbon, L. J.'s judgment at page 280 and Holmes L. J. at page 286.

The test is the belief of the testator or settlor as to the spiritual or other benefits. This Muktaḍ ceremony is an act of religious worship which amounts to an act of praise, adoration and thanksgiving involving a petition for benefits both temporal and spiritual on all Zoroastrians and all good people belonging to all other communities, including always a prayer for the ruling Sovereign of the country and for good government by him.

*Webb v. Oldfield* (4) decided that a bequest of perpetual rents of property to two Vegetarian Societies was good. Fitz Gibbon, L.J., there says that the essential attributes of a legal charity are that it should be unselfish, public, benevolent or philanthropic. *Cross v. London Anti-vivisection Society* (5) decided that societies for the suppression and abolition of vivisection are charities. *Yeap Cheah Neo v. Ong Cheng Neo* (6) turns upon *West v. Shuttleworth* (7); it referred to Penang where there was no native population when the British settled there. In India there was a population whose customs and usages had to be taken into consideration. In *West v. Shuttleworth* (7) no evidence of custom was taken; it was decided not on facts but on the English Statutes. See also *Cary v. Abbot* (8).

In *Colgan v. Administrator-General of Madras* (9) though the Judges say that the law of superstitious uses does not apply to England still they follow *West v. Shuttleworth* (7).

As to the ceremonies which are performed during the Muktaḍ days they amount to an act of divine and religious worship and result in benefits to the community and also to the world at large, and I cite passages from the Zoroastrian Scriptures to prove [138] that Muktaḍ ceremonies are enjoined in the Farvardin Yast which is dedicated to all Furohurs. As to Furohurs see Sacred Books of the East, Vol. 23, page 179. Farvashis are the same as Furohurs. There is a distinction between Fravashi and Ravan: Haugh's Essay on Parsis, 3rd Edition, page 206. (Civilization of the Eastern Iranians in ancient times by Geiger, Vol. 2, page 113; Zarathustra and Zoroastrianism by Rustomji Edulji Dastur Peshotam Sanjana, page 242.) The ceremonies enjoined during the Muktaḍ days are based on paragraphs 49-52 of the Farvardin Yast, see Sacred Books of the East, Vol. 23, page 192. These are the only references as far as Avesta literature is concerned, but there are other references in Pehlvi Dinkard, Vol. 37,

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(1) (1819) Ir. 7 Eq. 34 (note).

(2) (1875) I. R. 10 C. L. 104.

(3) [1906] 1 I. R. 247.

(4) (1898) 1 I. R. 431.

(5) (1895) 2 Ch. 501.

(6) (1875) L. R. 6 P. C. 381.

(7) (1835) 2 M. & K. 634.

(8) (1802) 7 Ves. 490.

(9) (1892) 15 Mad. 124.



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Sacred Books of East, page 17. There are further references in Bahman Yast (Vol. 5 of Sacred Books of the East, page 208.) That refers to the 11th century A. D. (See also Shayast La-Shayast (what is worthy and what is not worthy to be done), Vol. 5 of Sacred Books of the East, page 351, paragraph 31; Sad Dar Book, Vol. 24 of Sacred Books of the East, page 264, written in the 16th century; Patet Pashemani Spiegles Avesta, page 157, paragraph 18.)

The next question is what are the usual and essential ceremonies performed on these Muktaḍ days?

According to some people five ceremonies are essential; according to others these are four: (i) Afringan, (ii) Baj, (iii) Satum, (iv) Farokshi, (v) Yezeshne.

(i) Afringan consists of prayers expressing nothing but praise, adoration and love for the Almighty and the Furohurs. It is divided into three parts: (a) Afringan Dibache, the introduction and the most important part because it contains universal prayer and is universally said, (b) Afringan proper, (c) Afrin or benediction. Of Afringan proper there are in all eleven kinds. Afringan Ardafarvash, Afringan Dahaman, Afringan Surosh, are performed during the Muktaḍ days. Afringan Dahaman is taken from the sixtieth chapter of Yasna.

(ii) Baj ceremonies consist of recitals of chapter 3—8 of Yasna in Vol. 31 of the Sacred Books of the East, pages 207—230. Verses 5, 6, 8, chapter VIII, page 229, are very important.

[139] (iii) Satum, i. e., praise, see Yasna, chapter XXVI, page 278, clauses 1, 2, 5. Mr. Kanga's Khordah Avesta pages 382—391.

(iv) Furrokshi ceremony begins with Satum and the whole of the Farvardin Yast follows: Sacred Books of the East, Vol. 23, pages 179—230. Furrokshi is a ceremony for all the Furohurs. Farvardin Yast is a portion of it and a Yast which is dedicated to all Farohars.

(v) Yezeshne is said to be the highest and most solemn of all the ceremonies performed during the Muktaḍ days and consists of the whole of the Yasna of 72 chapters which includes 17 chapters of Gathas, chapters 3—8 of the Baj, chapter 60 of Afringan, and lastly part of the Satum: see Vol. 31 of Sacred Books of the East, page 195. Yasna and Yezeshne are the same.

As to the application of English law to Parsis I omitted to cite a case important as showing what the Privy Council said. *Rani Bhagwan Kuar v. Yogendra Chandra Bose* (1).

*Padsha* for the Advocate-General:—Trusts for the performance of Muktaḍ ceremonies are not void because of the prohibition on the ground of superstitious uses. As to what are superstitious uses see Bacon's Abridgment, Vol. 1, page 581 (5th edn.), Chapter on Mortmain and Superstitious Uses. Muktaḍ ceremonies have nothing to do with the souls of the dead but with their Furohurs and the Furohurs of the dead. The doctrine of superstitious uses relates only to the souls of the dead and would not apply to Muktaḍ ceremonies even though it were in force in India. Superstitious use is defined in Tudor (edition of 1906), page 4. All religions not subversive to morality are tolerated in India. Dr. Whitley Stokes, Vol. 1, page 390, note to section 105 of Succession Act, says that there is no prohibition in India of what English lawyers call superstitious uses. And at page 839, note 6, he says "In India a trust for what English lawyers call superstitious uses, e. g., saying Masses for

(1) (1903) L. R. 80 I A. 249 at pp. 253—255.



the dead, may be valid": *Das Mercers v. Cones* (1), *Andrews v. Joakim* (2), *Advocate-General v. Vishvanath* (3), [140] *Colgan v. Administrator-General of Madras* (4), followed in *Kaleloola Sahib v. Nuseerudeen Sahib* (5), all these cases show that the doctrine of superstitious uses does not apply to India, and if trusts for Masses have not been held valid it is not because of superstitious uses but on the ground of perpetuity. Though it might possibly be held that the English Civil law applied to Parsis as in *Naoroji v. Rogers* (6), yet the religious law of England since the Reformation has not been held to apply to India. It was held in *Mitford v. Reynolds* (7) and in *Mayor of Lyons v. East India Company* (8) that the statutes of Mortmain have not been extended to India. These were followed in *Yeap Cheah Neo v. Ong Cheng Neo* (9). Superstitious uses were created by the Reformation: see Tudor, page 4. Jarman on Wills, Vol. 1, page 163 (5th edn.), 23 Henry VIII, Ch. 10, 1 Edward VI, Ch. 14, *Reg. v. Commissioners of Income Tax* (10). The English Judges followed those statutes and extended their policy. Trusts to say Masses were held to be good religious trusts before the Reformation: see the arguments of Browne, K. C., in *O'Hanlon v. Logue* (11) at pages 248—254 and Coke on Lyttleton, Vol. 1, sec. 169 (19th edn.). The rule of perpetuity was in vogue at the time also but still such trusts were held valid. I argue therefore that even if we are governed by the common law of England and apply the same to our religious trusts and even if it is held that our Muktaḍ ceremonies resemble Masses still such trusts according to the common law prevailing in England prior to the Reformation would be held valid.

*In re Michel's Trust* (12) shows that the English law though it relaxed its severity in other matters still it retained its severity with regard to trusts to say Masses for the repose of the dead.

The question then is what Religious Law would apply to India. *Naoroji v. Rogers* (6) lays down that only as to civil rights English law would apply; as to religious trusts whether it is or [141] is not good must be decided by a secular judge upon the evidence of witnesses professing the same faith as the settlor or testator. In *Yeap Cheah Neo v. Ong Cheng Neo* (13) English law was applied because no evidence as to the customary law of the Chinese was taken. This case was referred to by West, J., in *Fatmabibi v. The Advocate-General of Bombay* (14). In *O'Hanlon v. Logue* (15) FitzGibbon, J. says the secular Court must act upon evidence of the belief of the members of the Community concerned. In India all religions stand on an equality except that Episcopal and Presbyterian Churches have some benefits from the Indian Revenue: 53 Geo. III, Chapter 155, section 33; Ilbert's Government of India, pages 256—259; *Advocate-General v. Vishvanath* (16). The *Lex Loci* applies where the country acquired is inhabited until the Crown or Legislature changes it.

The next point is to show that a religious trust is a charitable trust. In *Baker v. Sutton* (17) Lord Langdale M. R. says "all the cases with one exception go to support the proposition that a religious purpose is a charit-

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(1) (1864) 2 Hyde. 65.

(2) (1869) 2 Ben. L. R. (O. C. J.) 148.

(3) (1855) 1 Bom. H. C. Appx. ix at p. xv.

(4) (1892) 15 Mad. 424.

(5) (1894) 18 Mad. 201.

(6) (1867) 4 Bom. H. C. R. (O. C. J.) 1.

(7) (1841) 1 Phil. 185.

(8) (1836) 1 Moo. I. A. 175.

(9) (1875) L. R. 6 P. O. 881.

(10) (1888) 22 Q. B. D. 296 at p. 310.

(11) [1906] 1 I. R. 247.

(12) (1860) 28 Beav. 39.

(13) (1875) L. R. 6 P. O. 381 at p. 395.

(14) (1881) 6 Bom. 42 at p. 50.

(15) [1906] 1 I. R. 247 at p. 279.

(16) (1855) 1 Bom. H. C. Appx. ix.

(17) (1836) 1 Keen 224 at p. 293.



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able purpose. This was followed in *Townsend v. Oarus* (1), a very important case, and the judgment of the Vice-Chancellor is very instructive. In that case a bequest to trustees to pay monies to certain societies having regard to the glory of God, in the spiritual welfare of his creatures, was held a good religious purpose. *Powerscourt v. Powerscourt* (2) cited in *In re Darling* (3) where a gift by will "to the poor and to the service of God" was upheld as a good charitable gift. *Attorney-General v. Pearson* (4); *Commissioners for special purposes of Income Tax v. Pemsel* (5).

Muktad ceremonies are acts of religious and divine worship and they also form an important source of remuneration to the priestly class; in other words, they are for the benefit of the Ministers of the Parsi religion. Such a benefit is clearly within the definitions of religious or charitable uses in section 105 of the Indian Succession Act. *Magistrates of Dundee v. Presbytery* [142] of Dundee (6) upheld a gift for the benefit of the ministers of the Presbyterian religions of a particular town. In *Grievs v. Case* (7) a gift for the maintenance of preaching ministers was held good. *Middleton v. Clitherow* (8), *Gibson v. Representative Church Body* (9), Tudor, page 54.

There are two points of resemblance between Muktad and Masses; both are addressed to a large congregation and parts of the ceremony of both can only be performed by priests. The Parsi religion stands on the same footing as the Roman Catholic religion does in Ireland. Therefore the Irish cases are important. I rely on the evidence of the high priests.

*J. K. Tarachand* for the plaintiff in reply:—The Zoroastrian religion is the religion revealed by God to Zoroaster and then promulgated by him. Interpretations by priests or interested persons are not part of the Zoroastrian religion. The Gathas do not say anything about Farvashis. Muktad ceremonies are not religious ceremonies but ceremonies sanctioned by custom which arose after the Farvardin Yast was written which was long after the religion had been revealed to Zoroaster. What is custom is not religion. Section 50 of Farvardin Yast asks for prayers on the Furohurs themselves and not on God or anyone else. (Sacred Books of the East, Vol. 23, page 56, sections 8—11; Vol. III of Khordah Avesta, section 21.) The Muktad ceremonies are not, and were never intended to be, for the benefit of the souls of the dead. This is an erroneous belief and engendered in the minds of the ignorant Parsis by priests for the purpose of putting money into their own pockets. The evidence in *Limbuwalla's* case (10) shows clearly the difference between Furohurs and the souls of the dead (see Jardine, J.'s judgment at page 446). I submit Jardine, J., was right and that he had the proper evidence before him.

In *Allbless' case* (11) the Advocate-General did not object to the matter being re-opened. The question is does the English law apply to a perpetual trust for the performance of Muktad cere- [143] monies. *Maclean v. Critall* (12) gives a history of how English law was introduced into India. The Court must decide whether, and what part of, the law applies to this case. The element of public benefit is wanting although it may be a religious trust, although it may be necessary to employ a priest to perform the ceremonies, although it might

(1) (1843) 3 Hare 257.

(2) (1824) 1 Molloy 616.

(3) [1896] 1 Ch. 50.

(4) (1817) 3 Mer. 353.

(5) [1891] A. C. 531.

(6) (1861) 4 Macq. 228.

(7) (1792) 4 Bro. Ch. Cas. 67.

(8) (1098) 3 Vesey 784.

(9) (1881) 9 L.R. Ir. 1.

(10) (1887) 11 Bom. 441.

(11) (Unreported) Suit No. 96 of 1892.

(12) (1949) P. O. C. 75 at p. 86.



amount to an act of divine worship, still the trust would be bad in law as offending against the rule of perpetuity: Transfer of Property Act, sections 14—17. There must be present the element of public benefit. If a trust is for the advancement of religion it would be for the public benefit, but every religious trust is not for the public benefit: Queen's Proclamation, Ilbert's Government of India, page 572, *Commissioners for special purposes of Income Tax v. Pemsel* (1), *Dolan v. Macdermot* (2), *Jeffries v. Alexander* (3), *Morice v. The Bishop of Durham* (4), *Attorney-General v. Delaney* (5), *O'Hanlon v. Logue* (6), Tudor on Charities, page 37. *Yeap Cheah Neo v. Ong Cheng Neo* (7). In *Thornton v. Howe* (8), *In re Michels' Trust* (9), *Straus v. Goldsmid* (10) and *Turner v. Ogden* (11). the trusts were for the public benefit. The statute of superstitious uses merely made these existing trusts void and afterwards the Courts would not uphold the trusts of the same nature. The doctrine of superstitious uses made trusts illegal but did not make them non-charitable. If the trusts are illegal but charitable the doctrine of Cypres would apply. I submit that the Court is bound by the decision in *Yeap Cheah Neo v. Ong Cheng Neo* (7). *O'Hanlon v. Logue* (6) was not a decision of the highest Court of appeal nor were the Judges who decided it unanimous.

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I further submit that the trust is impossible of performance because certain objects are unascertainable; therefore the trust is void for uncertainty both as to the ceremonies to be performed and the time at which they are to be performed. The Parsis [144] have lost their Calendar; according to some, the new year commences in September, others say it commences in August, and others again say it begins on the 21st March. The commencement of the year being unascertainable the last ten days of the year cannot be ascertained. The Farvardin Yast directs that these ceremonies be performed at the end of the Parsi year.

I further say this trust is void as being opposed to public policy. See Sir Charles Farran's notes. The Legislature was approached to make such trusts valid and after due consideration came to the conclusion that these trusts are void by not passing any legislation to disturb the judgments. The Court should therefore uphold these decisions.

DAVAR, J.—Dinbai widow of Jehangir Cursetji Likimna, otherwise known as Tarachund, a member of the Parsi community of Bombay, on the 21st of December 1871 executed an Indenture of Trust whereby she appointed her two sons Kharsetji and Merwanji and her son-in-law Sorabji Hormusji Bottlewalla Trustees and conveyed to them certain immoveable and moveable property belonging to herself upon Trusts which are therein set out. All the three original Trustees are dead. The first defendant is the widow, and executrix of the will, of Merwanji one of the original Trustees. The plaintiff is the son and administrator with the will annexed of the property and credits of his late father Kharsetji who was another original Trustee. Defendants Nos. 10 and 11 are the surviving executors of the will of Sorabji Hormusji Bottlewalla the third Trustee under the Settlement made by Dinbai.

(1) [1891] A. C. 531.  
(2) (1865) L. R. 5 Eq. 60.  
(3) (1860) 8 H. L. C. 594, at p. 648.  
(4) (1804) 9 Vesey 399, at p. 406 and  
(1805) 10 Vesey 522, at p. 542.  
(5) (1875) I. R. 10 C. L. 104.

(6) [1906] 1 I. R. 247.  
(7) (1875) L. R. 6 P. C. 381.  
(8) (1862) 31 Beav. 14.  
(9) (1860) 28 Beav. 39.  
(10) (1837) 8 Sim. 614.  
(11) (1787) 1 Cox. Ch. Ca. 816.



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The portion of the Trusts created by Dinbai with which the Court is concerned in this case is in the following terms:—

"In trust to receive the interest and income thereof and to pay to the said Bai Dinbai during her life time and after her death upon trust to purchase or set apart out of the said Trust Funds Promissory Notes of the Government of India for the sum of Rs. Fifteen Thousand bearing interest at the rate of four per centum per annum and to pay the annual income thereof to each of them the said Kharsetji Jehangir Tarachund, Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachund and after the death of any of them to his or their Executors or Administrators alternately in regular rotation every third year in the order named above [145] to enable him or them to defray the expenses of annual Muktaḍ ceremonies of the dead members of the family in both sects of Shenshai and Cudmees."

Dinbai died on the 6th of March 1889. Previous to her death she executed a will bearing date the 15th of July 1886. By the said will she directed that certain silver utensils which were in her possession and which are used in the performance of the Muktaḍ ceremonies should be kept in trust by her executors and each of the Trustees of the Settlement of 1871 were to be allowed to use the same for the purposes of the Muktaḍ ceremonies. The Executors of the will were the same as the Trustees under the Trust Settlement of 1871. Kharsetji predeceased Dinbai. Sorabji died on the 31st of August 1902. The third Trustee Merwanji died on the 15th of March 1905. After Dinbai's death the Trusts in respect of the Muktaḍ ceremonies were carried out up till the death of Merwanji in 1905. The first defendant is in possession of the Government Paper of the nominal value of Rs. 15,000 mentioned in the Trust deed of 1871 and the silver utensils mentioned in the will of Dinbai. The Muktaḍ ceremonies were admittedly not performed in the year 1906. The plaintiff filed the suit and obtained an originating summons for the purpose of having certain questions arising under the Trust Deed settled by the Court. The first of these questions is:—

"Whether the Trusts declared in respect of the Government Promissory notes for Rs. 15,000 mentioned in the plaint are valid."

This originating summons first came on for hearing before me in Chambers on the 22nd of June when counsel for the parties appearing at the hearing took it for granted that I would follow the decision of Mr. Justice Jardine in *Limji Nowroji v. Bapuji Ruttonji* (1) declaring Trusts for Baj Rojgar and Muktaḍ ceremonies to be invalid. In recent years I had, however, occasions to consider that case, commonly spoken of as *Limbuwalla's case*, and I entertained grave doubts as to the correctness of the application of the rule against perpetuities to trust relating to Muktaḍ and Baj Rojgar ceremonies prevailing amongst the Parsis [146] professing the Zoroastrian religion. I had weighty reasons for declining to follow that decision and desiring to judge for myself whether the doubts I entertained were well founded. At this hearing the only question that I was asked to consider was raised by Mr. Kanga for the 1st and 2nd defendants who contended that the plaintiff's claim was barred by limitation. This contention was based on the decision of Mr. Justice Candy in *Cowasji N. Pochkhanawalla v. R. D. Setna* (2) and on the assumption that the Trust in question in this suit was bad in law. On my expressing my unwillingness to follow the previous decision referred to above Mr. Bahadurji who appeared for defendants 10 and 11 was instructed immediately to say that he would be prepared to support the Trust. The matter was after some argument adjourned to the following contested Chamber

(1) (1887) 11 Bom. 441.

(2) (1895) 20 Bom. 511.



day and came on again for further hearing on the 29th of June when I adjourned the summons into Court for evidence and argument and directed that the Advocate-General be added as a party defendant. At the hearing in Court Mr. Kanga for defendants 1 and 2, Mr. Bahadurji for defendants 10 and 11 and Mr. Padsha for the 12th defendant, the Advocate-General, combined forces and waged uncompromising war in favour of the Trust against the plaintiff whose counsel Mr. Tarachand bore the brunt of the attack with remarkable courage and attempted with much ability to uphold his contention that the Trust created by Dinbai for the performance of Muktaḍ ceremonies was not a Charitable Trust and was bad in law as offending against the Rule forbidding perpetuity.

It is not easy to learn or understand the true meaning and import of the ceremonies involved in the comprehensive word Muktaḍ or Dosla. Though a Parsi myself it took me considerable time before I could correctly understand the real meaning and nature of the ceremonies—their origin and effect—and the true aim and object of the performance of those ceremonies during the Muktaḍ days. As the case progressed before me I realised how much patient labour must have been involved on the part of counsel for all parties before they were able to place the [147] case before me in the manner in which it was placed before the Court and not a little credit is due to the solicitors who worked and laboured to instruct them so efficiently.

Before I proceed to consider the main point in the case it is necessary that I should deal with the contention of Mr. Tarachand forcibly pressed upon me by him that I was bound to follow the decision of Mr. Justice Jardine more especially as other Judges had followed the same in other cases.

Sitting on the Original Side of this Court I concede at once that I am bound ordinarily to follow the judgment of another Judge when he has decided a question of law—or laid down certain principles of practice or procedure—or judicially construed any provision of the law prevailing in the country. But surely there the matter must end. Is a single Judge bound to follow another Judge's *findings of facts based on the evidence recorded by him*, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion? I am fully aware that one of the maxims governing a Judge in administering justice is:—“*Omnis innovatio plus novitate perturbat quam utilitate prodest.*”—“Every innovation occasions more harm by its novelty than benefit by its utility.”

This Judicial Rule “*Stare Decisis*” is discussed at page 69 of the first volume of the 21st Edition of Blackstone's Commentaries where it is said:—

“It is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of *exception*, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, [148] not

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that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined."

The course I thought fit to adopt in this case was not adopted without the most anxious consideration. I have carefully studied every line of the judgment of Mr. Justice Jardine. I have carefully perused the proceedings in the case and studied the learned Judge's notes of the arguments addressed to him by counsel and the evidence recorded by him. The more I have thought over the case the more convinced I have felt that his "*determination is most evidently contrary to reason and is clearly contrary to the divine law*" as it prevails amongst the believers of the Zoroastrian tenets: It is a decision which to my mind is "*manifestly unjust*."

The error of the judgment of Mr. Justice Jardine is proved to demonstration by the evidence both oral and documentary recorded in this case. As this is the first case that came before the Court, and as the judgment is reported in the authorised reports of our Courts, as other learned Judges have accepted the finding as correct and followed it, I think it is very necessary to examine the circumstances under which the parties to that suit obtained the decision, and see whether the learned Judge was not misled into arriving at an erroneous conclusion by the way in which the case was placed before him.

The plaintiff, as the Committee of the estate of a lunatic, goes before the Chamber Judge and applies for leave to join certain other parties in stating a case for the opinion of the Court under section 527 of the Civil Procedure Code. In support of his application he made an affidavit in which he states as follows:—

"(3) The said Testator set apart the income of the said one-third share in the said Khetwady Bungalow for the performance in perpetuity of certain Private Religious Ceremonies, namely, the Baj Rojgor ceremonies, the consecration of the Nirungdin, the recitation of the Yajusni, and the annual Ghambar and Dosla ceremonies."

"(6) I am advised that the devise of the said one-third share in the said Khetwady Bungalow is void as being in perpetuity and not for a charitable use."

[149] On the plaintiff being authorised to state a case for the opinion of the Court, a case is submitted to the Court wherein it is stated that the plaintiff as such committee as aforesaid and the first four defendants contend that the devise is void as being in perpetuity and not for a charitable use, and that failing the trust the plaintiff and the first four defendants were entitled to the property in equal proportions. The fifth defendant was the mother of the first four defendants and executrix of the will of their father. The sixth defendant was the Advocate-General.

It does not appear from the proceedings who advised the plaintiff and the other parties that the ceremonies in question in the case were private religious ceremonies and that the devise was void in law. At the time the case was submitted to the Court and previously thereto the solicitor acting for the parties could not possibly have done so, as it is proved in this case that he could have known nothing or next to nothing about the nature of the ceremonies. If a case was submitted to counsel the advice would be valueless in that the counsel advising would probably know less than the solicitor preparing the case. The same solicitors who appeared for the plaintiff appeared for the first five defendants. The Advocate-General knowing nothing about the real nature of the Trusts in his capacity as Advocate-General, said nothing, but submitted himself to the orders of the Court but in his capacity as counsel he appeared for the first five defen-



dants instructed by the same solicitors as represented the plaintiff and supported the plaintiff's case. Only one witness was examined in the case.

A lurid light is thrown on how the plaintiff's solicitor within a quarter of an hour educated himself on questions that have cost me many days' concentrated attention to understand and in what manner the only witness was examined before the learned Judge in the course of half an hour or so, by the following passage in the evidence of the same witness Mr. Jivanji "Jamsetji" Mody when examined before me:—

"In the *Limbwalla* case Mr. Wadia of Messrs. Wadia and Ghandhy came to me and asked me to explain certain ceremonies. The interview lasted for quarter of an hour. Some day subsequently I was asked by a clerk to come to Court. He said the Judge might wish to ask me some question.

"[150] I demurred to go in that way without notice, but eventually I was persuaded and I came to Court after the tiffin hour. I was very shortly examined. I was given no opportunity to explain my evidence and convey the right impressions to the Judge. Mr. Justice Jardine's decision came to me and many others as a surprise."

The learned Judge's note book affords very instructive reading and shows how the case was engineered at the hearing. Mr. Lang appeared for the plaintiff. The acting Advocate-General, Mr. Macpherson, appeared for the first five defendants. These parties had joined hands to defeat the Charity and divide the spoils. Counsel who appeared in the case could know nothing about the Scriptures and the Ritual of the Zoroastrian religion. They must necessarily depend upon the materials supplied to them in their briefs. Stray passages from Dr. Haug's "Essays on Parsis" and the late Mr. Dossabhai Framji's book were read before the Court. Mr. Jivanji Mody was put in the box and such questions as suited the parties were asked. There was no one present to defend Charity or to explain and elucidate the passages read on the evidence given. Cases which have scarcely any applicability to the trusts in question were cited and a spirit of happy unanimity and perfunctoriness seems to have pervaded the discussion of a question of the most vital importance to a whole community, and the combined efforts of the parties led the Judge into forming conclusions that are manifestly erroneous.

The learned Judge observes in his judgment (at p. 447):—

"From the evidence of the priest and the reference made to Dr. Haug's learned Essays, I come to the opinion that the benefits which, according to the belief of the Parsis, result from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Frohars or prototypes of the dead."

The learned Judge then goes on to say that the objects of these trusts bear analogy to devise of property to "maintain Tombs of deceased relatives" or for a "gift to private company." The judgment ends up by saying:—

"There has been no conflict, the parties being of accord that the devise is void, and the Advocate-General, as representing the Charity, leaving them in the hands of the Court."

[151] The evidence of the only witness in the case—on a point of such vital importance to a whole community—would not occupy more than one side of foolscap sheet and at the end of the evidence I find a note:—

"As counsel for defendants, the Advocate-General supports Mr. Lang's case, as Advocate-General he leaves the case to the Court."

From a perusal of the records and proceedings in this case one would be led into the belief that the Zoroastrian religion had no Sacred Books,

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no Scriptures, no religious literature of antiquity or authority—that Scriptures written in Gatha, Avesta, Pehlvi and Pazund languages which distinguished scholars of the civilized world had laboured to translate and explain for many years never existed, but that the Zoroastrian religion solely depended on a German Doctor's Essays on Parsis and Mr. Dossabhai Framji's interesting book delineating manners and customs prevailing amongst the Parsis and the Bombay Gazetteer. Not a single text from the Scriptures seems to have been cited, not a single book of authority is referred to, not a word appears to have been said as to whether the performance of these religious ceremonies were enjoined by the Scriptures of Zoroastrianism, not a hint is given as to the origin and meaning of the various ceremonies. The only party before the Court—the Advocate-General—whose duty it was to protect the Charity—if of course valid in law—was left in ignorance of the true nature of these ceremonies and he never made an effort to defend the Trust because he must have believed that what was stated in his brief for the defendants for whom he appeared must have been correct, and I have no doubt whatever that those who instructed counsel in the case must in their ignorance have believed that they were putting forth correct instructions.

It never seems to have struck any one in the case that the Trust in question was a religious trust—that it was a trust in "advancement of religion" and as such in law necessarily a charitable trust. It never seems to have struck any one to look at the prayers that are ordinarily recited at the performance of the ceremonies in question to find out whether those prayers [152] did not amount to an act of divine worship. The real point in the case was never placed before the Court. The true intent, purport and meaning of the ceremonies required to be performed during the Muktaḍ days were never so much as mentioned, much less explained to the Court. Authoritative translations of the Zoroastrian Scriptures contained in the "Sacred Books of the East" and other works of Oriental scholars were not submitted to the court for its consideration. Not only evidence which was available in abundance was not given, but the one witness who was examined had no opportunity of explaining or elaborating his answers, but was confined to answers to questions which appear to be framed to suit the purposes the parties had in view. A decision obtained under circumstances such as I have set out can hardly command the confidence of the other parties affected by it. If the community so gravely affected by the decision had a chance of placing all the materials available at the disposal of the Advocate-General—the official guardian of all charities—had he been in a position to put the case fully and fairly before the Court—if anything like what is possible to be said in support of the Trust had been said and considered by the learned Judge trying the issue—if there had been some one before the Court who was interested in supporting the trust and had made even an attempt to do so, I might have hesitated before making up my mind to refuse to follow the decision in the case. I feel very strongly that Mr. Justice Jardine was misled into coming to the conclusions he did and that the judgment in the case was improperly obtained. I do not use the expressions "misled" and "improperly obtained", in any sense offensive to the parties concerned in the case. I have no doubt they acted according to their lights, but it seems to me it would be a very perverse mind that can—after reading the evidence and exhibits recorded in this case—still maintain that Mr. Justice Jardine's conclusions as regards the Muktaḍ, Baj and other like



ceremonies are correct. I will conclude the consideration of this case by recording that I feel that if I had merely followed this judgment and declined to Judge for myself I would have been guilty of shirking a duty cast upon me by my office.

[153] I am told that this is not the only case on the subject of trusts in respect of Baj, Muktaḍ and other like ceremonies; that since February, 1887, when Mr. Justice Jardine decided *Limbuwalla's* case discussed above, there have been other cases and that other Judges have come to the same conclusions. The records of the Prothonotary's office have been most carefully searched and every case relating to Muktaḍ and Baj Rojgar ceremonies has been mentioned and discussed before me. In fairness to the plaintiff, who relies on these cases, and in fairness to myself and the course I have adopted, I feel that it is necessary to consider each one of these cases separately—though the review of these cases must necessarily be much shorter than that of *Limbuwalla's* case, which was the first of its kind, and which I am clearly of opinion is responsible for the results of every subsequent case. While writing this judgment I have the pleadings, proceedings, notes of counsel's argument and of evidence, all before me, and although it has taken me considerable time to do so, I have carefully considered and scrutinised every paper important or unimportant in all these cases. I will take the cases in their chronological order.

The first case that came before the Court after the decision of Mr. Justice Jardine in *Limbuwalla's* case (1) was *Dinbai v. Hormusji Dinsha Hodiwalla* (2). It is generally spoken of as *Hodiwalla's* case. A Parsi of Surat by his will directed that the income of the residue of his property should be spent in the performance of religious ceremonies affecting the deceased members of his family. He left a mother, who was the plaintiff in the case, and a widow, with whom evidently he was on bad terms and whom he had disinherited by his will—she was the fifth defendant—the first four defendants being the executors of the will. The plaintiff contended that the trust created by the will was void and that she and the fifth defendant, the mother and the widow, were entitled to the residue. Two of the executors did not appear at the hearing—the other two submitted themselves to the Court and the fifth defendant supported the plaintiff's contention. The Advocate-General was no party to the [154] suit but he appeared before Mr. Justice Farran, who heard the case, as counsel for the plaintiff. The Advocate-General cited Mr. Justice Jardine's decision in *Limbuwalla's* case (1), which by then was reported in I. L. R. 11 Bom., referred to the case of *Yeap Cheah Neo v. Ong Cheng Neo* (3), which was relied on by Mr. Justice Jardine, mentioned section 105 of the Indian Succession Act, and then examined the testator's brother as the only witness in the case. The witness purports to explain what was meant by "outlays relating to the dead." He mentions Muktaḍ, Baj, etc. His evidence-in-chief consists of seven sentences and his cross-examination of two more short sentences. Mr. Justice Farran gave no judgment but merely recorded a decree declaring that the bequests in the will were void and that the plaintiff and the fifth defendant were entitled to the residue of the estate. It cannot even be pretended that Mr. Justice Farran brought his mind to bear upon the main question in the case. He assumed that *Limbuwalla's* case was rightly decided and merely followed it.

(1) (1887) 11 Bom. 441.

(2) (Unreported) Suit No. 267 of 1890.

(3) (1875) L. R. 6 P. C. 381.

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The next case is *Dhunbaiji v. Nowroji Bomonji and others* known as *Wadia's case* (1). Although it was filed before the *Hodiwalla* case discussed immediately before this—it was heard and decided after that case. It involved very complicated questions of devolution of property. It was heard by Mr. Justice Farran also and a decree was passed on the 7th of March 1891. The questions in the suit arose out of an instrument in writing bearing date the 15th of February 1826. It is not necessary for the purposes of this case to go into any other matters in the suit except that portion that relates to the Trust created in favour of Muktaḍ and Baj ceremonies. Para 8 of the plaint states:—

“By the said writing the expenses of the Baj Rojgar and Muktaḍ ceremonies of the said Nusservanji Dadabhai, Navrozbai, Dadabhai and Jaiji, and the members of the family of the said Nusservanji and Navrozbai together with those for the maintenance of the Fire Temple at Nargore were directed to be paid out of the income of the Warehouse at Modikhana and the part adjoining Churniwadi, and since the date of the said writing such expenses have been paid out of the said income.”

[155] The first issue in the case was:—

“Whether the bequests and charitable trusts are binding and ought to be carried out.”

The sixth issue was:—

“Whether in the events which have happened the plaintiff is not entitled to have the charitable and religious trusts carried into effect.”

Mr. Justice Farran begins his judgment by saying:—

“Though the property at stake in the suit is not of great value and the friendly spirit in which the cause has been contested shows that its decision is not of great moment.”

Referring to the Trusts, he says:—

“Trusts for the performance of Muktaḍ and Rojgar ceremonies have been decided not to be charitable Trusts: *Limji v. Bapuji*, I. L. R. 11 Bom. 441. That case has been frequently followed and is binding on a single Judge as an authority. The trusts, therefore, not being charitable are void as offending against the law which forbids perpetuities. The fact that the plaintiff and her mother carried out these trusts for a long series of years does not entitle the plaintiff to go on doing so against the wishes of the rest of the descendants of Mithibai.”

The findings on the first and sixth issues recorded are in the negative and for the defendants. This case shows that Parsis, as early as 1826, were settling property in perpetuity for the performance of Muktaḍ and Baj Rojgar ceremonies. The passage from the judgment I have set out shows that in this case also the same learned Judge, who heard the previous *Hodiwalla's case* (2) has followed Mr. Justice Jardine's decision in *Limbuwalla's case* (3) without bringing his own mind to bear on the question of these trusts. But the most startling part of the case is a portion of the decree which runs as follows:—

“This Court doth declare that the religious and charitable trusts in respect of the Baj Rojgar and Muktaḍ ceremonies and the maintenance of the Fire Temple in the town of Nargore in the plaint mentioned are invalid and inoperative and the same are hereby set aside.”

The maintenance of the Fire Temple, as I have shown above, is referred to in the plaint. It is not referred to in Mr. Justice Farran's judgment and the discovery of the declaration in the decree that the Trust for the maintenance of the Fire Temple at [156] Nargore is invalid and inoperative will come as a cruel surprise to the counsel for the plaintiff.

(1) (Unreported) Suit No. 565 of 1889.

(2) (Unreported) Suit No. 267 of 1890.

(3) (1887) 11 Bom. 441.



When in the course of his argument he urged that Trust for Baj and Muktaḍ ceremonies were not trusts in advancement of the Zoroastrian religion, I asked him to give me some instances of trusts that, according to him, would be really in advancement of the Zoroastrian religion, he instanced a trust for the maintenance of a Fire Temple. It seems to me that the attention of the learned Judge, who in this case was considering many complicated questions of devolution of property, was never drawn to this portion of the trusts. The omission of any reference to this branch of the trust where he sums up the provisions of the writing of 1826 in the beginning of his judgment and merely mentions Baj Rojgar and Muktaḍ ceremonies, lends support to my surmise that this particular question could never have been argued before him. I refuse to believe that any Judge of this Court would deliberately declare that a Trust created by a Parsi for the maintenance of a Fire Temple is invalid and inoperative. It appears in the decree because the Judges have nothing to do with the drawing up of decrees unless the parties are at variance and the minutes are spoken to before the Judge passing the decree.

Before leaving the discussion of this case, I should like to say that the statement of Mr. Justice Farran that the decision in *Limbuwalla's* case (1) has been "frequently followed" appears to be erroneous. There was no case between this and *Limbuwalla's* case except *Hodiwalla's* case (2), where the same learned Judge followed Mr. Justice Jardine. Mr. Bahadurji challenged the plaintiff's counsel to produce any other case and a strict search in the Prothonotary's office has failed to find any.

The fourth case relating to Baj Rojgar and Muktaḍ trusts is what is known as *Gorewalla's* case—*Cowasji Byramji Gorewalla v. Peerozbai and others* (3). In this case an attempt was made to uphold the trusts by all the parties other than the first defendant. The trusts were created by a will which was not executed or deposited as required by section 105 [157] of the Indian Succession Act. An attempt was made to show that the properties were devised to charity before the will, but the attempt failed, the Court holding that there was no such valid devise previous to the will. There was more evidence given in this case than was given before Mr. Justice Jardine, but it was all oral evidence unsupported by any scriptural texts or quotations. Mr. Justice Parsons, who heard the case, delivered an oral judgment, notes of which exist. The following passages occur in these notes :

"Purposes of alleged Trust are six in number—

- (1) Asodat (presents to priests),
- (2) Supply of sandalwood to temples,
- (3) Performance of Baj Rojgar and Muktaḍ ceremonies,
- (4) Distribution of alms to deformed,
- (5) Outlays on death of relations, and
- (6) Good and charitable acts.

Of those only numbers 1, 2 and 4 can be held legal and valid."

"Baj Rojgar and Muktaḍ are only prayers for the death which have been held to be *invalid purposes* by several decisions of the Court and evidence in the case shows the correctness of the decisions. Outlays on death of relations are mere private expenses, neither public nor charitable, and other good acts is too vague and indefinite an expression to denote anything."

"The bequest, however, is void as the will was not executed or deposited as required by section 105 of Act X of 1865."

(1) (1887) 11 Bom. 441.

(2) (Unreported) Suit No. 267 of 1890.

(3) (Unreported) Suit No. 281 of 1892.

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The question as to which, if any, any of the purposes were charitable seems to have been one of academic interest in the case in view of the fact that owing to the will not being executed and deposited in the manner required by section 105 of the Indian Succession Act all bequests for a religious or charitable use would be void.

The *several decisions* referred to by the learned Judge are only the decisions in the three cases I have discussed previous to this.

Plaintiff's counsel argued that in this case at all events the Court considered the evidence and he points to the words "the evidence in this case shows the correctness of the decision." I have read that evidence; it is very meagre and very incomplete. It is not supported by a single quotation from a reference to the [158] scriptures. It seems to me, however, that in this case it was really not necessary to find on the evidence at all, and the finding really never affected the result, as the bequests were void for non-compliance with the requirements of section 105 of the Indian Succession Act. The predominating factors influencing the finding, however, were the "several decisions of the Court" which the learned Judge had in mind.

However be it, it cannot be argued that I am bound to follow this finding—if finding it be—on the evidence recorded in that case, when fuller and far more satisfactory evidence was available in the case before me.

The fifth case in which the question of Baj Rojgar and Muktaḍ ceremonies came up before the Court for consideration was *Maneckji Edulji Allbless and others v. Sir Dinsha Maneckji Petit and others* (1). It is known as the *Allbless* case, and was heard by Mr. Justice Bayley. In the course of the hearing the learned Judge has recorded the following note:

"The Advocate-General says he understands Parsi community are not satisfied with that decision...(referring to 11 Bom. 441) and that he will not object to its being reconsidered."

Evidence has been recorded in this case and much of what I have said as to the evidence in the previous case also applies to the evidence in this case.

In this case the settlor had set aside Government Paper of the nominal value of twenty-five thousand, and directed that the income thereof should be used for the purpose of performing Baj Rojgar and Muktaḍ ceremonies and also for the purpose of giving "Dinners of Feasts to the indigent poor Parsees and Eranoes or Persian Parsees respectively who may be disabled by age, blindness or other infirmity of body or mind and who may for the time being be residing in the charitable buildings or asylums provided for them at or near Malabar Hill near the Towers of Silence". The learned Judge delivered an oral judgment on the 16th of April 1895, and passed a decree declaring "that the Trusts declared in the said Indenture of the 30th day of June 1880 as to Promissory Notes of the Government of India of the [159] nominal value of Rs. 25,000 are wholly void." Thus the remarkable result achieved by reconsidering the decision of Mr. Justice Jardine is not only that the Trusts for Baj Rojgar and Muktaḍ ceremonies are void but that a Trust created by a Parsee for feeding the indigent, blind and infirm members of his community, who, by reason of their misfortunes and afflictions, would be inmates of the charitable houses provided for them by their community are also void. This decision requires

(1) (Unreported) Suit No. 96 of 1892.



much under-standing, and it is very unfortunate that no authentic note of the judgment exists amongst the records of the Court. The plaintiff's counsel has furnished me with notes of the judgment taken by counsel, and what they show makes it still harder for me to reconcile what the learned Judge is taken down as having found on the evidence with what he decided. One thing is quite clear. The main ground of his decision was the judgment of Mr. Justice Jardine. The following are some of the notes taken by counsel :

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"Sanjana's evidence showed that ceremony is for benefit of whole community but especially and primarily for relations of deceased persons."

"The public benefit is extremely small."

"The ceremonies are primarily and principally for the dead and incidentally for the whole community."

"As to feeding of poor attempt has been made to separate the benefit but in my opinion the feeding provision stands or falls with the whole bequest of 25,000 rupees. Witness said: Feeding is part of the ceremony following at end of the ceremony."

"As to Baj Rojgar ceremony—trust is void by virtue of Indian Law Reports 11 Bom. 441."

"Decision of Farran, J., in 565 of 1889 following above case though unreported as stated by counsel."

"I follow 11 Bombay and hold that the ceremony is a private one, and the feeding a part of the same occasion as the Bag Rojgar ceremonies and the trust for Rs. 25,000 fails and forms part of the settlor's estate."

Here we have the first faint indication that the ceremonies were for the benefit of the whole community, though the learned Judge thought the benefit was only incidental and that there was public benefit, although in the opinion of the Court the benefit was extremely small.

[160] The next case is spoken of as Markur's case—*R. R. Dadina v. Advocate-Genaal and others* (1). It arose out of two trust deeds executed by the late Mr. Framji Markur, and amongst the very many questions that arose, the questions of the validity of Trusts in respect of Baj and Muktdas was one. I have perused with care the evidence in the case and Mr. Justice Candy's long judgment on the various points arising therein. With reference to the question I am now considering this is what he says:

"In *L. N. Banaji v. Bapuji Ruttonji*, 11 Bom. 441, Mr. Justice Jardine held that trusts for the purposes of performing the following ceremonies were not valid charitable trusts. The ceremonies were:

Baj Rojgar, Consecration of Nirungdin, Recitation of the Yejushni, Annual Gham-bars and Dosla ceremonies.

The only witness called in the suit on this part of the case was Mr. Hormusji Chichgur, a solicitor of the Court."

Now Mr. Hormusji Chichgur was a layman and never pretended to be a Pehlvi, Zend or Avesta scholar, and his evidence is of the most formal description, mostly directed to explain what the Navjote (Investiture of Sacred Thread) ceremony was. He, however, had the courage to tell the Court that the decision in *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (2) "caused a great shock." Mr. Justice Candy had no better materials placed before him than was before Mr. Justice Jardine and he merely followed that learned Judge's decision.

The seventh and last case, Suit No. 468 of 1895—*Cowsji N. Pochkhanawalla v. Rustomji Dossabhoy Setna*—was also heard by Mr. Justice Candy. It is reported (3). The only question argued in the case was one

(1) (Unreported) Suit No. 49 of 1895.

(3) (1895) 20 Bom. 511.

(2) (1887) 11 Bom. 441.



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of limitation and on that question the learned Judge, in passing, remarks: "In February 1887 there has been a decision of the Court, *L. N. Banaji v. Bapuji* (1), that the objects of such a Trust were not valid charities."

These seven cases that I have discussed above are all the cases that came before the High Court between 1887 and now. The [161] question does not seem to have arisen previous to 1887. These are cases the decisions in which I am asked to follow. When carefully examined, it is clear that in all the cases that succeeded *Limbuwalla's* case (1) the learned Judges have followed Mr. Justice Jardine's decision. When read in the Law Report, where it is published, that judgment at first sight impresses the reader. It tells one how a head priest had expounded and explained the ceremonies, and the result that follows is of course correct if the learned Judge's finding of fact as to the real nature and true meaning of the ceremonies is correct. I have no hesitation whatever in saying that the evidence, both oral and documentary, recorded in the present case *demonstrates* beyond any doubt that the learned Judge was led by the parties to that suit possibly unintentionally but undoubtedly *led* into an error in believing that trusts for Baj and Muktaḍ ceremonies were not charitable trusts and as such exempt in law from the application of the rule against perpetuities. In one or two subsequent cases an attempt was made to supply the deficiency in the evidence so palpably apparent in the first case—but the attempt was so feeble—the additional evidence so slender—the further materials supposed to be placed before the Court were so meagre, that it is no wonder that the learned Judges thought it safer to follow than to disturb what they took to be settled law. Studying the evidence with care in the *Gorewalla* (2) and *Allbless* (3) cases, it becomes quite evident that the whole fault lay at the door of those instructing counsel, for judging from the questions put and the answers elicited from the witnesses, it seems that although witnesses evinced anxiety to lead counsel on the right track, counsel took the witness away into matters which did not affect the real question before the Court. It seems to me amazing that no one in all the cases took the trouble to go to the original sources—the scriptures of the religion, to which the ceremonies belonged—to the sacred writings that are most undoubtedly authoritative, and—to the original texts founding the ceremonies and enjoining the performance thereof. The most important portions of the scriptures of the Zoroastrian religion of the ancient Persians are all translated [162] into English by eminent Oriental Scholars and are all contained in the volumes of the "Sacred Books of the East" edited by Professor Max Muller. These Books are easy of access and a complete set is in our Law Library, and yet it is a most inexplicable circumstance that these books have never been touched and nothing in them ever placed before the learned Judges who heard seven successive cases. These cases contain indication that the Parsi "community was not satisfied with the decision" in the case of *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (1) that "it caused a great shock," and yet it is a most remarkable circumstance again that it never struck those affected by the decision to approach the Advocate-General—put the case properly before him—put him in funds to fight the case on its true merits, and if necessary take it to the Appeal Court. No Advocate-General, if properly approached, would have

(1) (1887) 11 Bom. 441.

(2) (Unreported) Suit No. 281 of 1892.

(3) (Unreported) Suit No. 96 of 1892.



refused to lend the whole weight and authority of his position in making a fight in favour of the charity.

The decisions of all the previous cases have been based on the evidence placed before the Court in each instance. On the evidence the learned Judges came to the conclusion that the Trusts were not charitable in the legal sense of the term and that they transgressed against the rule which forbids perpetuities. These decisions are based on findings of facts, on the evidence given in each particular case. It would be sufficient for me to say that it is quite open to me to judge for myself and find on the evidence tendered before me. If, however, it is necessary for me to say, I am prepared to say that in my opinion the "former determination" of Mr. Justice Jardine and the other decisions based on that determination appear to me, in the words of Blackstone, in the passage cited above, to be evidently "contrary to reason and clearly contrary to the Divine Law," according to the beliefs of the community professing the Zoroastrian religion, and that they are "manifestly unjust," and I refuse to follow them.

The only question before me in this case is: Is the Trust created by Dinbai for the performance of Muktaḍ ceremonies a [163] Charitable Trust in the legal sense of the word charitable, and, as such, exempt from the application of the rule against perpetuities? For the proper determination of the question it is absolutely necessary that in the first instance the true nature and meaning of these ceremonies should be clearly understood, and I will first consider what are Muktaḍ or Dosla ceremonies, before discussing the law applicable to Trusts for the performance of these ceremonies. Three members of the community, of established reputation for great learning and original research in the Scriptures of the Zoroastrian religion, have been examined before me, and numerous passages from the original writings dating from the most ancient times have been cited, explained and put in at the hearing of the suit. Wherever the correctness of any statement of these witnesses was challenged or doubted, they were able to refer to the original texts in support of their statements. From the evidence given before me at the hearing, it appears that the Zoroastrian religion is a revealed religion. It was revealed to Zoroaster or, as he is sometimes called, Zarthustra by Ahura Mazda the Supreme Being, who, according to scripture, was the only self-created Being. The celestial Hierarchy consists of six Amasha Sapentas or Amshaspunds. Ahura Mazda himself is sometimes spoken of as the Chief Amesha Sapenta, in which case they would be seven. The Amesha Sapentas are referred to in the Scriptures as the Bountiful Immortals. Then come thirty-three Izuds. Before bringing into existence the material creation, Ahura Mazda brought into being Furohurs or Fravashis, and these Fravashis helped the Almighty in bringing into existence all material creation. According to the Avesta Scriptures, the first man created was Gayomard, also known as Kayomard. Either he or his great-grandson Hooshung was the founder of the Peshdadian dynasty. Historians have not been able to say during what period of time this dynasty reigned over Persia.

This dynasty was followed by the Kaianian Dynasty which was founded by Kai Kobad. One of the Kings of this dynasty was Kai Gustap, otherwise called Kai Vistasp. In the Scriptures of Zoroastrian religion he is mentioned and referred to. Zoroaster flourished in the reign of this King. The religion revealed by Ahura Mazda to Zoroaster was by Zoroaster [164] communicated to King Vistasp and was then promulgated

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amongst the people. Oriental scholars and historians have not been able to fix with any certainty the period of the reign of King Kai Vistasp. Many are inclined to fix the period at five or six thousand years before Christ. Dr. Haug believes Zoroaster flourished about 1100 B. C. Whereas Professor Darmesteter believes that he flourished somewhere about 600 B. C. This, however, is the latest date fixed by any historian or Oriental scholar and all that can be said with some amount of certainty is that Zoroaster lived and flourished considerably before 600 B. C. Some of the scriptural writings and prayers, however, are shown to be much older than 600 B. C. For instance, the Farvardin Yast is said to have been written about 1500 B. C. and the sounder opinion seems to be that Zoroaster flourished long before 600 B. C. The Kaianian Dynasty was followed by the Achaemenian Dynasty. During the reign of last King of this dynasty, Alexander the Great conquered Persia. It is believed that a great portion of the Avestaic literature was burnt or lost during this invasion and conquest of Persia. Tradition has it that Alexander himself set fire to a library containing Zoroastrian scriptures, but many Oriental scholars believe that this is an unjust slur cast on the conqueror of Persia. However that may be, the fact remains that about this period a great portion of the scriptural literature of the ancient Persians was lost or burnt. The period which followed the conquest of Persia by Alexander was, so far as the Zoroastrians were concerned, a period of darkness—during which the religion suffered considerably. After the dark ages, came the Parthian Dynasty. During the reign of one of the kings of this dynasty the religion of Zoroaster began to revive, and in the reign of the first King Ardashir Babegan of the Sassanian Dynasty which followed the Parthian Dynasty, Zoroastrianism became the religion of the King and of the Empire of Persia. In the reign of Ardashir Babegan, Zoroastrianism became the religion of the State—its scattered scriptures were collected—the Avestan writings were translated into the Pehlvi language, and commentaries were written. The original scriptures that were lost were about this time rewritten and reproduced by men whose forefathers had committed them [165] to memory and in that way transmitted them from father to son. One of the Sassanian Kings that followed Ardashir Babegan was Shapur the Second. The greatest Dastur known to the Zoroastrians of all ages—Dasturan Dastur Adarbad Mahareshpund—flourished in his reign. Shapur the Second reigned over Persia from 309 to about 380 A. D. and during this period the Great Dastur composed and wrote the Patet Pashemani, Duva Nam Satayoshni, Tun Darosti and other prayers, and almost all the Afrins. This great apostle of the Zoroastrian religion is regarded with the highest reverence by all true believers of the Zoroastrian faith and the prayers composed by him are at this day recited and regarded with the very greatest of veneration by the Parsis professing the Zoroastrian faith.

Zoroastrianism flourished in Persia with varying fortune till the persecution of Mahomedans drove the majority of those that professed that religion out of their ancient home. A body of Persians professing the Zoroastrian religion were compelled by reason of religious intolerance and persecution to leave Persia about 1200 years ago. They first took refuge in Kohistan, where they remained for about 100 years—they then went to the Isle of Ozmuz, where they remained for about 19 years. They then came to Diu, near Kattyawar, and remained there for about 15 years. From Diu they came to Sanjan, and there they settled down for very nearly 700 years. From Sanjan they spread over various places in the



Gujarat district and their principal headquarters now are Bombay, Naosari and Surat. A sprinkling of Parsis are to be found in several villages in Gujarat. They derive their present name Parsi from Fars, in Persia, from which place they originally came to India.

It was their staunch adherence to their own religion and their refusal to adopt the religion of their Mahomedan conquerors that was the cause of all the sufferings they had to undergo. They preferred to leave their country and exile themselves to a foreign land rather than give up the religion of their forefathers. They have persevered in their religious beliefs, preserved their old institutions and customs and have in the country of their adoption continued to follow the ancient religion of their [166] ancestors. One of the most solemn ceremonies enjoined by the religion promulgated by Zoroaster is the performance of certain religious ceremonies during the Muktaḍ days. The Muktaḍ days are otherwise known as Dosla or Farvardgan days. These Farvardgan days are days that are sacred to the Furohurs.

Before proceeding with the consideration of the ceremonies themselves, it is very necessary to have clear conception of what the Furohurs are, according to the Zoroastrian scriptures. The Furohurs are constantly referred to in the Sacred Books of the Zoroastrians, and are the same as Fravashis. "Furohur" is the modern Persian name. Fravashi is the corresponding Avestaic name. In *Limbuwalla's* case (1) Mr. Justice Jardine says:—

"According to Dr. Haug these *Furohurs* were originally the departed souls of ancestors, comparable to the *pitris* of the Brahmins and the *manes* of the Romans. Now they are regarded as Guardian Angels, each being of the good creation having one."

That this is an error is shown in the case both by the oral evidence of witnesses examined before me as well as by copious quotations from the original scriptures. The same error that Dr. Haug commits is also committed by Professor Darmesteter, who in his Introduction to the *Farvardin Yast*, says:—

"The Fravashi is the inner power of every being that maintains it and makes it grow and subsist. Originally the Fravashis were the same as the *Pitris* of the Hindus or the *Manes* of the Latins, that is to say, the everlasting and deified souls of the dead."

All the three witnesses in this case are profound scholars of the Zoroastrian scriptures, whose opinions are entitled to far greater weight, agree in saying that what is stated above by Professor Darmesteter and Dr. Haug is erroneous, and they have quoted passages from the original scriptures in support of their views. Dastur Darab in his evidence says:—

"In his introduction to the *Farvardin Yast*, Professor Darmesteter says that the Fravashis were originally the same as the *Pitris* of the Hindoos or *Manes* of the Latins. This, according to my opinion, is incorrect; it is merely the conjecture of Professor Darmesteter. According to the Avesta the idea of Fravashis is that they are Spiritual Existences which were brought into being by the Almighty before he created the Universe. They came into [167] being before all material creation, every man born or unborn has a Fravashi of his own, according to the Avesta. After the birth of the man or woman his or her Fravashi watches over his actions and guides him to the right path. The Fravashi protects him or her from all evil. After death the Fravashi goes to heaven, and the soul, according to his deeds, goes to heaven or hell as it deserves. According to Zoroastrianism the Fravashi is not responsible for the man's good or bad actions. The soul is responsible for all acts committed in life. Inanimate objects have their

(1) (1887) 11 Bom. 441, at p. 446.

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Fravashis too. The Fravashi aids both animate and inanimate objects—animate objects in their moral and physical development, inanimate objects in their growth and development."

"Furohurs are *not* souls of the dead. They are totally different Entities. Souls of the dead are known as Ravan. Ravan is the Persian word for the soul of the dead. The Avestaic word for the soul of the dead is Uravan."

Ervad Jivanji Mody confirms this. He says:—

"The Fravashis are *quite distinct* from the souls of the dead or from the souls of the living. Fravashis and souls are not identical in *any* respect . . . the souls and Furohur are two distinct Entities. That appears from various parts of the Zoroastrian scriptures."

The witness then points out several passages, which are put in and marked Exhibits Nos. 22, 23 and 24 in support of his statement, and then goes on to say,

"There are similar passages in various religious books making similar distinctions between the soul (Ravan) and Furohur. A human being is said to possess *both* soul and Furohur. The function of the Furohur during a human being's life is to guide the soul in paths of virtue. After a man's death the soul meets with the consequences of its actions in the world. The Furohur mixes with the other Furohurs of the world or goes to its abode in Heaven."

Ervad Sheriarji Bhurucha, who followed Mr. Jivanji Mody, confirmed the views of the previous witnesses. That the view of the total distinction between the soul and the Fravashi of a human being is absolutely correct appears from the following original scriptural passages placed before the Court.

"And (having invoked them) hitherto, we worship the spirit and conscience, the intelligence and Soul and Fravashi of those holy men and women who early heard the lore and Commands of God."

(Yasna Ch. 26, para. 4, "Sacred Books of the East," Vol. 31, page 278, Exhibit No. 18).

"We present hereby and we make known, as our offering to the bountiful Gathas which rule (as the leading chants) within (the appointed times and seasons of the Ritual, all our landed riches, and our persons, together with our [168] very bones and tissues, our forms and forces, our consciousness, our Soul and Fravashi."

(Yasna Ch. lv, para. 1, "Sacred Books of the East," Vol. 31, page 294, Exhibit No. 22.)

"Yea, I desire to approach [the Fravashis of the Saints with my praise, redoubled (as they are) and overwhelming, the Fravashis of those who held to the ancient lore, and Fravashis of the next of-kin; and I desire to approach towards the Fravashi of mine own Soul in my worship with my praise."

(Yasna Ch. xxiii, para. 4, "Sacred Books of the East," Vol. 31, 278, Exhibit No. 23.)

"All pure Heavenly Yazatas we praise—all earthly Yazatas we praise—we praise our own Souls—We praise our own Fravashi. Come hither to help me, O Mazda. The good, strong, holy Fravashis of the pure we praise."

(Khorsed Nyaz—Spiegel's "Avesta" volume iii, p. 7, Exhibit No. 24).

These are not by any means the only or solitary passages in the holy writings showing that the soul is entirely different and distinct from the Furohur. Ahura Mazda Himself, the Creator of the Universe, has a Fravashi of his own. In Chapter 26 of the Yasna, paragraph 2, we find this passage:—

"And of all these prior Fravashis, we worship here the Fravashi of Ahura Mazda which is the greatest and the best, the most beautiful and the firmest, the most wise and the best in form, and the one that attains the most its ends because of Righteousness." ("Sacred Books of the East," Vol. 31, page 278.)

Paragraphs 85 and 86, Chapter 24 of the Farvardin Yast (Exhibit No. 2) ("Sacred Books of the East," Vol. 23, page 200) shows that not



only are there Fravashis of human beings, but there are Fravashis of the Holy Creation and of inanimate objects, such as fire, water, sky, plants, the earth, etc.

By far the best description of what is the true conception of the Zoroastrian religion regarding Furohurs that I have come across is contained in Naib Dastur Rustomji Peshotan Sanjana's very learned book "Zarathustra and Zarathustrianism in the Avesta," at page 242. He says there:—

"Before proceeding further it would be useful to say a few words about the signification of the term Fravashi, that so often occurs in our Sacred writings. The word is derived from Fra—forward, and vared, or vakhsh to grow, to increase, to advance or to cause prosperity. Fravashi is then, that animating power in a being which causes growth, increase, [169] advancement of prosperity. The Avesta tells us that all beings including Ahura Mazda himself, have got their own Fravashis. The earth, the fire, the sky, the water, the plant, the animal, the Blessed Shrosh, the truest Rashna, Mithra, Mathra-Sapenta, and all other things, either material or immaterial, have been endowed with that power which tends to preserve and promote their well-being. Man also possesses it. . . . The Fravashis of living holy men are more powerful than those of the departed. From the former the world derives benefit directly, whereas from the latter only indirectly through their good example and influence. . . . It is through the Holy Fravashis that the earth, the water, the plant, the animal, and all other things, both animate and inanimate, are preserved and promoted in this world."

With reference to this quotation, I think it is necessary to mention that for every statement made therein the learned author has cited authority in his footnotes. Professor Darmesteter seems to suggest that the conception of Furohurs as given in the above passages is a conception of a later date, for in his introduction to the Farvardin Yast, after saying that the Furohurs are the same as the Pitris of the Hindus and Manes of the Latins, he goes on to say:—

"In course of time they found a wider domain and not only men but goods and even physical objects, like the sky and the earth etc., had each a Fravashi."

There is only one remark to be made in connection with the opinion of Professor Darmesteter about this conception of Fravashis having come into existence in later times and that is that it is entirely contradicted by the original scriptures from which I have quoted passages above. The witnesses in this case who aver emphatically that this opinion is erroneous and that the souls of the dead and the Furohurs are totally different and distinct and have nothing in common, are supported by original scriptural texts. Para. 76 of the Farvardin Yast ("Sacred Books of the East," Vol. 23, p. 198) proves that the Fravashis were brought into being and were already in existence before the Almighty created this world. The para. runs:—

"They are the most effective amongst the creatures of the two Spirits, they the good, strong, beneficent Fravashis of the faithful, *who stood holding fast when the two Spirits created the world the good Spirit and the evil one.*"

[170] It is true that in that portion of the original Gathas that remains to us there is no reference to the Fravashis, but Ervad Sheriarji points out that the earliest reference to the Fravashis is in the Haptang Yast, which is a portion of the Yasna. It is written in the Gatha dialect, and therefore, he contends, it must have been written very near the time that the Gathas were written. The plaintiff's counsel was throughout the hearing most ably assisted in the conduct of his case by men who have made a study of the scriptures relating to the Zoroastrian religion, but he was not able to cite one single text or passage which could even remotely

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support the theory that Furohurs and souls of the dead were one and the same thing. This theory is the foundation on which the judgment of Mr. Justice Jardine is based in *Limbuwalla's case* (1). After a perusal of the evidence recorded in this case—principally the evidence from the Scriptures themselves—I do not think there is any possible room to doubt the conclusion that the theory that Furohurs and souls are the same or have anything in common is wholly and absolutely fallacious. That this is the conviction forced upon the mind of the counsel for the plaintiff himself after a study of the subject, seems to be fairly clear from the following questions he put to Dastur Darab.

*Question*—"Those who have read the Scriptures know the difference between Fravashis and Souls, but is it not a general belief amongst those who have not read the Scriptures that Muktaḍ ceremonies bring benefit to the Souls of their deceased relatives?"

*Answer*—"They believe that the Souls are pleased. They believe that one of the benefits is that the Souls get pleasure and satisfaction."

*Question*—"Was the distinction between Fravashis and Souls, which is so well known now, generally known amongst the Parsis 30 years ago?"

*Answer*—"It was known, but I cannot say what was generally known 30 years ago."

Once it is established that the Fravashis were created before the world and came into existence before any human being was created, it is impossible to believe that they are the same as the souls of the dead. Besides, how is it possible to conceive that the Fravashis of Immortal Amasha-Sapentas, or Archangels, and [171] Izuds, or Angels, and the Fravashis of inanimate objects, like the sky, earth and water, be the same as the souls of the dead. The clear and lucid exposition of the real nature and meaning of what the Furohurs are according to the religion of Zoroaster that has been given by the witnesses in this case, supported by original texts, destroys the very foundation on which the whole fabric of *Limbuwalla's case* (1) is constructed.

Having seen what the Furohurs are according to the scriptures of the Zoroastrians, I think it is necessary here to examine shortly what those scriptures are that have remained to us at the present day and are available to us for authoritative reference. It appears from the study of the literature now available to us that in the most ancient times when Zoroastrian religion came into existence, there were 21 Nasks (books) of the Avesta scriptures. All except about a fifth part of these holy writings are lost. What remains to us of the original 21 Avesta Nasks are the Vendidad, the Yasna, the Visparad, and the Khordeh Avesta. Of these the oldest are written in the Avesta language, the next in antiquity are written in the Pehlvi language, and then come those that are written in the Pazund language.

The *Vendidad* is a Code of 72 Religious, Social and Moral Laws of the ancient Iranians, and it also contains an enumeration of sins and their punishment both here and hereafter.

The *Yasna* or *Yejusni* consists of 72 chapters. The five Gathas form part of the *Yasna* chapters. The Gathas are hymns expressing philosophical thoughts on the teachings of the Prophet Zoroaster and on the good Spirits the Amasha-Sapentas and the Izuds that work with the Deity. The *Yasna* contains invocations to the various Izuds and describes their several functions. It also contains liturgical directions and

(1) (1887) 11 Bom. 441.



prescribes the Ritual to be observed at the performance of certain ceremonies.

The *Visparad*, consisting of 23 chapters, mostly contains invocations to the Amasha-Sapentas and the Izuds.

The *Khordeh Avesta* contains Afringans, Ghees, Nyaz, Yasts, Patets, Afrins and certain other prayers.

[172] Besides the Nasks that remain to us we have various other books of antiquity and authority which are accepted by the Zoroastrians as forming a part of their religious scriptures.

One of such books is the *Dinkard*. It is the compilation of Dastur Atro Froba, and is ascertained to be written a thousand years before now. Dastur Darab has already translated a portion of this work and he is engaged now in translating other portions of it. Dr. West's translation of the *Dinkard* is in the 37th volume of the "Sacred Books of the East" and is prefaced by an exhaustive Introduction giving the nature and character of the composition. Dr. West says: "It is evident that the compiler intended, in the first place, to give merely a very short account of the general contents of each Nask, to be followed by a detailed statement of the particular contents of each chapter, etc."

Another work of authority is *Shayast La Shayast*, meaning the Proper and Improper. Its translation in English is in the fifth volume of the "Sacred Books of the East." The Introduction describes it as "a compilation of miscellaneous laws and customs regarding sin and impurity with other memoranda about ceremonies and religious subjects in general." Dastur Darab points out a reference in the book to the Hasparam Nask, which existed originally in the Avesta language, as showing that the author had drawn his materials from the original Nasks before they were lost, because the Hasparam Nask is one of the original Nasks that are now lost to us. *Shayast La Shayast* was written about the end of the Sassanian dynasty—in the Middle of the 7th century Anno Domini.

Another ancient compilation which is regarded as a book of authority relating to the Zoroastrian religion is the *Sad Dar*, which literally means a hundred subjects. Its age and authorship is lost in antiquity. Its English translation appears in the 24th volume of the "Sacred Books of the East" and the introduction states that it is generally accepted as a work of "important authority" and contains a "convenient summary of many of the religious customs handed down by Pehlvi writers."

The *Nirungistan* is another book relating to Zoroastrian scriptures. It is a Pehlvi composition and its author is unknown. [173] It came into existence some time between 226 B. C. and 600 A. D. "The whole book," says Ervad Sheriraji, "is a ceremonial code, or rather a manual or guide book for priests. The book deals with the duties, functions and rules relating to the Ervads or ordained Priests." This book is published by the Parsi Panchayat, and Dastur Darab has written an introduction and given the various meanings of the words in the original texts.

These, according to the evidence given before me, are the principal authoritative scriptural writings, governing the Zoroastrian religion.

I will now consider what are the Muktaḍ, Dosla or Farvardigan days. All these three expressions refer to the same thing. The three fundamental beliefs of Zoroastrianism, or the three Essentials of Zoroastrian religion as Ervad Jivanji Mody calls them, are:—

- (1) Belief in the existence of One God—Ahura Mazda;
- (2) Belief in the Immortality of the soul; and

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(3) Relief in the responsibility hereafter for good and bad acts done on earth.

The Zoroastrian religion as revealed to Zoroaster by Ahura Mazda and communicated by Zoroaster to King Vistasp and his other disciples, contemplates no sects or sections; the community of believers in Zoroastrianism are all Mazdyasnians. Through a mistake in the calendar, however, there is a difference of opinion amongst the Parsis of the present day as to the date when their year ends and the new year commences. The larger section, the Shenshais, believe that their new year commences in the middle of September, while the smaller sect, Kadmis, believe that the new year commences a month earlier. There is no other difference between the sects so far as religious beliefs are concerned. The Zoroastrian year consists of twelve months each of thirty days. But at the end of each year occurs five Intercalary days which are known as Gatha Ghambars. These are the holiest days of the year. The winter ended the old Iranian year. The Muktaḍ ceremonies are enjoined to be performed at the end of the year. The majority of Parsis in India regard eighteen days as Muktaḍ or Farvardigan days. Dastur [174] Darab thinks the first and the last two days are not really Farvardigan days, but that real Farvardigan days are fifteen—namely, the last five days of the last month of the year—the five Gatha Ghambar days, and the first five days of the new year. Ervad Jivanji also says that according to the common practice prevailing amongst Parsis both in Bombay and the Mofussil, Farvardigan days are eighteen. A very small minority of the Parsis of the present day are, however, of opinion that the real Farvardigan days are only ten, and they say the first five days of the new year are not really Farvardigan days. How this difference arose is fully explained in Ervad Jivanji's book, an extract from which is Exhibit No. 25. However that may be, there is no question that the Farvardigan days whether they be eighteen, fifteen, or ten according to each individual's honest beliefs, are days which are regarded by Zoroastrians as days of the greatest sanctity. There are very few outward ritualistic practices amongst the Parsis. The principal form of profession of faith—the discharge of the religious duties and obligations—the main observance of religious rites,—consists in reciting prayers and having prayers recited by their Mobeds or Priests.

All witnesses agree in saying that the Farvardigan days form the most important festival in the Zoroastrian calendar, and that the ceremonies performed during the Farvardigan days form the most important ritual of the Zoroastrian religion. They agree in saying that the performance of the Muktaḍ ceremonies during the Farvardigan days is enjoined by the Zoroastrian religion—that those ceremonies are acts of great religious merit—they form the most important portion of their divine worship, and that according to the beliefs of those that profess the religion the performance of the Muktaḍ ceremonies not only brings down the blessings of the Almighty on the party performing them and his household but on the whole community, be they Zoroastrians or non-Zoroastrians—their King and his Satraps, and on the whole universe. They are ceremonies that involve praise, adoration, propitiation, recognition and worship of the Supreme Being from all his creatures here below. The non-performance of the Muktaḍ ceremonies is, according to the scriptures, a sin which is taken into account [175] when, after death, a man's good and bad actions are weighed and reward or punishment is meted out to the soul.



It must be remembered that what I have summarised above are statements made by three of the most eminent living oriental scholars and profound students of Avestaic—Pelhvi and Pazund—literature relating to Zoroastrian religion. In what they have said they are in entire accord with one another and for every statement made by them they have quoted chapter and verse from the original scriptures.

It is said that Mr. Justice Jardine's finding in *Limbuwalla's* case (1) "that the benefits which, according to the belief of the Parsis," resulting "from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Furohurs or prototypes of the dead," is in accordance with the belief prevailing amongst the Parsis of the present day. The plaintiff's counsel points to the phraseology of the settlement in the present case: "Annual Muktaḍ ceremonies of the dead members of the family in both sects Shinshais and Cudmis." It is possible that from the fact that the dead of a party performing the ceremony being incidentally remembered during the recitation of some of the prayers, the ignorant and the illiterate members of the community may have formed an erroneous belief that the Muktaḍ ceremonies are performed merely for the benefit of the souls of the dead. It has not, however, been seriously argued before me that the Court is bound to be guided by erroneous impressions produced on the minds of ignorant members of the Parsi community. One has only to read the very clear and convincing evidence given in the case and to refer to the scriptural passages placed before the Court to come to an unhesitating conclusion that the Muktaḍ ceremonies performed during the Farvardigan days have *nothing whatever* to do with the souls of the dead and have not the least tendency of conferring any benefits on the souls of the dead members of a family. The ceremonies enjoined to be performed during the Farvardigan days are not in any way connected with the souls of the dead and the suggestion that they are [176] is contradicted by the scriptures and the tenets of the Zoroastrian religion. All the ceremonies for the souls of the dead are performable on certain days calculated from the date of the death. We have first, ceremonies performed for the benefit of the souls of the dead for the first three days, and on the fourth or Charum day. Then follow the Dasma, or the tenth-day ceremony, next the Massisa, or the thirtieth-day ceremony—next the Chhumsi, or the sixth-monthly day ceremony, and then the Varsi or the anniversary of the day of death. In some families the anniversary ceremony is performed for several subsequent years. All ceremonies after the first three days are more or less commemoration ceremonies; for if the scriptures are true, nothing that one can do affects the soul or redounds to its benefit after the fourth day. According to the beliefs of the Zoroastrians founded upon their ancient scriptures, the soul of the dead remains in the place where death takes place for the first three days. On the dawn of the fourth day the soul ascends and reaches the Chinwad Bridge. There the Angels weigh its good deeds and its evil acts during its sojourn on earth, and if the good deeds outweigh the bad ones by certain Cetr̥s, the soul is allowed to cross the bridge and enter the abode of Heaven. If, however, its sins outweigh its good deeds by certain Cetr̥s it is thrown from the bridge into hell below. On the fourth day reward or punishment is meted out to the soul and the *Judgment is irrevocable*. There is nothing in the scriptures for the redemption of the soul after the final judgment of the

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fourth day. How then can it be said that any ceremony or prayers performed or recited after the fourth day can tend towards or can be intended for the benefit of the soul? That the Muktds have no connection with the souls of the dead, is, I think, also clear from the fact that the time of their performance has no reference to the date of the death of individuals.

If the belief exists in the minds of some that Muktds are intended for the benefit of the souls of the dead, it clearly is an erroneous belief for which there is no foundation whatever, and can only exist amongst the ignorant and the illiterate. In the Zoroastrian religion no days during the year are as holy as the Farvardigan days and no ceremonies so sacred as the Muktd [177] ceremonies. The observance of the Farvardigan days and the performance of the Muktd ceremonies is enjoined by the Zoroastrian scriptures. Paragraphs 49 to 52 of the Farvardin Yast show that the Zoroastrians are asked to perform certain ceremonies during the Farvardigan days.

The Farvardin Yast is written in the Avestaic language, and its earliest age is said by some scholars to be 1500 B. C.; whilst others give 600 B. C. as the date when it came into existence. Dastur Darab and Professor Max Muller are of opinion that the former date is correct.

This Yast is dedicated to the Furohurs and is a glorification of the powers and attributes of the Furohurs in general. On the Farvardigan days the Furohurs "come and go through the Borough—they go along for ten nights asking this :"—(Para. 49).

"(50). Who will praise us? Who will offer us a sacrifice? Who will meditate upon us? Who will bless us? Who will receive us with meat and clothes in his hands and with prayer worthy of bliss? Of which of us will the name be taken for invocation? Of which of you will the soul be worshipped by you with a sacrifice? To whom will this gift of ours be given that he may have never-failing good for ever and ever?" (Exhibit No. 1).

Paragraphs 49 to 52 and the concluding paragraphs, more particularly paragraph 157, of the Farvardin Yast, have been very fully discussed before me. Great light is thrown on the meaning of paragraph 50 by the explanatory Exhibit No. 20. It seems from the evidence of the witnesses that all the ceremonies performed during the Farvardigan days take their origin from para. 50, and the concluding paragraphs show that if a Zoroastrian performs these ceremonies the Furohurs "will leave the house satisfied and carry back from here hymns and worship to the Maker Ahura Mazda and the Amesha Sapentas." Exhibit No. 20 is a transcript of the original paragraph into Gujarati characters and then the meaning and the indication of each expression is explained in English. All the witnesses say that Exhibit 20 gives a correct exposition of the meaning of para. 50 of the Farvardin Yast. The plaintiff's counsel complained that it was prepared for the purposes of this case. His original information was that it was prepared by Ervad Sheriarji, but he [178] subsequently ascertained that it was prepared by the Advocate-General's Solicitor, Mr. Vimadlal. Nobody ever pretended that it was not prepared for the purposes of the suit.

All I can say of it is that it has been extremely helpful to me in understanding the true spirit of the paragraph, and evidences both knowledge and learning in the party who prepared it.

When the Furohurs come down to the earth during the Farvardigan days and ask for the performance of the ceremonies as mentioned in para. 50 of the Farvardin Yast, they go on to say,



(51) "And the man who offers them up a sacrifice with meat and clothes in his hands, with a prayer worthy of Bliss, the Awful Fravashis of the Faithful satisfied, unharmed and unoffended, bless thus:—

(52) "May there be in this house flocks of animals and men! May there be a swift horse and a solid chariot! May there be a man who knows how to praise God, and rule in an assembly, who will offer us a sacrifice with meat and clothes in his hand and with a prayer worthy of bliss."

There can be no doubt that the performance of certain ceremonies during the Farvardigan days is enjoined as the duty of every true Zoroastrian by Ahura Mazda himself. In the Bahaman Yast, para. 45, Ahura Mazda, speaking directly to Zoroaster, reveals to him in a prophetic spirit that the Farvardigan ceremonies will not be performed with the same devotion they should be performed in the troublous times in the future.

He says to the Prophet:—

(45) "And they practise the appointed feasts of their ancestors, the propitiation of Angels, and the prayers and ceremonies of the season Festivals and Guardian Spirits in various places, yet what they practise they do not believe in unhesitatingly; they do not give reward lawfully and bestow no gifts and alms, and even those they bestow they repent of again." (Exhibit No. 5)

This passage is explained by Dastur Darab as follows:—

"Farvardigan is one of the appointed feasts referred to in the passage; instead of 'appointed' I would translate the text as 'established.' The original text is Nihatak in Pehlvi, which means established by revelation and followed by the Ancients. The Farvardigan ceremonies are ceremonies which are appointed by the Deity Ahura Mazda and it is the duty of every true Zoroastrian to perform the ceremonies during the period fixed for them. The 'prayers and ceremonies of the season festival' referred to in [179] the passage are the Ghambars and the prayers and ceremonies of the 'guardian spirits' are the prayers and ceremonies said and performed during the Farvardigan days."

The Bahaman Yast, in which this passage occurs, is the Pehlvi translation of the original Avestaic text, and is dedicated to Bahman, who is one of the Amesha Sapentas. The original Avestaic text is lost, but a translation in Pehlvi has been preserved. The age of the Bahaman Yast is the same as that of the Farvardin Yast. In the Introduction to its translation at page 50 of Vol. V of the "Sacred Books of the East," it is stated that the Bahaman Yast "professes to be a prophetic work in which Ahura Mazda gives Zoroaster an account of what was to happen to the Iranian nation and religion in the future." Farvardigan days and Muktaḍ ceremonies are also referred to in the Dinkard (see Exhibits Nos. 3 and 4); in the Shayast La Shayast (see Exhibit No. 6); and in the Sad Dar (see Exhibits Nos. 7 and 8). There is also a reference to the Farvardigan days in the Patet Pashemani (see Exhibit No. 9). Though the temptation to set out all these passages and comment on them is great, I feel that there would be no limit to this judgment if I yielded to the temptation. Dastur Darab in his evidence has given very clear explanations of these passages, and I must content myself by merely recording that the various passages from the scriptural writings placed before the Court and explained by the witnesses leave no doubt in my mind that the Farvardigan days are the days appointed for the performance of the Muktaḍ ceremonies—that the performance of those ceremonies is enjoined by the religion of Zoroaster—that it is a duty cast on every Zoroastrian by his religion to perform Muktaḍ ceremonies—that the performance of those ceremonies is an act of great religious merit which brings to the man who gets them performed Hathim or Great Reward (Exhibit No. 7), and that the non-performance of them is a great or what is always spoken of as a

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Bridge Sin (Exhibit No. 8). Exhibit No. 9 is a passage from Patet Pashe-mani (Prayers of Penitence) wherein the non-observance of Farvardigan days and the non-performance of the ceremonies prescribed for these days are referred to as sins for which the man praying expresses his penitence.

[180] The usual ceremonies to be performed during the Farvardigan days are five in number; (1) The various kinds of Afringans with the Debache preceding them and the Afrins following them; (2) Baj; (3) Satoom; (4) Furrokshi; and (5) Yejusni. Of these, the Afringans, Baj and Satoom ceremonies are compulsory and must be performed. Dastur Darab thinks the Furrokshi ceremony must also be performed, but Ervad Jivanji says it is performed by some and not by others. Yejusni is a very complicated, long and expensive ceremony, and only the well-to-do members of the community can afford to have them performed and it is optional with Zoroastrians to perform it or not. The Debache of the Afringans precede all the Afringans. It is an invocation of all the Furohurs including those of the persons who are specially mentioned on the occasion. In the Debache, the priests mention the name of the town or city where the prayers are recited and they pray for plenty, joy, victory and happiness. The plenty, joy and happiness prayed for is for the inhabitants of the town or city, and victory prayed for is the victory of the Sovereign over all his enemies. Ervad Jivanji, in the course of his evidence has told the Court that the benefit or help that is asked of the Furohurs in the prayers offered during the Farvardigan days is asked not only for the individual who invokes such help and asks for such benefit, not only for the whole Zoroastrian community, but for all human beings. Here it may be mentioned that in *all* the prayers recited by a Zoroastrian he never prays for himself alone. He prays for the community and for all peoples quite independently of their being Zoroastrians or otherwise. He is utterly unselfish when he approaches the Almighty and asks for His blessings. He asks them for all, he prays for universal joy, universal prosperity and for the well-being of all men of good life.

The English translation by Bleek of the Debache to the Afringans is given in the third volume of Spiegel's Avesta and marked as Exhibit No. 10 in the case. The different Afringans are described at some length by Dastur Darab in his evidence, and I do not think it is necessary to discuss them here except perhaps to refer to the Afringan Ghambhar, which is not included in any of the Yasts, and which contains prayers for the [181] Sovereign. Paragraphs 14 to 18 of this Afringan Ghambhar, which is Exhibit 14 in the case, contain solemn prayers for the Sovereign of the country, and for all his Satraps and Vice regents. As translated by Dastur Darab, the prayers begin with the following sentence:—

"In the name of Ahura Mazda the resplendent and glorious, I bless with my prayers the Rulers of the country the Chief of all Rulers of the country."

The prayers then go on to invoke the blessings of the Creator on the Sovereign, and on all his representatives. They contain supplications for his health and his happiness, and pray for his long reign and for victory over all his enemies. These four paragraphs are recited at the end of every *Afringan* and Dastur Darab says that,

"This Blessing on the Rulers and the Chief of the Rulers is quite independent of the Rulers or the Chief Ruler of the Rulers being a Zoroastrian or not. This blessing, whenever recited, would apply to our King Emperor and all subordinate Rulers under the Empire"

Ervad Sheriarji in his cross-examination said,



"It is not correct that in that passage (Exhibit No. 14) Zoroastrian Sovereign is meant. It means any Sovereign—any good Sovereign who reigns wisely, justly and well."

Referring to the same paragraphs, Ervad Jivanji Mody in his cross-examination said:—

"Reading the passage at page 371 (Exhibit No. 14) I say that this does not refer to a Zoroastrian Sovereign alone. It means any Sovereign or Ruler. The passage was recited at the Ailbless Bag on the occasion of the Coronation of our present Sovereign, and that shows that every Zoroastrian has understood it in the sense that it refers to Sovereign not necessarily Zoroastrian."

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After the Afringan follow the Afrins. They are not the same, like the Debache, but vary with different Afringans. Shortly stated, Afrins are invocations to God to make men pious and virtuous, to send down His Blessings on all mankind. All the five ceremonies are described and explained in Dastur Darab's evidence and I do not propose to discuss them here separately.

[182] All the ceremonies referred to above have to be performed by priests. From the most ancient times a distinct and separate class, the priests, have existed amongst the Iranians, and their only source of livelihood is the fees they receive from their lay brothers for the performance of religious ceremonies. Some of the officiating priests observe the Burushnoom, and they alone can perform certain ceremonies, whereas the ordinary officiating priests who do not observe the Burushnoom are entitled to perform certain other ceremonies. A certain number of descendants of the priestly class have taken to earning their livelihood in other walks of life, and this class is known amongst the Parsis as Athornans. Messrs. Padshah and Kanga, who have rendered such valuable help in this case are, for instance, distinguished members of that class, Zoroastrian liturgical ceremonies are divided into two classes, the inner and the outer liturgical ceremonies. The inner liturgical ceremonies can only be performed in an Agiary or Atash Behram, and only by priests who have gone through the Burushnoom, and are observing all its requirements. The outer liturgical ceremonies are ceremonies which can be performed outside an Agiary or Atash Behram, that is, at the private residences of the members of the community, and can be performed by priests who are not observing the Burushnoom. The main distinction is not so much in the place as in the priest performing the ceremony, for even the inner liturgical ceremonies may be performed in a private residence if there is a separate place which is cleansed, purified, and temporarily consecrated for the performance of those ceremonies—but in no event can they be performed by any priests other than those who are observing the Burushnoom. The inner liturgical ceremonies are the Yejushni, Baj, Vendidad and Visparad. The outer liturgical ceremonies are the Afringans, Furrokshi and Satoom.

An officiating priest must go through the Nahan and Martab ceremonies. No layman is allowed to go through these ceremonies—the man going through these ceremonies must be a member of the priestly class.

Ervad Sheriarji says:

"From the most ancient times—from the time of Herodotus, the priests as a separate class have existed amongst the Zoroastrians. They were called [183] the Magi, and in the performance of religious ceremonies the presence of a Magus was always necessary. There is historical evidence of this in existence. Herodotus wrote about the customs prevailing amongst the Zoroastrians in his own times, which was 400 B. C." See Rawlinson's Herodotus, Vol. I, pages 217 and 218.



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Dastur Darab, in the course of evidence, said that with the exception of Baj and Yejusni a layman may perform the other ceremonies if he is very poor. He said if a man can afford it he must employ a priest, because a priest is supposed to be more pious and is more conversant with the ceremonies. This led to a little misunderstanding, which was cleared up when Dastur Darab explained that what he meant was that it is a duty cast upon every Zoroastrian to get these or some of these ceremonies performed by the priests during the Muktaḍ days, and that the non-performance of them was a great sin. Where a Zoroastrian is so situated that no priest is available or where he is so poor that he cannot afford to employ a priest, rather than not have them performed he ought, in the opinion of the witness, to try and perform them himself. He admitted that he had never known a layman perform these ceremonies. Whatever may be Dastur Darab's opinion on this point, the fact remains that from the most ancient times the Magi in the olden times and the Mobeds or priests in the more recent times, have always performed these ceremonies, and the scriptures of the Zoroastrians contemplate that they shall be performed by the priests. For instance, the very Debache of the Afringan shows that that ceremony is performed by the priest, for, at the very outset, the priest says : — ' I have performed the offering. I have offered the Daruns. I now offer the Mayazd.'

No layman could say : " I have performed the offering and I have offered the Daruns."

It has been the universal practice existing amongst the Zoroastrians for centuries that all the Muktaḍ ceremonies should be performed by the priests and to this there never has been known a single exception.

The priests, as a rule, are wholly dependent for their livelihood and for the maintenance of themselves and their families on [184] the fees they get from their lay brethren for the performance of their religious ceremonies. The Farvardigan days being continuous—the Muktaḍ ceremonies being regarded as the most sacred—and this period being the most holy amongst the Zoroastrians, the priests during these days make a far larger income than they do at any other period during the year. The fees received during the Muktaḍ days are one of the principal sources of a priest's income during the year. The observance of the Muktaḍ holidays helps very considerably towards the maintenance of the priestly class.

The observance of the Farvardigan days and the performance of the Muktaḍ ceremonies have come down to the Parsis of the present day from times immemorial. That these Farvardigan days were observed in the ancient times in Persia, Ervad Jivanji proves by Exhibit No. 26. It seems that in the year A. D. 575, Emperor Justin of Rome sent an embassy to King Noshirwan of Persia, otherwise known as Khooshroo the first. The Persian King asked the embassy to wait, as he was then engaged in observing the Farvardigan days.

Exhibit No. 27 is an extract from the works of an Arabic author named Alberuny, who flourished about 1000 A. D. This passage shows that the Muktaḍ ceremonies were well known and duly performed by the Zoroastrians at and previous to the time the Arabic author wrote his " Chronology of Ancient Nations."

We have seen in the *Wadia* case that as far back as 1826 a Parsi created a Trust for the performance of Muktaḍ ceremonies.

Besides the recitations of prayers during the performance of the various Muktaḍ ceremonies—fruit, flowers, cooked food and Darun or consecrated bread and clothes, are used in the performance of some of these



ceremonies. Ervad Jivanji in his cross-examination explains the object. He says :—

“The original object of using food and clothes was to prepare food and clothes and distribute them amongst the poor. Fruits and flowers are also used in the performance of the ceremonies. The idea is that the party praying says : ‘These are some of thy best gifts to us, O God, and we place them before you and offer them to you as our humble offerings.’ The food and clothes are offered to all forming the Celestial Hierarchy—the Almighty—the Amesha Spentas—the Izuds and the Furohurs. The food [185] is *not* offered to the souls of the dead, but to the Fravashis and other Higher Intelligences. Clothes are consecrated only in the Baj ceremony. Cooked food, flowers and fruits are placed before the priests performing the Baj—the Afringan and the Satoom ceremonies, and only consecrated bread (Darun) is used in the performance of the Yejushni ceremony.”

The evidence recorded in the case covers many points both of importance and interest, but it is not possible to discuss all of them within the limits of a judgment which I am afraid is already too long, and I must leave the evidence to speak for itself and proceed to summarise my findings thereon. In considering the evidence, it must be remembered that the witnesses who give evidence before the Court were speaking from the scriptures written in dead languages—they were elucidating many very abstruse and elliptical passages—and they were giving the results of patient and laborious research over a vast amount of literature written in the ancient languages. The perfect unanimity prevailing amongst them lends great weight to their depositions, and there can be no doubt that their evidence is perfectly accurate and thoroughly reliable.

I find from the evidence that the Farvardigan days are the most holy days during the Zoroastrian year, and that the performance of Muktaḍ ceremonies during the Farvardigan days is enjoined by the scriptures of the Zoroastrian religion. In para. 20 of the Farvardin Yast, Ahura Mazda commands Zoroaster in times of danger or difficulty to invoke the help of the Furohurs—who are the active helpmates of the Creator and with whose assistance he wages a continuous and successful war against the Evil Spirit.

These Furohurs come down to the earth and express a desire for the performance of certain ceremonies during the Farvardigan days. These expressions of desire on the part of the holy Furohurs have been interpreted to be commands which a faithful Zoroastrian is bound to obey. The ceremonies to be performed are indicated by the Furohurs, and the followers of the Zoroastrian religion have, from the most ancient times, been known to perform these ceremonies and to recognise the non-performance of them as a sin for which they ask forgiveness in the penitential prayers—the Patet Pashemani. In the ancient religious writings the Farvardigan days are constantly referred to. They are the Season festival—the most sacred festival in the Zoroastrian calendar. It is established by historical evidence that these ceremonies were performed in ancient Iran from the most olden times, and the Parsis after their domicile in India have continued to perform them. The performance of the Muktaḍ ceremonies is, I find, a *religious duty* imposed upon the Zoroastrians by the proved tenets of the religion they profess.

I further find that the ceremonies themselves are acts of religious worship. They include worship, praise and adoration of the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the Sovereign, for good Government by him,

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and for victory to him over all his enemies. The Muktab ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt, on the evidence before the Court that the performance of these ceremonies is an act of *Divine Worship* in its highest and truest sense.

I also find that the moneys paid to the priests for the performance of the Muktab ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktab ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

I also find that, according to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktab ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. Every right-minded human being—be he a Zoroastrian, Christian, Mahomedan, Hindoo or Jew, believes in the efficacy of prayers proscribed by the religion he professes, and even the most indifferent and callous of them approaches the Almighty and resorts to prayers in times of sickness, difficulty or distress. Any doubt or scepticism as to efficacy of prayers addressed to the Almighty would be, to my mind, an unmistakeable sign of debased and degraded human nature.

Having found the facts as set out above the only question that now remains to be discussed is whether the Trust created by Bai Dinbai for the performance of Muktab ceremonies is valid in law. Ever since Westropp, J., delivered the judgment of the Appeal Court in *Naoroji Beramji v. Rogers* (1), wherein he said that the law uniformly applied to Parsis and their property before the legislation of 1865 was English law and that the law applicable to that particular case was English law (see pages 11 and 12 of the Report), it has been the fashion at the bar to assume, that English law applied to Parsis in all matters. In the early stages of the case I expressed some doubt as to whether English law applied to the customary religious rites and ceremonies of the Parsis and to their religious institutions. Mr. Bahadurji has been at great pains to discuss before me almost every Parsi case both before and after the decision I have referred to, and the discussion has been most valuable as showing that it is by no means correct to make an unqualified statement that English law applied to Parsis in all matters as would appear from various decisions of our Court since Westropp, J., decided the case of *Naoroji v. Rogers* (1) in which it was held that in those cases English law did not apply to the Parsis. See *Dhanjibhai v. Navaz'hai* (2); *Mithubai v. Limji Nowroji Banaji* (3); *Peshotam v. Meherbai* (4); *Byramji Bhimjibhai v. Jamsetji Nowroji Kapadia* (5); and *Shapurji v. Dossabhai* (6). However interesting or important this discussion may be, on a fuller consideration of the case now before me, I have come to the conclusion that for [188] present purposes it is wholly unnecessary to discuss this question here. I will proceed with the consideration of the question as to whether this is a valid Trust in law

(1) (1867) 4 B. H. C. R. (O. C. J.) 1.

(2) (1877) 2 Bom. 75.

(3) (1881) 5 Bom. 506: on appeal (1881) 6 Bom. 151.

(4) (1888) 13 Bom. 302.

(5) (1892) 16 Bom. 630.

(6) (1905) 30 Bom. 359.



or not on the basis that English law applied to this trust. Once the nature of the ceremonies for which the trust is created is clearly understood the question of law presents no difficulty whatever.

At the outset it is as well to observe that the English law of Mortmain does not extend to British India. For this the Privy Council decision in the case of the *Mayor of Lyons v. East India Company* (1), is a very clear authority.

In England the Statute I of Edward VI., Chapter 14, known as "The Act for Chantry's Collegiate" made certain existing religious trusts void and on the analogy of that Statute all trusts that followed the passing of that Statute and were analogous to those declared void by it were also held to be void. This policy of the Law is spoken of as the Doctrine of Superstitious Uses, and it is well established by a series of decisions, that this doctrine is not extended to India and has no application to Trusts relating to religion created in India. See *Advocate-General v. Vishvanath Atmaram* (2); *Andrews v. Joakim* (3); *Joseph Ezekiel Judah v. Aaron Hye Nusseem Ezekiel Judah* (4); and *Yeap Cheah Neo v. Ong Cheng Neo* (5).

It is quite clear that it cannot be argued that the Trust in this case is void because it falls under the Doctrine of Superstitious Uses. It is argued, however, that the Trust is bad because it offends against the Rule of law which forbids the locking-up of property in perpetuity. The rule against perpetuity, there is no doubt, is a well-established Rule of Law and is enforced in India, as in England, with equal rigour. In *Cooper v. Laroche* (6) Vice-Chancellor Malins says: "there is no rule of law in England more absolute than that all property, whatever may be its nature, real or personal, must be absolutely vested in some person, and be alienable within a life in being and twenty-one years after."

[189] Section 14 of the transfer of Property Act now enacts this rule as substantive law in India. It is, however, an equally well-established Rule of law that this rule against perpetuities does not apply to Charitable Trusts. This exception to the rule is reproduced in section 17 of the Transfer of Property Act which enacts that the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the *Advancement of Religion—Knowledge—Commerce—Health—Safety* or any other object beneficial to mankind. Although the Transfer of Property Act does not apply to the Trust in this case, its provisions are the reproduction of the Law as it existed before the Act was framed and passed, and are a useful guide in considering the question before me.

This exception in favour of Charitable Trust, is fully recognised in English law. In *In re Bowen* (7) Stirling, J., says:—"Property may be given to a charity in perpetuity."

In Tudor on Charities and Mortmain, 4th edition, at page 131, it is said:—

"This exception from the rule against perpetuities is well established. It is founded upon grounds of public policy, and is essential to the useful existence of Charitable Trusts."

"In order, however, to have the benefit of the exemption from the rule against perpetuities, a Trust must be charitable within the meaning which the law assigns to that term."

(1) (1836) 1 Moo. I. A. 175.

(2) (1855) 1 Bom. H. C. R. Appx. ix.

(3) (1869) 2 Ben. L. R. (O. C. J.) 148.

(4) (1870) 5 Ben. L. R. (O. C. J.) 433.

(5) (1875) L. R. 6 P. C. 381.

(6) (1881) 17 Ch. D. 368 at p. 372.

(7) [1893] 2 Ch. 491 at p. 494.

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Tudor, at page 35 of the 4th edition, most admirably sums up the result of numerous authorities as to what in law is the meaning of Charity in the following passage :—

"The word 'charity' has a technical meaning in English law, which can now only be defined by a reference to the Statute 43 Eliz. ch. 4." Its preamble enumerates "a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. The objects enumerated in the preamble have in fact been treated as instances, the result being that 'those purposes are charitable which the statute enumerates or which by analogies are deemed within its spirit or intendment.' There is, moreover, one thread which connects the whole of the objects enumerated thereby, namely, 'the consideration whether, in order to fall within the Act, the gift was, as had been said, a gift for general public use which extended to the poor as well as to the rich'."

[190] One of the purposes which have been held charitable within the language or spirit of this preamble is "advancement of religion."

In England on a review of the cases relating to Religious Trust, it will be found that Religious Trusts or Trusts relating to religion have been held void either as being forbidden by law or as falling under the doctrine of superstitious uses. In England there is an established Church. In India we have no established Church. By some of the older statutes churches for certain denominations of Christians were established in India and supported from the revenues of the country, but that was merely for the purpose of encouraging Christians to go out of the country and for the convenience of such Christians as came and settled either temporarily or permanently in India. In this country we have unfettered religious toleration. Every one is entitled to profess openly the religion he believes in. In the eye of the law in India all religions are alike, and it follows therefore that each religious community professing a particular religion, and for the matter of that each member of such community, is entitled as of right to do any thing that to him may seem right for the maintenance and advancement of the religion which the community or individual member thereof professes and follows.

Now, is this a Charitable Trust in the legal sense of the word Charitable? Mr. Justice Chitty in *In re Foveaux*, (1) says :—

"Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice."

This case is useful on other points in the present case, and therefore I think it would be convenient to notice that it was [191] here held that societies for the suppression and abolition of vivisection were charities within the legal definition of the term Charity. The learned Judge concluded his judgment by observing :—

"The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion."

(1) [1895] 2 Ch. 501 at p. 504.



Having regard, then, to the technical meaning ascribed to Charity in law, I propose now to consider a few cases which throw light on the question now before the Court, showing what Religious Trusts are held to be good Charitable Trusts, and as such exempt from the application of the rule against perpetuities. It must be remembered that in England, after the Reformation, persons who differed from the established religion—such as Protestant Dissenters, Roman Catholics and Jews, were held to be obnoxious to the law, everything that was calculated to have for its object the propagation of the rights of a religion not tolerated by the law was included in the comprehensive expression "superstitious use," and all gifts for superstitious purposes or uses were held to be contrary to the Policy of the Law and therefore illegal. Those cases, therefore, in the English Reports declaring religious trusts of various kinds to be invalid, as being trusts for superstitious uses, have no application whatever to the present case. Religious Trusts in India have a much greater analogy to Religious Trusts in Ireland since the disestablishment of the Church in that country in 1869 by 32 and 33 Victoria, chapter 42. Of course, in later years in England many enabling and relieving Acts have been passed, and many disabilities against those who are not members of the established Church have now been removed, but still these relieving Acts do not repeal the whole law of Superstitious Uses, and the doctrine still holds sway—although in the present time to a limited extent even in England.

A large number of authorities on many points closely connected with the question in this case have been cited before me, but as I said before, I propose to discuss only a very few [192] of them, with a view to see what trusts in connection with religion, religious observances, and religious and other beliefs have been held valid in England and Ireland.

In *Powerscourt v. Powerscourt* (1), a Testator by his will devised £ 2,000 to Trustees in trust to lay out the sum at their discretion until his son came of age, "in the Service of My Lord and Master, and I trust Redeemer."

This bequest was held to be a good and valid bequest to charity and was ordered by the Court to be carried into effect. This is an Irish case, but in 1895 in the case of *Farquhar v. Darling* (2), Mr. Justice Stirling refers to this case with approval and follows it. There the Testatrix bequeathed the residue of her property "to the poor and to the service of God." Mr. Justice Stirling in giving judgment says:—

"I have to construe this will according to the ordinary meaning of the language as used by English testators; and I think that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended."

The learned Judge then quotes a passage from the judgment of Lord Manners, L.C., in *Powerscourt v. Powerscourt* (1) and concludes his judgment in these words:—

"It has not been disputed before me that a bequest for religious purposes is a good charitable bequest; and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes."

In *Webb v. Oldfield* (3), a Testator devised a portion of a perpetual yearly rent to two Vegetarian Societies in equal moieties for the use of the said societies, to be paid to them for ever.

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(1) (1824) 1 Molloy 616.

(2) [1896] 1 Ch. 50.

(3) [1898] 1 I. R. 431.



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The Master of the Rolls held that the objects of those Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two societies in equal moieties, and the Court of Appeal affirmed the decision.

[193] In *Straus v. Goldsmid* (1), the Court in England had before it the will of a Testator professing the Jewish religion. He bequeathed a third of the residue of his estate to the Rulers and Wardens of the Great Synagogue in the City of London, with directions to them to utilise the interest and dividends of the said third of the residue every year on the eve of Passover in distributing, at least amongst 10 worthy men . . . to purchase meat and wine fit for the service of the two nights of Passover. The Vice-Chancellor held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good, and the Trust was upheld.

In *Attorney-General v. Stepney* (2), a bequest of the residue of personal estate for the "increase and improvement of Christian knowledge and promoting religion," was held by Lord Eldon to be good charitable bequest, as it had for its object a General charitable purpose of promoting Christian knowledge.

In a later case, *Baker v. Sutton* (3), the Master of the Rolls, Lord Langdale, refers to this case and follows it. In this case the testator made a bequest of the residue of his personal estate for "such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper." The Master of the Rolls, in the course of his judgment, observes (at p. 233):—

"All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose. In the *Attorney-General v. Stepney* (2) . . . Lord Eldon assumes throughout his Judgment, that a religious purpose was a charitable purpose . . . I am of opinion that the bequest, in the present case, for such religious and charitable institutions and purposes as the trustees should think fit, is a good charitable gift."

*Townsend v. Carus* (4) is another case in which a Testatrix bequeathed a legacy to Trustees "upon trust to pay, divide or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions or purposes, having regard to the Glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit." This gift was construed to be a gift [194] for religious purposes, and as such valid and restricted to such purposes. The Vice-Chancellor refers in his judgment to the case of *Baker v. Sutton* (3), which I have discussed immediately above, and says:—

"If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases. The cases referred to in *Baker v. Sutton* (3), and that case itself, are sufficient authorities on this point."

Another very instructive case is that of the *Attorney-General v. Lawes* (5). In that case the testatrix by her will gave directions to her executors "to pay unto Messrs. Drummonds, Bankers, a clear yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, or

(1) (1887) 8 Sim. 614.

(2) (1804) 10 Ves. Jun. 22.

(3) (1886) 1 Keen 224.

(4) (1843) 3 Hare 257.

(5) (1849) 8 Hare 82.



half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman-Street."

This bequest was held by the Court to be a valid charitable bequest of a *perpetual* annuity. The Vice-Chancellor, at the close of counsel's argument, observed that the bequest was not the less a charitable bequest from the fact that it was given *for the benefit of a limited class of persons*—that it was not the number of the objects which made the distinction between a public and private charity—that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances and not to the class at large.

*In Re Michel's Trust* (1) is a case of great use in considering the question now before the Court. - The testator, Abraham Michel a Jew, by his will bequeathed so much money as would produce £10 a year upon trust to pay the said sum of £10 every year to three persons to learn in their Beth Hammadrass or College two hours daily—and on every anniversary of the Testator's death to say the prayer called in Hebrew "*Candish*," which is a [196] short Hebrew prayer in praise of God and expressive of resignation to His will. Many of the disabilities relating to Jews residing in England were removed by 9 & 10 Vic. c. 59, s. 2, which provided that "from and after the commencement of this Act Her Majesty's subjects, professing the Jewish religion in respect to their schools—places for religious worship, education and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise." Although the testator died in 1821 the case does not seem to have come before the Court till 1865. The Master of the Rolls, Sir John Romilly, held that the statute had a retrospective effect and applied to this will. The bequest was sought to be defeated by the residuary legatee on the ground, first, that "the gift was void as a superstitious use, as an anniversary or obit, and was similar to praying for the testator's soul"; and, secondly, on the ground that the gift was invalid as "tending to a perpetuity." In delivering judgment, the Master of the Rolls made the following very important observations:—

"I have no doubt of the validity of this bequest, and it is therefore the duty of this Court to carry it into effect. . . . I see nothing in the bequest which is superstitious. . . . If it be part of the forms of their religion, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question. . . . I think that this is a valid gift for the benefit of a Jewish charity."

I will next consider the very peculiar case of *Thornton v. Howe* (2). In this case the Testatrix Ann Essam bequeathed the residue of her estate both real and personal, in trust, "for printing, publishing and propagating the sacred writings of Joanna Southcote." The Heiress-at-Law of the Testatrix filed a Bill for a Declaration that the trust was void in law. She charged that the writings of Joanna Southcote. . . purport to declare, maintain or reveal that she was with child by the Holy Ghost and that a second Messiah was about to be born of her body, and that her [196] writings were of a blasphemous and profane character, and that the trust was for the propagation of doctrines subversive of or contrary to the Christian religion. The Master of the Rolls, Sir John Romilly, before giving Judgment, himself studied the works of Joanna Southcote. He

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(1) (1860) 28 Beav. 39.

(2) (1862) 31 Beav. 14.



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came to the conclusion that she was a foolish ignorant woman, of an enthusiastic turn of mind. He said he had found much in her writings that in his opinion was very foolish, but there was nothing in them that was likely to make persons who read them immoral or irreligious, and he declined to declare the devise of the testatrix as invalid by reason of the tendency of the writings of Johanna Southcote. In the course of his Judgment the Master of the Rolls has made some very weighty observations, which are of considerable importance in this case. He says (at p. 19):—

"I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest. . . the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void . . . But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests."

Lord Macnaghten in the great Judgment he delivered in the House of Lords in the case of the *Commissioners for special purposes of Income Tax v. Pemsel* (1), says:—

"That according to the law of England a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses' 'charitable trusts' or 'charitable purposes,' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or Trusts form a distinct head of equity. Their distinctive position [197] is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. . . In Ireland, though neither the Statute of Elizabeth nor the so-called Statute of Mortmain extended to that country, the legal and technical meaning of the term 'charity' is precisely the same as it is in England."

His Lordship then goes on to enunciate the four principal heads under which he divides charities. He says:—

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; *trust for the advancement of religion*; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

I have merely referred to the cases cited above and pulled out passages from the various judgments and set them out without any comment of my own; firstly, because I am oppressed by a feeling that this judgment is already exceeding the length to which an ordinary judgment should go; and secondly, because it seems to me that the importance and the applicability of these cases to the present one are so obvious that they require no comment from me.

There is one other case of paramount importance but, before I refer to it, I think it would be convenient here shortly to notice the cases on which the plaintiff's counsel relies in support of his contentions against the validity of the Trust in this case.

The case on which Mr. Tarachand chiefly relies is that of *West v. Shuttleworth* (2). In this case the testatrix directed several sums of

(1) [1891] A.C. 531 at p. 580.

(2) (1895) 2 My. & K. 684.



money to be paid to several Roman Catholic priests and chapels and desired that they might be paid as soon as possible after her death so that she might have the benefit of their prayers and Masses. These bequests formed one branch of the case. The other branch related to a bequest of the residue of her property to Trustees upon trust to pay £10 each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and the remainder was directed to be appropriated in such a way, as the trustees might judge best, as would be calculated to promote the knowledge of the Catholic Christian [198] religion amongst the poor and ignorant inhabitants of two towns in the County of York mentioned by the testatrix. These bequests were attacked on two grounds. It was contended that the legacies to the priests and chapels were void as being for superstitious uses, and it was argued that the gift of the residue was also void in law as being for the express purpose of promoting the Roman Catholic religion. As there has been a difference of opinion between counsel as to the precise grounds on which this case was decided, I cannot do better than give the grounds of the decision in the words of the Master of the Rolls in the Judgment itself. He says (at p. 697):—

“There can be no doubt that the sums given to the priests and chapels were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes, but that they were given, as expressed in the letter, for the benefit of their prayers for repose of the testatrix's soul and that of her deceased husband; and the question is, whether such legacies can be supported.

“The legacies in question, therefore, are not within the terms of the statute of Edward VI, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in *Duke*, been decided to be *within the Superstitious Uses* intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void.”

These words can leave no room for doubt that the legacies in question forming the first branch of the case were held to be void as being gifts for superstitious uses “although not coming within the statute relating to superstitious uses.” See *Yeap Cheah Neo v. Ong Cheng Neo* (1). The question involved in the second branch of the case, relating to the gift of the residue, involved the consideration of the provision of Statutes 2 & 3 Will. IV, c. 115. The Master of the Rolls, after discussing the provisions of the statute and certain decided cases, said that they left no doubt in his mind of the validity in law of the gift of the residue. How the decision of this case, holding the gifts to priests and chapels void because they were construed to be gifts for superstitious uses, can help the plaintiff in this case, I fail to understand. As shown above, the doctrine of superstitious uses [199] has no applicability whatever to religious trusts in this country, and I must confess I see nothing in this case to help the plaintiff in his contentions. If anything, this case is indirectly of use to the contentions of the defendants, because, in the first place the bequest of the residue for promoting the Roman Catholic religion is held valid, and the words of the Master of the Rolls lead one to believe that if the gifts involved in the first branch were “intended for the benefit of the priests personally or for the support of the chapels for general purposes,” the result might have been different. I can understand the plaintiff's counsel's reasoning if he merely wishes to make use of the case as showing that a gift for prayers for the repose of the soul of the donor or

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(1) (1875) L. R. 6 P. C. 881.



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those connected with the donor is bad in law. It is not necessary for the purposes of the case to consider that question at all. Nobody has argued before me that gifts for the purpose of saying prayers for the repose of the souls of the dead are good gifts in law. The whole force of the defendant's fight is directed towards proving that the present Trust is not a trust for the purpose of saying prayers for the repose of the souls of the dead, and I think they have succeeded in proving that beyond a shadow of doubt.

The next case on which Mr. Tarachand relied was that of *Heath v. Chapman* (1). In this case there were trusts declared for certain Roman Catholic chapels, for saying Masses and requiems for the souls of donor and for other souls, and for the souls of the "poor dead" and for other pious purposes. It was held that gifts for Masses, etc. for the dead were superstitious and void—that the pious uses could not—as religious uses—be separated from the others and were therefore also bad, and that the words pious uses could not be construed charitable uses—consequently the property given to these uses went to the Residuary Legatee of the donor. *West v. Shuttleworth* (2) was in this case followed. This case again does not help the plaintiff in the least, for the same reasons as apply to *West v. Shuttleworth* (2).

The case of *West v. Shuttleworth* (2) is often cited and is referred to in many subsequent cases, and before leaving the consideration of the case and passing on, it would be interesting to note that in *In re Blundell's Trusts*, (3) twenty-five years after its decision, Sir John Romilly, Master of the Rolls, expresses doubts as to the soundness of that decision in the following words:—

"I expressed my difficulty, in the case referred to, as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality; but I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West v. Shuttleworth* (2), which I cannot overrule."

The next case relied on by Mr. Tarachand is that of *Colgan v. The Administrator-General of Madras* (4). This was a case in which the Court had to consider the disposition made by an Armenian lady by her will, and the Appeal Court in Madras held that a bequest for perpetual Masses for the benefit of the soul of the testatrix and for souls in purgatory was void as infringing the rule against perpetuities. This case was decided in 1892. The same remarks that I have made with reference to *West v. Shuttleworth* (2) and *Heath v. Chapman* (1) apply to this case. This case is also open to the further remark that after the decision in 1906 of the case of *O'Hanlon v. Logue* (5) by the Court of highest jurisdiction in Ireland—to which case I will presently refer—it seems to me now to be quite certain that the decision in this case that bequests in perpetuity for the celebration of Masses are void is not good law, and no Court in India will or can follow the case or regard it as a correct decision on this subject.

The last case on which the plaintiff's Counsel relies and which is his sheet anchor, is the case of *Yeap Cheah Neo v. Ong Cheng Neo* (6). As the case is treated by Mr. Justice Jardine in *Limji Nowroji Banaji v. Bapuji Rattanji Limbwalla* (7) as an authority in "approaching the question of law." I think it is desirable to consider with care what

(1) (1851) 2 Drew 417.

(2) (1835) 2 My. &amp; K. 684.

(3) (1861) 30 Beave 360 at p. 362.

(4) (1892) 15 Mad. 424.

(5) [1906] 1 I. R. 247.

(6) (1875) L. R. 6 P. C. 381.

(7) (1887) 11 Bom. 441.



bearing this decision of their Lordships of the Privy Council has on a [201] trust created by a Parsi in India. The testatrix whose will was under consideration was a Chinese lady who had taken up her residence in Penang in the Straits Settlement. This tract of country was ceded by a Native Prince in or about 1807 to the East India Company. It was then wholly uninhabited. The Company built a fort and a town, and a number of Chinese Malays and Indians settled there. The place had no original or indigenous peoples of its own and consequently there were no customs or usages which could be said to have been in vogue amongst the people of the land. Amongst the points decided by the Privy Council in the case, those that are supposed to affect the question in the present case are two, namely :—

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(1) That a devise of two plantations in which the graves of the family were placed, to be reserved as a family burying-place and not to be mortgaged or sold, was void as a devise in perpetuity and (2) that a direction that a house for performing religious ceremonies to the testatrix and her late husband be erected, was void, as being a devise in perpetuity, which was not for a charitable use.

Mr. Justice Jardine, referring to *Yeap Cheah Neo v. Ong Cheng Neo* (1), says :—

“ Their Lordships’ observation appears applicable to Parsis in Bombay. ‘In this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for Masses for the dead, or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives’ ”

A careful perusal of the paragraph at page 396 of the report from which this sentence is picked out, shows conclusively that what their Lordships said was that, according to English Law prevailing in *England*, the gifts they were considering would be analogous to gifts for Masses or for the upkeep of tombs, and such gifts being gifts merely for pious uses would be void as being gifts for *Superstitious Uses*. That this is without doubt so will be seen by the observations of their Lordships which immediately precede the sentence in question. They say :—

“The performance of these ceremonies is considered by the Chinese to be a pious duty . . . . The dedication of this Sow Chong House bears a close analogy to gifts to priests for Masses for the dead. Such a gift by a Roman [202] Catholic widow of property for Masses for the repose of her deceased husband’s soul and her own, was held in *West v. Shuttleworth* (2) not to be a charitable use, and although not coming within the statute relating to superstitious use, to be void.”

The concluding sentence of their Lordships in this paragraph is—

“ All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.”

These and similar gifts, although not falling strictly within the letter of the statute of Edward VI, have nevertheless been held void as in *West v. Shuttleworth* (2), as being within the spirit and intendment of the statute, and being analogous to those mentioned in the statute, fell within the purview of the Doctrine of Superstitious Uses, which took its origin from the statute and became applicable to certain trusts for pious uses on grounds of public policy. This doctrine has *no applicability whatever* to trusts in India, and therefore, with great deference to the learned Judge, I venture to say that their Lordships’ observation in *Yeap Cheah Neo v. Ong Cheng Neo* (1) quoted by him, has *no applicability* to Parsis in Bombay or to the trusts created by them.

That it was possible that their Lordships’ decision might have been different if they had evidence before them proving the usage and customs

(1) (1875) L. R. 6 P. O. 381.

(2) (1835) 2 My. & K. 684.



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prevailing amongst the Chinese community at Penang, appears from the observations in the judgment at page 395, where they say :—

"The devise of the two plantations . . . is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a Charitable use. The weight of authority is against a devise of this nature being so held in the case of an English will; and the only point, therefore, requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose at Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong."

[203] Side by side with *Yeap Cheah Neo v. Ong Cheng Neo* (1), Mr. Justice Jardine refers to *Fatmabibi v. The Advocate-General of Bombay* (2). In his judgment in that case Mr. Justice West refers to *Yeap Cheah Neo v. Ong Cheng Neo* (1), and it is most instructive to notice his observations as to that case and its applicability to trusts in India. At page 50 of the report his Lordship observes :—

"As to the ultimate trust for constructing wells and aiding marriages and pilgrimages, the case of *Neo v. Neo* shows that the rule against perpetuities extends to a Colony where the English Law is enforced *only so far as that law is adapted to the circumstances of the community*, because it is regarded as having its foundation in principles of general application. But it is subject to exception in the case of 'Charities' liberally construed as objects 'useful and beneficial' to the community. But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition; but they must in general apply the standard of *Customary Law and common opinion amongst the community to which the parties interested belong*.

The same principle enunciated by Mr Justice West in this case found expression in the much earlier case of *Kojahs and Memons* (3), and this principle ought, I think, always to be kept in mind by the Courts in India, dealing with trusts and settlements created by those communities in India, who are not covered by the exception created by statute in favour of Mahomedans and Gentoos, and to whom English law is promiscuously applied.

Before finally leaving *Limbuwalla's* case (4) I ought to notice another passage in the judgment, where Mr. Justice Jardine says :—

"The other object, viz., the acquiring by a few private persons of benefits through the protection of the Furohura seems to me to resemble a gift to a private company and therefore not a gift to a charitable use."

The learned Judge relies on the cases of *Cocks v. Mannors* (5), and the *Attorney-General v. Haberdashers' Company* (6) as authorities for the above passage. In the first of these cases the Court had to deal with gifts to two chapels, a convent and a [204] society of sisters of charity, and in the second case the gift was to a company in London "for increase of their stock of corn." It is very difficult to find where the resemblance of trusts for Mukhad ceremonies with gifts to private companies comes in, but it seems to me that the whole difficulty has arisen from the fact that the learned Judge was led into forming erroneous views as to the real nature and objects of the trusts he had before him.

In the course of the trial much has been said before me about Masses in Ireland and gifts for saying Masses for the repose of the souls

(1) (1875) L. R. 6 P. C. 331.

(2) (1881) 6 Bom. 42.

(3) (1847) P. O. C. 110.

(4) (1887) 11 Bom. 441.

(5) (1871) L. R. 12 Eq. 574.

(6) (1834) 1 My. &amp; K. 420.



of the dead, and it appears to me to be very useful here to consider how the Courts have treated those gifts. The gradual but radical change that has come over the Courts when considering the questions relating to gifts for the celebration of Masses is most remarkable. The law relating to religious trusts prevailing in Ireland ought really to be the law applicable to religious trusts in India. In Ireland, as in India, there is no established Church, and all religious creeds are alike in the eye of the law. It is, therefore, to the Irish cases that we must look for help and they have a far greater applicability to religious trusts in India than some of the English cases relating to the same subject. It is not necessary to refer to cases earlier than *Attorney-General v. Delaney* (1). This and the two subsequent cases I propose to refer to give fairly elaborate and exhaustive summaries of the statute and case law relating to religious trusts in both England and in Ireland.

In the course of an elaborate judgment delivered by him in *Attorney-General v. Delaney* (1), Chief Baron Palles held that trusts for the celebration of Masses in private were invalid, as not being charitable, but expressed a very strong opinion that if the trust had been for the celebration of Masses in public, the trust would have been a good and valid charitable trust in the eye of the law. His colleagues on the Bench—Barons Fitzgerald, Dowse and Deasy—were not prepared to go to the length the Chief Baron had gone, and guarded themselves by declaring that they must not be taken as holding that the opinion expressed [205] by the Chief Baron was the judgment of the Court. The Court in this case contented itself by saying that they left the question as to whether a trust for Masses directed to be celebrated in public would or would not be a valid charitable trust, open to be decided whenever it may arise. Twenty-two years afterwards it did arise in the case of the *Attorney-General v. Hall* (2) wherein a Bench consisting of Lord Ashbourne, the Lord Chancellor of Ireland, and Lords Justices FitzGibbon, Barry and Walker, held that “a bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator’s soul, is a valid charitable bequest.”

Thus, what the Chief Baron Palles had expressed as his opinion was pronounced to be a judicial finding nearly a quarter of a century afterwards.

But by far the most remarkable advance in the law was made in the great case of *O’Hanlon v. Logue* (3). By a curious coincidence it happens that Chief Baron Palles was a member of the Bench which decided this case—the other Members being Lord Chancellor Walker and Lords Justices FitzGibbon and Holmes. In the whole discussion before me, and amongst the numerous authorities cited before me, I consider that the case is by far the most important and has the closest bearing on the question I am now considering. The testatrix in this case devised and bequeathed all her property to trustees upon certain trusts, the ultimate trust being “to sell and invest the proceeds and to pay the income thereof from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of my late husband, my children and myself.” The Court, after a most elaborate and exhaustive

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(1) (1875) I. R. 10 C. L. 104.

(2) [1897] 2 I. R. 426.

(3) [1906] 1 I. R. 247.



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argument, overruled *Attorney-General v. Delaney* (1), thirty-one years after its decision, and held:—

“That a bequest for Masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not.”

[206] What are Masses is fully explained in *Attorney-General v. Delaney* (1) and some extracts from the prayers recited during the celebration of the Masses are given in that case. Though commonly these prayers are supposed to be recited for the repose of the souls of the dead, a perusal of them will show that, very much like the prayer said by the Parsi priests during the Muktab ceremonies, they are prayers involving a sacrifice to God, invoking blessing on mankind, and including worship of the Creator. They are prayers offered to God to propitiate His anger, to return thanks for His benefit and to bring down His blessings upon the whole world. The celebration of the Masses is, like the celebration of the Muktab ceremonies, an Act of Divine Worship, and the performance of Masses helps to maintain the priestly class, the moneys paid to them for Masses forming a portion of their ordinary income and means of livelihood.

No apology is necessary for transcribing here certain passages from the judgments delivered in this case; first, because those passages have the closest and the most important bearing on the present case; and secondly, because they contain sentiments and thoughts the most ennobling that humanity could utter. The Lord Chancellor, in the course of his judgment, says (at p. 259):—

“There are some legal propositions germane to the case for which it would be mere pedantry to cite authority:—(a) That in speaking of what is ‘charitable’ we use the word in the artificial sense, which is derived from the statute 43 Eliz. c. 4; (b) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (c) that a gift for the advancement of ‘religion’ is a charitable gift; and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the Law. . . . Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality.”

[207] Chief Baron Pallett, in the course of his judgment, after reviewing all the English and Irish authorities, goes on to say (at p. 270):—

“The acts of worship of a Church are admitted, by all theistic religions, to tend to discharge, to some extent, the debt due to God by the general body of the faithful, and to bring down upon them temporal and spiritual benefits. But these acts must be performed by ministers of that Church; and thus the gifts are in a two-fold manner charitable—first, and principally, by reason of the piety which is the essence of the gift to God, the gift which is to be applied to His Divine Worship; and secondly, by the mode in which it is to be so applied, viz., in the maintenance and support of the ministers by whom the acts of worship are to be performed.”

That there is a most striking resemblance between the ceremonies performed and prayers recited during the Muktab days and the performance of Masses will appear from the following passage in the Chief Baron’s judgment (at p. 274):—

The Service of Mass “is an act of divine worship of the Church, an offering of praise, adoration, and thanksgiving, involving a petition for benefits temporal and spiritual, for all the faithful alive, whether present or absent.”

This is exactly what the witnesses have said with regard to the Muktab ceremonies, with perhaps this addition, that the prayers recited by

(1) (1875) I. R. 10 C. L. 104.



the Zoroastrian priests are more altruistic, and the petition for benefits is not confined to the faithful but is universal.

The Chief Baron goes on to say (at p. 275):—

“ The existence of a divine service is essential to all religions; and equally essential is the existence of a privileged class, a priesthood or a class of ministers, by whom that divine service shall be celebrated, on behalf of the Church. The divine service of the particular religion must be defined by the doctrines of its own religion. Without those doctrines it cannot exist as a divine service. Without a knowledge of those doctrines, the spiritual effect of the service cannot be understood. Consequently, the effect of the divine service cannot be known, otherwise than from the doctrines of its religion, coupled with a hypothetical admission of their truth. But *the advancement of any theistic religion is charitable, and such advancement may result from an increased number of the celebrations of its divine service.* Therefore the charitable nature of a divine service must (when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question.

[208] In the course of the argument before me it has been strenuously contended that the performance of the Muktaḍ ceremonies results in no public benefit; that it merely has a tendency to put money in the pockets of the priest, and that the recitation of the prayers and the compliance with all the solemn rituals accompanying the performance of the ceremonies have no real efficacy and do not result in any benefit of a public nature. This identical question is dealt with by the Chief Baron, and the contention is refuted in the most effectual manner. He says (at p. 276):—

“ But when it (the Law) knows those doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it *objectively* and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so but it is contrary to the principle that all religions are now equal in the law. It follows that there must be one of two results: either—(1) the Law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit, or, (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

“ The first alternative is an *impossible* one. The law, by rendering all religions equal in its sight, did not intend to deny that which is the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognise the essence of all religion.

“ The other result must, therefore, necessarily ensue. It must ascertain the spiritual efficacy according to the doctrines of the religion in question; and if, according to those doctrines, that divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable.”

Now, in this case it is proved beyond doubt that according to the doctrines of the Zoroastrian religion the performance of the Muktaḍ ceremonies is enjoined—that it is the duty of all Zoroastrians to have these ceremonies performed. The Court has before it the knowledge what ceremonies are obligatory and what are optional—the Court has before it the prayers ordained to be recited during the ceremonies—the Court has before it the evidence of witnesses proving that these ceremonies have to be performed by priests who are paid for doing so and such honoraria as they receive form a portion of their income, and are their [209] ordinary means of livelihood. The Court is then in a position to judge how far the witnesses are right, when they say the performance of such religious ceremonies amounts to an act of Divine worship which is believed by the community to bring down to the world both temporal and spiritual benefits—not only on those that perform the ceremony—but on the whole community—on their country and their Sovereign—on

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all mankind—on the Universe. If this is the belief of the community—and it is proved undoubtedly to be the belief of the Zoroastrian community—a secular judge is bound to accept that belief—it is not for him to sit in judgment on that belief—he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind, and say to him, “You shall not do it.” This Court can only judge of the efficacy of such gifts in procuring public benefits by the belief of the donor and of the community to which he belongs—the belief of those who profess the religion—the ordained ceremonies of which the donor desires performance.

Lord Justice Fitz Gibbon, speaking on the point, says (at p. 279):—

“In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the Church or denomination, or body, who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It can have no other guide upon that subject.

“The exclusiveness, the vagueness, or the self-sufficiency of principles religiously held by particular creeds, whether they rest on dogma, or on conscience, cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

“It would be strange, indeed, if bequests for the promotion of total abstinence, or even vegetarianism; for the maintenance of a place of worship, or of a minister, for a small congregation of peculiar people; for the dissemination of the works of Joanna Southcote; or for the prevention of cruelty to animals, should be held, as they have been, to be charitable objects, if a provision by a Roman Catholic, for Roman Catholics, for the celebration of the Mass, more especially in Ireland, where ‘Superstitious Uses’ are not *mala prohibita*, were to be excluded from that category.”

To this I would add that it would be stranger still in a country like India, where superstition abounds, where each community is [210] by the Crown left free to profess what religion it pleases—from where the doctrine of superstitious uses is rigorously excluded, where trusts of lands and moneys in perpetuity for idols and similar trusts are recognised and enforced by the Courts—that a Parsi professing the Zoroastrian religion should be precluded from making a gift for the performance of religious rites and ceremonies which he is enjoined by the religion he professes to perform, and the non-performance of which, according to his religion, is a great sin. Why should he be precluded from setting apart a portion of his property and devoting it to a purpose which he believes would result in benefits to himself, his family and his community—in promoting the religion he professes and saving his descendants from committing a sin should circumstances place them in a position of inability to perform these ceremonies for want of means. On this point in the same case Lord Justice Fitz Gibbon, a Protestant Judge, observes (at p. 280):—

“Speaking with all reverence of a faith which I do not hold, touching the very ‘Mystery of Godliness’, I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a Sacrifice a private and exclusive benefit for himself alone, as being much less than blasphemy; and, as I understand the proved doctrine of the Church, it would certainly be heresy. But the hope or belief that, in some shape or form, here or hereafter, a man’s good works will follow him—an ingredient of selfishness in that sense—enters into almost every act of charity; and if the act is done in the belief that it will benefit others; for example, in the belief that he that gives to the poor lends to the Lord, it can be none the less charitable because the giver looks for his reward in heaven.”

Lord Justice Fitz Gibbon ends his judgment by saying:—

“The fruition of faith, ‘the evidence of things not seen’, is hidden from humanity. It is not within the power of any earthly tribunal to entertain the question



whether these propositions are true. But it is for us to decide that belief in their truth is part of the faith of the members of the Church which has laid them down."

Speaking of the belief of the Roman Catholics in the efficacy of the performance of Masses being benefits to the community, Lord Justice Holmes says (at p. 286):—

"A temporal Court in Ireland, having no authority to decide for itself whether it was true or not, must take as its guide the belief of the Church of which the testatrix is a member."

[211] I would like here to say that so far as I am concerned, I have scarcely ever come across a case in a Court in another country bearing closer resemblance to facts and contentions of a case before our Courts than the case of *O'Hanlon v. Logue* (1) bears to the present case. It must be remembered that it is decided by the tribunal having the highest jurisdiction in a country in which religious matters bear remarkable analogy to this country—Ireland like India having no established Church, no State religion, and where the doctrine of superstitious uses has no application. It is decided as recently as 1906, its pronouncements are clear and emphatic; there is no element of doubt or a note of uncertainty in the judgments pronounced; every case of importance on the subject, ancient or modern, is carefully considered and the question before the Court finally and definitely settled. Judgments such as those pronounced in this case must command the respectful attention of other Courts deciding similar questions. This case alone is sufficient to set at rest all doubts and remove all difficulties in the decision of this case, and enables me to answer the question before me—

"Whether the Trust declared in respect of the Government Promissory Notes for 15,000 Rupees mentioned in the plaint are valid."

in the affirmative with considerable confidence. I hold that Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktaḍ, Baj, Yejushni and other like ceremonies, are valid "charitable" bequests and as such exempt from the application of the Rule of Law forbidding perpetuities.

The only other question to be considered is as to costs. The plaintiff is a member of the Bar, and as such he has conducted his own case. At the end of the case he intimated to me that he does not propose to saddle the trust funds with his own fees. This is generous of him. I ought here to say that throughout the whole case the attitude of the plaintiff was most correct. He did not come to the Court for the purpose of dividing the Trust estate. His share in the funds would have been so small that it would not have been worth his while troubling about it if his [212] motive had been merely to share in the division of the funds. On the very first day the matter came on before me, he expressed his perfect willingness to have the matter decided against him, which, of course I had no power to do in the face of the decision in 11 Bombay and in the absence of any materials before me. He came to Court for directions as the original Trustees had all died, the ceremonies had remained unperformed in the previous year, and the income of the funds remained unutilized. His single-handed but vigorous fight has saved the case from being stigmatised as a one-sided show or a happy-family arrangement. He is entitled to his costs; whether he takes them or not it is for him to decide. Had the other parties, excluding from this expression, of course, the Advocate-General—followed the plaintiff's example as I had hoped

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they would and offered to bear their own costs, the plaintiff's unselfish offer would have been most useful. When I gave expression to my inclination to give priority to the Advocate-General for his costs a most acrimonious discussion ensued. Mr. Bahadurji vigorously resented the suggestion, and argued—I now find correctly—that there is no precedent for such an order and that it would be a most unusual order to make. Mr. Kanga claimed priority for the costs of his clients and argued that his clients were trustees, and as such were entitled to have their costs paid out of the funds taxed as between attorney and client. He claimed a lien on the funds for his costs. Mr. Kanga's clients are not Trustees. They are merely the executor and executrix of the will of one of the original Trustees and are in exactly the same position as the plaintiff who is Administrator of the estate of another original Trustee, and the tenth and eleventh defendants, who are executors of the will of the third original Trustee. That his clients are in possession of the Trust property is merely an incident due to the fact that their Testator was the last of the Trustees to die. This circumstance does not alter their position or give them any preferential rights over others as to costs. Mr. Raikes, the Acting Advocate-General whom I directed to be added as a party, has made a successful fight for the Trust and earned the gratitude of all those interested in upholding the Trust, and I would be extremely sorry if his [213] costs are not fully recovered from the Trust Funds. I regret I can find no precedent enabling me to give him priority as to his costs. The only order under the circumstances, I can make, is that the costs of all parties appearing before me be paid out of the Trust property—those of the Advocate-General being taxed between attorney and client. Costs to be taxed as if this Originating Summons had been a long cause.

I cannot conclude this judgment without expressing my sense of obligation to the members of the legal profession engaged in this case, most especially to Mr. Bahadurji, for the very valuable assistance they have rendered to the Court throughout the case.

Attorneys for the plaintiff:—*Messrs. Wadia, Gandhi & Co.*

Attorneys for defendant No. 1:—*Messrs. Pestonji, Rustim & Kola.*

Attorney for defendants Nos. 10 and 11:—*Mr. P. S. Battivala.*

Attorneys for defendant No. 12:—*Messrs. Jehangir, Gulabbhai and Billimoria.*

*Note* :—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in this judgment, indicate that Mr. Justice Davar desired to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken.—EDITOR.

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### CRIMINAL REVISION.

*Before Chief Justice Scott and Mr. Justice Heaton.*

EMPEROR v. BABULAL KANAIALAL.\*

[17th July, 1908.]

*Penal Code (Act XLV of 1860), secs. 21, 186—Public Servant—Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bombay Act III of 1901).*

A clerk in the cess-collection department of a District Municipality constituted under the Bombay District Municipal Act (Bombay Act III of [214] 1901),

\* Criminal Application for Revision No. 86 of 1908.



is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860); and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against the conviction and sentence recorded by the Honorary First Class Magistrate of Ahmedabad.

The complainant was a clerk in the cess-collection department of the Ahmedabad City Municipality.

The municipality served a bill for privy tax (Rs. 2-1-0) upon the accused in respect of his house. The amount not having been paid, a notice of demand was served upon the accused. The Municipality subsequently obtained a warrant of attachment, which they attempted to serve through their clerk, the complainant. When the complainant went to the accused's house to execute this warrant he was obstructed by the accused, who was thereupon tried for and convicted of an offence punishable under section 186 of the Indian Penal Code (Act XLV of 1860). The accused was sentenced to pay a fine of Rs. 25.

The accused applied to the High Court.

*L. A. Shah*, for the accused.

The complainant is not a public servant within the meaning of section 21 of the Indian Penal Code. The act of the accused therefore does not amount to an offence under section 186 of the Code.

There was in the old Municipal Act (Bombay Act II of 1884, section 46) a provision making all Municipal servants public servants within the meaning of section 21 of the Indian Penal Code. The present Municipal Act (Bombay Act III of 1901, section 45) however makes only particular servants public servants for certain limited purposes.

The case of *Reg v. Nantamram Uttamram* (1), which is against my contention, was decided under the old Municipal Act of 1859, where there was no provision corresponding to section 45 of the [215] present District Municipal Act. Referred to *Emperor v. Gulab* (2) and *Emperor v. Ezekiel* (3).

*M. N. Mehta*, for the complainant, was not called upon.

SCOTT, C. J.:—The accused and his wife were living together in a house in Ahmedabad and were liable for Rs. 2-1-0, in respect of privy tax for the house they were living in under section 82 of Act III of 1901. A bill for the sum claimed for the tax was presented to the accused although the bill itself was made out in the name of his wife. The bill not having been paid notice of demand in the statutory form prescribed in Schedule B was served upon the accused and on his failure to pay a warrant was served upon him by the complainant Lakshmishankar Maganlal who was a clerk in the cess-collection department of the Ahmedabad Municipality. When the warrant of attachment was taken to the accused for execution according to law the accused obstructed the complainant in the execution of the warrant. For this he has been charged under section 186 of the Indian Penal Code and there is no doubt that he is guilty if the complainant was a public servant executing his duty within the meaning of that section of the Indian Penal Code.

Public servants are defined by the Penal Code, section 21: clause (10) of that section includes in the term "public servant" every officer whose

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(1) (1869) 16 Bom. H. C. R. Cr. Ca. 64.

(3) (1904) 16 Bom. L. R. 54.

(2) (1904) 1 All. L. J. 125.



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duty it is as such officer to receive any property for the secular purpose of any taluka or district.

We are of opinion that the complainant being clerk in the cess-collection department of the Municipality falls within the words of clause (10), which we have read, and we are supported in that conclusion by the judgment of this Court delivered in the case of *Reg v. Nantamram Uttamram* (1).

We, therefore, think that the conviction was right and we dismiss the application.

33 B. 216 (=10 Bom. L. R. 488=2 I. C. 294).

[216] ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

SIR JEHANGIR COWASJI JEHANGIR, *Appellant and Plaintiff, v.*

THE HOPE MILLS, LIMITED, AND OTHERS,

*Respondents and Defendants.\**

[3rd March, 1908.]

*Practice—Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order.*

A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

*Held*, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

[Ref: 35 Mad. 1 ; 67 I. C. 10=34 C. L. J. 405 ; 77 I. C. 171=25 Bom. L. R. 888.]

APPEAL from an order of Davar, J.

The plaintiff, Sir Jehangir Cowasji Jehangir, as mortgagee in possession of the property of the first defendant company, The Hope Mills, Limited, instituted this suit in August 1903 to recover the moneys due to him under his mortgage and prayed that in default of payment the right to redeem may be foreclosed or the mortgaged premises might be sold. The mortgage was dated the 5th April 1900. After the date of the mortgage the plaintiff on the 30th of May 1901 had entered into an agreement with the first defendant company under the terms of which he worked the Mills of the company.

On the 26th of January the plaintiff obtained a decree which was defective in some respect. On the 9th August 1904, an application for final decree for foreclosure or sale was refused [217] on the ground that the exact amount due to the plaintiff as first mortgagee was not determined.

On the 19th of October 1907 one Jivanlal Choonilal Chinoy, claiming to be the senior partner in the firm of Rangildas Bhookandas and Co.

\* Suit No. 490 of 1903 : Appeal No. 3 of 1908.

(1) (1869) 6 Bom. H. C. R. Cr. Ca. 64.



agents of the first defendant company, obtained on behalf of the company, a rule nisi calling upon the plaintiff to show cause "why he should not pass his accounts as first mortgagee in possession of the moveable and immoveable property of the said first defendant company before the Commissioner for taking accounts."

The rule was argued before Davar, J., on the 21st November 1907, who made the rule absolute by ordering the plaintiff to pass his accounts before the Commissioner.

Against this order the plaintiff appealed.

Scott, Advocate-General, and Robertson for the appellant. In the course of this argument they referred to the following cases:—*Ajudhia Pershad v. Baldeo Singh* (1), *Nandram v. Babaji* (2), *Tiluck Singh v. Parsotein Proshad* (3), *Tara Prosad Roy v. Bhobodeb Roy* (4), *Akikunnissa Bibee v. Roop Lal Das* (5), *Tara Pado Ghose v. Kamini Dassi* (6).

Setalvad (with Raikes) for the respondent.

CHANDAVARKAR, J.—We are of opinion that the order appealed from ought to be set aside.

A preliminary point has been raised by the learned counsel for the respondent that no appeal lies from that order upon the ground that it was made under either section 206 of the Civil Procedure Code or Rule 305 of this Court's Rules.

In order to bring the order under section 206 of the Code it is necessary that the application was made to bring the decree into conformity with the terms of the judgment or to correct or rectify a clerical or arithmetical error found in the decree. Now, it is not pretended by the counsel for the respondent that the decree or order was defective on the ground of a clerical or [218] arithmetical error; nor has it been argued that there was any inaccuracy to bring the decree within the terms of Rule 305. What has happened is that while the decree contemplated an account being taken between the parties, it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. It is argued that the omission was due to pure inadvertence, but we do not think we can presume anything of the kind, because, as the learned Advocate-General has said, the decree nisi was settled by the solicitors of the parties and they could not have failed to note what the terms they settled would mean.

Under these circumstances we must presume that the omission was intentional. The decree left it open to the parties to have the account taken and settled privately by some person of their nomination.

We do not think that the application made before the learned Judge in the Court below can be treated as one for the mere amendment of the decree under either section 206 of the Code or Rule 305.

It must be remembered that the defence set up by the appellant in the Court below was that after the decree, new rights had come into existence; that the decree having contemplated an account being taken, it had been taken by a person appointed jointly by the parties with the result that a certain sum was found due by the respondent company to the appellant. This is not disputed. In this state of facts the rights of the parties would fall within the law enunciated in the case of *McKellar v. Wallace* (7). There the Right Hon. T. Pemberton Leigh in delivering the

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(1) (1894) 21 Cal. 818 at p. 823.

(2) (1897) 22 Bom. 771.

(3) (1895) 22 Cal. 924.

(4) (1895) 22 Cal. 931.

(5) (1897) 25 Cal. 133.

(6) (1901) 29 Cal. 644.

(7) (1853) Moo. I. A. 372 at p. 395.



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Judgment says:—"The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those [219] accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud;—in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side".

Therefore, if there is no fraud, it is a settled account and gives rise to new rights between the parties to the decree. Under these circumstances, what the learned Judge was deciding was the question of a right; by his order he has varied the decree which he had no jurisdiction to do in a proceeding such as this initiated by a rule *nisi*. We must, therefore, hold that an appeal lies.

Another cogent ground is that the order now under appeal requires the plaintiff to file a suit. That certainly affects the plaintiff's rights. The plaintiff is entitled to say that he is not bound to file a suit. If the respondent questions the agreement between the appellant and the company there is no reason why the respondent should not, if he chooses, file a suit to have that agreement cancelled: why should the appellant be compelled to file a suit? We think that again leads us to hold that an appeal lies.

[220] Having held that an appeal lies, we now come to the merits, and the observations, which I have made, dispose of that point also. We think there was no question of any amendment, and if new rights have come into operation between the parties, the Court was not called upon to modify the decree or to direct the plaintiff to file a suit and have the rights between the parties adjudicated upon. The plaintiff says there has been an account taken under the decree between him and the defendants and that as a result of the account a new agreement has come into existence between the parties. That is not disputed. His defence is in fact that the decree is superseded by the agreement. If it is so, it would be open to the defendants to have that agreement cancelled.

Under these circumstances, we must reverse the order appealed against with costs.

We do not express any opinion upon the question whether the agreement set up by the plaintiff falls within section 257 A of the Code of Civil



Procedure. That is not a question which was before the learned Judge or which can arise in this proceeding. The question now merely is whether the decree should be amended or not, and therefore, no question under section 257 A can arise, nor can any question as to the invalidity of it upon any other ground be gone into.

We set aside the order and discharge the rule with costs.

The appellant is entitled to add the costs to his mortgage debt.

Attorneys for the appellant:—Messrs. Mulla & Mulla.

Attorneys for the respondent:—Messrs. Bhaishankar, Kanga & Girdharlal; Messrs. Malvi, Hiralal, Modi & Runchhoddas; and Messrs. Daphtary, Farrera & Divan.

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33 B. 221 (=10 Bom. L. R. 973=9 Cr. L. J. 226=2 I. C. 277=4 M. L. T. 45).

[221] ORIGINAL CRIMINAL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

*In re* BAL GANGADHAR TILAK.

[8th September, 1908.]

*Criminal Procedure Code (Act V of 1898), sections 233, 234, 235, 236, 237, and 239—Charges, joinder of charges—Privy Council, leave to appeal to, in criminal case—Practice and Procedure.*

The accused was charged with an offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860) in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them.

*Held*, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of.

Sections 235 (2) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

*Ex parte Carew* (1) and *Dinizulu v. Attorney-General of Zululand* (2), followed.

[Dist: 32 All. 219; Ref.: 83 I. C. 530=39 C. L. J. 1=28 C. W. N. 377.]

THE accused was the editor, printer and publisher of a weekly newspaper called the "Kesari", which was published at Poona. [222] The newspaper, in its issue dated the 12th May 1908, contained an article entitled "The Country's Misfortune", and there appeared another article

(1) [1897] A. C. 719.

(2) (1889) 61 L. T. 740.



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under the heading of "These remedies are not lasting" in its issue dated the 9th June 1908.

The accused was charged before the Chief Presidency Magistrate of Bombay, by complaints filed separately in respect of each article. Each complaint alleged that the accused committed offences punishable under sections 124A and 153A of the Indian Penal Code, 1860, in respect of each of the two articles. Two inquiries were made; and the Magistrate committed the case to the High Court under two committing orders, each of which was based on charges under sections 124A and 153A in reference to each of the two articles.

When the trial in the High Court began, the Advocate-General applied for one trial on all the charges.

*Branson* (officiating Advocate-General) for the Crown :—Section 234 of the Criminal Procedure Code, 1898, applies to this case. The offences charged are exactly the same : they are committed within three weeks of each other ; and, therefore, they should be tried together at one trial. As a matter of fact, there are separate charges with respect to each of the offences. The prosecution desires one trial for all the charges. We are within the wording of section 235 of the Code: see *Emperor v. Fattu* (1).

The incriminating articles, as well as the articles which are put in to show the intention of the accused, begin from the 12th May 1908. The newspaper in question has published a series of articles which form the subject-matter of the charges, namely, the articles of the 12th May and the 9th June, and a series of intervening articles upon which we rely as showing that they were all written as part and parcel of one transaction intended for the purpose of producing disaffection and disloyalty against the Government established by law in British India.

The accused in person :—I contend that section 227 of the Criminal Procedure Code, 1898, is the section that applies to this case. The Magistrate has framed the charges under sections 233, [223] 234 and 235. Section 234 applies to the charge when the charge is first framed by the Magistrate and there is no provision in the Criminal Procedure Code by which the different charges can be amalgamated as it is proposed at present. Secondly, though the articles are in the course of the same transaction, yet they form different subjects altogether ; and it would be more convenient for me to have each of them tried separately. The two articles refer to different subjects, and if the trial is jointly carried on, it will introduce a sort of confusion in my mind. Sections 234 and 235 are permissive, but section 233 is imperative. There are separate articles dealing with separate aspects of the question. They do not form part of one transaction.

*Branson* in reply :—This is not a question of the amendment of charges at all. Even if it be so treated, the Court has great powers under section 226. As a matter of fact the two charges remain unaltered and I propose to try them both together.

I am entitled to put the charges before the Court, and in reference to the possible difficulty of there being four charges I submit that section 235 would dissipate that difficulty altogether. The charges under sections 124A and 153A will be treated as being alternative charges or charges framed in order to meet possibly of one or the other set of facts, in which case either offence might or might not be proved. In that case there would be four charges. In order to avoid the possibility of there being any difficulty

(1) (1903) 26 All. 195.



or doubt, I propose to proceed under section 333 and say that for the present at all events I will not proceed under section 153A on the first article and that will result in a stay of proceedings and discharge of the accused but not an acquittal.

DAVAR, J. :—In this case two separate informations were laid before the Magistrate, and the Magistrate held two separate enquiries and made two separate commitments. The question now before me is whether these two cases can be taken together and tried at one trial. It would be extremely desirable from my point of view and also, I think, in the interest of the accused himself that there should be one trial if possible and the whole [224] question should be before one Jury who tries him. The accused, under section 233 of the Criminal Procedure Code, is entitled to be tried separately unless the provisions of sections 234, 235, 236 and 239 come into operation. I have grave doubts about section 235 applying to this application. It seems to me that there would be some difficulty in holding that separate newspaper articles written week after week would come under the "same transaction"; but I have no difficulty whatever in ordering the same trial under section 234, provided that the charges do not exceed three. In this instance the charges are four, but the Advocate-General offers to make use of section 333 to stay proceedings with reference to one of the four charges. I am quite willing to allow him to make use of that section and to allow him to withdraw any one of the four charges he chooses to withdraw. But I do not wish the Advocate General to be taken by surprise. I think it would be fair to the accused if the Crown is not prepared to go on with any particular charge or for convenience wishes, or feels inclined, not to proceed with one of the charges that I should under the powers given to me under the same section order that the discharge of the accused should amount to an acquittal. It is not right that the accused should have that charge hanging over him indefinitely. I will order three charges in the two cases to be tried at one trial provided that there are three charges only and the fourth one is abandoned and not kept hanging on the accused's head. That would be for the Advocate-General to decide.

The prosecution accordingly selected three charges, *viz.*, those under section 124A and section 153A with respect to the article dated the 12th May 1908 and the one under section 124A as to the article published on the 9th June 1908.

The trial proceeded with a Jury, on the three charges. The Jury returned their verdict of guilty on all the three charges. The sentence passed was three years' transportation on the first charge under section 124A of the Indian Penal Code, three years' transportation on the second charge under section 124A, the two sentences to run consecutively: and a fine of Rs. 1,000 on the charge under section 153A.

[225] After the sentence was passed the Advocate-General intimated to the Court that he would not proceed on the charge under section 153A, which was held over, and the learned Judge thereupon discharged the accused on that charge directing that the discharge should amount to an acquittal.

The accused, thereupon, applied for leave to appeal to the Privy Council. Among the grounds on which the leave was sought, were the following:—

32 (h) That the learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences, not of the same kind and not committed in

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the same transaction, contrary to the express provisions of section 233 of the Criminal Procedure Code and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal, null and void *ab initio*.

32 (s) That the learned Judge acted illegally in passing two sentences, one under section 124A, Indian Penal Code, and the other under section 153A, Indian Penal Code, if it be held by the Court that the transaction is one and the same, but your petitioner submits that the transaction is not the same as ruled by the learned Judge.

32 (t) That the learned Judge acted illegally in passing two sentences, one under section 124-A and the other under section 153-A upon one article and the one and the same act.

The Court in granting a Rule passed the following order:—

As we stated yesterday we issue a Rule calling upon the Crown to show cause why the Court should not grant a certificate that this is a fit case for an appeal to the Privy Council on points 32 (h) and 32 (s) and (t) in the petition of the accused.

We have taken time to consider whether we should issue a Rule upon any other point and we have come to the conclusion that there is no substance in any of the other points that have been taken.

We think it right, however, to mention with regard to point 32 (r) as to the addition of a fresh charge at the close of the case with reference to the previous conviction that it appears to us upon the *ex parte* argument which we have heard that a procedure was adopted which is not contemplated by the Criminal Procedure Code. It was evidently adopted in order to bring to the mind of the Judge in passing sentence the fact that the [226] prisoner had been previously convicted. But that fact was obviously already present to his mind, for he had cited copiously from the summing up of Mr. Justice Strachey in the previous Tilak Trial in 1897, and he had before him and present to his mind the affidavits that had been made on the bail application which mentioned the previous conviction and the undertaking which had been given by the prisoner upon his release. We, therefore, think there is no substance whatever in the objection that has been taken, and it would not be right to needlessly occupy the time of the Court by granting a Rule upon the point thus inviting further argument.

We make the Rule returnable on Wednesday next.

*Baptista*, in support of the rule:—

Section 233, Criminal Procedure Code, lays down the fundamental rule, any contravention of which constitutes an illegality incurable by section 537 upon the Privy Council decision in *Subrahmanya Ayyar v. King-Emperor* (1). This case was followed in several cases in Bombay: see *King-Emperor v. Krishnarao* (2); *Emperor v. Nathalal* (3); *Emperor v. Lallubai* (4); *Emperor v. Wassanji Dayal* (5); and *Emperor v. Jethalal* (6). The number of offences may be large or small. That makes no difference. If the rule is infringed the trial is illegal. In *Emperor v. Wassanji Dayal* (5) only two offences under sections 380 and 414, Indian Penal Code, were charged. In *Nawab Khajah Solemollah Bahadur v. Ishan Chandra Das* (7) the Court even held the trial was illegal for omitting to give the notice prescribed in section 145, clause (3), of the Criminal Procedure Code.

(1) (1901) 25 Mad. 61.

(2) (1902) 4 Bom. L. R. 53.

(3) (1902) 4 Bom. L. R. 433.

(4) (1902) 4 Bom. L. R. 440.

(5) (1904) 6 Bom. L. R. 725.

(6) (1905) 29 Bom. 449; 7 Bom. L. R. 527.

(7) (1905) 9 C. W. N. 909.



Section 234 does not apply, because the offences are not of the same kind as they do not come within the same section, and the amount of punishment is not the same.

Section 235 does not apply, for this section with all its clauses is confined to offences committed in the same transaction only: see *Sher Shah v. Empress* (1); *Gopaluni Narasaiya* (2). If it were [227] not confined to the same transaction, these trials can never be illegal and the Privy Council ruling in *Subrahmanya's case* would be wrong. In this case the two articles do not form part of the same transaction.

Section 236 is also confined to the same transaction. Moreover, it does not apply to the present case because this is no case of doubt.

It is, therefore, clear that the excepted cases in section 233; taken singly, do not sanction the trial in the mode in which it was conducted; but it is contended that if the exceptions are taken cumulatively the trial is legal. This depends upon the construction of section 233. The question remains whether they can be taken cumulatively. I submit they cannot be so taken.

The policy of section 233 is plainly designed for the protection of the accused. It is a humane rule for the purpose of preventing confusion, embarrassment, or prejudice to the accused by the very multiplicity of charges. The true construction would therefore be the one that would "suppress the mischief and advance the remedy." See Maxwall on the Interpretation of Statutes (3rd edition,) Ch. X, pp. 367 *et seq.* and p. 385.

The natural meaning of the words in section 233 appears to be that the exceptions in section 233 should be taken *singly* and not *cumulatively*. No doubt the exceptions are joined by the word "and". But the words are "except in the cases mentioned in sections 234, 235, 236, and 239." This phraseology makes all the difference. We have to look to the cases mentioned in the sections and see whether the present trial is covered by any of those cases and not by a new case formed by a combination of two or more of those cases. It is, however, clear that section 234 cannot be taken cumulatively with section 239: see *Budhai Skeikh v. Tarap Sheikh* (3). "And" must therefore be read as "or" as far as section 239 is concerned. That being so "and" must be read as "or" with respect to all the sections. It cannot be read "and" and "or" in the same section. Moreover, if the exceptions were not mutually exclusive, why not combine all the sections 234, 235, 236 and 239? This would render the rule [228] in section 233 perfectly nugatory. It would then be difficult to conceive of any case of misjoinder. If that was intended the Legislature would have used plainer language instead of all this circumlocution and would not make these elaborate provisions for possible contingencies. Besides the limited interpretation would prevent the law being circumvented by the addition of fictitious charges. For example, it is admitted that the offence under section 124A in one transaction cannot be joined with the offence under section 153A in another transaction and tried together. Yet the addition of a fictitious charge under section 124A in the second transaction would enable the Crown to do so if the aid of section 235 or section 236 can be invoked: see *Abdul Majid v. Emperor* (4).

Furthermore, section 234 cannot be joined with section 235 as they are mutually destructive. Section 234 looks exclusively to number, time, and sameness of the offences without regard to the number of transactions.

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(1) (1887) P. R. No. 43 of 1887 (Cri).

(2) (1883) Weir 892.

(3) (1905) 10 C. W. N. 32.

(4) (1906) 33 Cal. 1256 at pp. 1267-68.



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Section 235 is the converse of section 234. It looks exclusively to the sameness of the transactions and is indifferent as to the number, time and sameness of the offences. The essential ingredients of section 234 are immaterial in section 235 and *vice versa*. A combination of the two must end in the destruction of the essentials of each.

It is contended that the word 'section' in section 234 may be read as 'sections', and if that be done, then the offences under sections 124A and 153A in one transaction can be joined with offence under sections 124A and 153A in respect of another transaction because then they are offences of the same kind as they fall respectively under the same sections. But if this be so, it would make no difference whether there are two or twenty offences in each transaction. This would render the protection designed by section 233 practically worthless. There is really no reason to read "section" as "sections." The word "transaction" in section 239 cannot be read in the plural: see *Budhyai Sheikh v. Tarap Sheikh* (1). What section 239 is to "transaction", section 234 is to "section." The General Clauses Act does not apply because to read 'section' in the plural is repugnant to the [229] context. If the present sections be compared with the sections on the same subject in Act X of 1872, it will be perceived that the Legislature disapproves of such extension in meaning. Section 453 of the old Code (Act X of 1872) is now section 234. In the old section 453 there was an explanation. It referred to the old section 455, which corresponded with the present section 236. The old explanation incorporated what is now section 236, in the very definition of 'offences of the same kind.' Thereby it extended the meaning of the expression 'offences of the same kind': see *Manu Miya v. The Empress* (2). But that explanation has no place in the present Code. Its exclusion from the new Code excludes section 236 (old section 455). The legislature has thereby indicated that now section 234 is not to include cognate offences or doubtful sections falling within section 236. *A fortiori* it must exclude other more distinct offences.

In this connection the addition of clause (2) to section 222 makes it clear that the word offence as used in section 234 was not intended to include every act so connected with that offence as to form part of the same transaction: see *Bhagwati Dial v. King-Emperor* (3) and *Subrahmaniam Ayyar v. King-Emperor* (4). The whole question whether section can be read as sections and whether the exceptions can be taken cumulatively has been very carefully considered in *Bhagwati Dial v. King-Emperor* (3); *Kasi Viswanathan v. Emperor* (5); *Nga Lun Maung v. King-Emperor* (6); and *Budhai Sheikh v. Tarap Sheikh* (1). All these cases hold that the sections are mutually exclusive, and section cannot be read as sections: see also *Bipin Chandra Pal v. Emperor* (7); and *Queen v. Itwaree* (8); *Queen-Empress v. Mulua* (9). The only exception is *Emperor v. Tribhovandas* (10) decided the other day by a Division Bench of this Court. But that decision is distinguishable from the present case. In that case there were not distinct charges on sections 124A and 153A but one charge for both. [230] They were regarded by the Appellate Court as alternate charges. The Appellate Court confirmed the conviction of one

(1) (1905) 10 O. W. N. 82.

(2) (1882) 9 Cal. 371.

(3) (1905) P. R. No. 2 of 1905 (Cri.)

(4) (1901) 25 Mad. 61 at p. 73.

(5) (1907) 30 Mad. 328.

(6) (1902) 2 Lower Burma Rulings

p. 10.

(7) (1907) 35 Cal. 161.

(8) (1866) 6 W. R. 88 (Cri. Rul.).

(9) (1892) 14 All. 502.

(10) ante p. 77: 10 Bom. L. R. 801.



offence only, viz., section 124A. The sentences were not separate on sections 124A and 153A. There was only one sentence and that within the maximum imposeable under section 153A.

The grounds on which His Majesty will review criminal proceedings are specified in *Queen-Empress v. Bal Gangadhar Tilak* (1) and *In re Dillet* (2). In this case there is an important question of law. Unless corrected the misjoinder will create a precedent that would divert the law into new channels and prove prejudicial to accused in other cases, and open the door to grave mischief and miscarriage of justice. The mode of trial adopted disregarded the forms of legal process. It is desirable to obtain the decision of the highest tribunal in the Empire upon this point. Secondly, if the trial is illegal, there can be no conviction and sentence. The detention of the petitioner in jail is a violation of the principles of natural justice and constitutes substantial and grave injustice. There is now no means of remedying the injustice except by an appeal to the Privy Council. This Court has not to see whether substantial or grave injustice is done, but leave that to the Privy Council. This Court has to make the requisite declaration if a *prima facie* case is made out. Thirdly, this case goes to the very root of jurisdiction. The Court has no jurisdiction to try a man on such a misjoinder of offences and charges. This is, therefore, a case where the Court should declare that it is a fit case for appeal to His Majesty in Council.

*Robertson*, Advocate-General, instructed by the Government Solicitor to shew cause :—No attempt is made to bring this case within the rule laid down by the Judicial Committee of the Privy Council in *Ex parte Carew* (3). Every irregularity in procedure, as laid down in the Criminal Procedure Code, does not permit a party to go to the Privy Council : but the party seeking for leave must shew that departure from the required procedure has caused substantial and grave injustice to be done. It is not [231] sufficient to show that there was an irregularity, and to argue from that that because there was an irregularity there was also an illegality. Some little injustice inevitably results from every irregularity ; but section 537, Criminal Procedure Code, is designed to cover such cases. In criminal cases leave is not given to appeal to the Privy Council upon the ground of a violation of a technical rule of procedure : see *Dinizulu v. Attorney-General of Zululand* (4). No prejudice was caused to the accused in his trial by the joinder of charges, nor was there any violation of an express provision of the law. As to when special leave to appeal is granted, see *Safford and Wheeler's Privy Council Practice* pp. 755, 756, 757; *Attorney-General of New South Wales v. Bertrand* (5).

'Offence' is defined in section 4 (o), Criminal Procedure Code, in any act or omission made punishable by any law for the time being in force. The offence is the act or omission and it is with the act or omission that a man is charged. Here the acts are the publications on two different dates. There are, therefore, only two offences though the acts constituting such offences are punishable under different sections of the Code. The word 'act' may be compared with the word 'game'. Game is a general or a particular term. The game of golf, or cricket, &c., or one, two or more games of golf, &c. In the same way the word offence may be used in a general or a particular sense. The act constituting the

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(1) (1897) 22 Bom. 112 at p. 150.

(2) (1887) 12 App. Cas. 459.

(3) [1897] A. C. 719.

(4) (1889) 61 L. T. 740.

(5) (1867) L. R. 1 P. C. 520 at p. 530.



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offence may be punishable under several sections defining particular offences. The word 'offence' is used in a general sense in some sections of the Code and in a limited sense in others. In section 233 it is used strictly according to the definition meaning. The section does not say that for every act punishable under several sections the accused should be tried separately. What section 234 looks to is the 'act,' i. e., the general offence and not the particular one. This case is governed by the ruling in *Emperor v. Tribhovandas* (1).

The two articles formed part of the same transaction. If both articles could be charged under section 124A and tried at one trial under section 234, Criminal Procedure Code, the mere addition of a charge under section 153A in respect of the second article has not caused grave and substantial injustice. No suggestion is made that the accused was embarrassed in his defence. The accused himself said in his statement that the two articles formed part of one controversy.

Section 235, cl. (1), Criminal Procedure Code, applies to this case, because a series of articles were published by the accused forming part of the same transaction, namely, that of defaming the Government. Section 235, cl. (2) also applies. 'Offence' in this clause is used in a distributive sense. One act may give rise to several offences.

Section 233, Criminal Procedure Code, mentions as exceptions "sections 234, 235, 236 and 239." The word 'and' indicates that the Legislature did not mean these sections to be mutually exclusive.

Section 236 also applies, if the charge under section 153A is considered to be an alternative charge; and there is nothing in the mode in which the charges are framed in this case which militates against this view. In a trial under s. 236 it is not necessary that conviction should only be as regards one offence: the accused may be convicted on each of the offences charged.

As regards sentences, if the trial is legal, then the sentences are legal. Unless the trial is set aside the Privy Council will not interfere with the sentences.

*Baptista* in reply:—"Act" and "offence" are not synonymous terms. Acts are not charged but offences are charged, and acts are only mentioned to give notice of the way in which the offence is committed. One act may give rise to many distinct offences. If a man fires a gun in a crowd where Police Officers are doing duty he may hurt one, cause grievous hurt to another, murder a third, set fire to a house, and injure or kill Police officers. One single act of firing the gun would thus result in many offences. Offences are committed not by acts alone, but acts and their consequences, though juridically all these are acts. Similarly, if a man publishes an article whereby he defames A, B and C, he commits three distinct offences of defamation. So one publication may give rise to two offences under section 124A and [233] section 153A of the Indian Penal Code, but they are nevertheless distinct offences and those offences are charged and not the act of publication. The act of publication is really one of the series of acts which constitute one transaction. The series of acts consist in writing each word of the article, delivering the written article to compositors, etc., and finally the publication in the newspaper.

The two articles do not form part of the same transaction. The accused said so in so many terms. The version of the official short-hand writer is not correct. The correct version is that given by the short-hand

(1) ante p. 77; 10 Bom. L. R. 801.



writer engaged by the accused and that, I understand, tallies with that of the short-hand writer engaged by the prosecution. Apart from this the accused cannot be pinned down to every word he utters in a charge to the jury or in urging his objections. It is quite clear from the points asked to be reserved that he regarded the transactions as distinct or else he could have no objection to the joinder of charges. Parties cannot make transactions the same if they are *distinct* in the eye of the law. As to what constitutes the same transaction, see Stephen's definition quoted in Cunningham on Evidence (7th edn.), p. 92. The point was fully considered in *Queen-Empress v. Fakirappa* (1); *Queen-Empress v. Vajiram* (2); *Emperor v. Punya Naika* (3); and *Emperor v. Sherufahi* (4). The publications of the 12th May and 9th June cannot form the same transaction. The authors are distinct persons. This we would have proved but Mr. Justice Davar ruled that the transactions were not the same. The accused of course accepted the full legal responsibility but not the authorship. Secondly, the subjects are not the same. There is no continuity. There is an interval of nearly one month. The Crown regarded this as distinct transactions. The sanctions under section 196, Criminal Procedure Code, were distinct, one for each article. In the Criminal Sessions of the High Court the Crown applied for a Special Jury for each case and two Special Juries were ordered by the Judge. The Judge did not regard the transactions as the same. The Jury too went on that [234] basis and brought in distinct verdicts. In the face of two sanctions, two complaints, two warrants, two inquiries, two committals, two applications for special Juries by the Crown, two convictions and two sentences on section 124 A alone, a third conviction on section 153 A and an acquittal on the second section 153 A, it is impossible now for the Crown to contend with any fairness that the two articles constitute the same transaction.

SCOTT, C. J.—This is a rule granted by us on a petition for a certificate that the decision of the judge and jury in the case of *Emperor v. B. G. Tilak* (5) is a fit subject for appeal to His Majesty in Council.

Before granting the rule we required counsel for the petitioner to specify the grounds upon which he was prepared to support his application. He then argued that a certificate should be granted as prayed for each of the reasons specified in paragraphs 32 to 35 of the petition. After hearing his arguments we decided that it was unnecessary to call on the Crown to show cause upon any points, except points (h) (s) and (t) of paragraph 32 of the petition and we accordingly granted a rule upon those points only.

The rule has now been argued. We can only grant the required certificate if in our opinion the case is a fit one for appeal. The test of fitness is furnished by various decisions of the Judicial Committee which show the circumstances under which they will entertain appeals in criminal cases. It is sufficient to refer to *Ex parte Carew* (6) and *Dinizulu v. Attorney General of Zululand* (7), in both of which the judgment was delivered by Lord Halsbury. In the former case the rule was stated thus: "It is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a criminal investigation is not granted by this Board." The rule is accurately stated as follows, in the case to which their Lordships referred in the course of

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(1) (1890) 15 Bom. 491.

(2) (1892) 16 Bom. 414, at p. 424.

(3) (1902) 4 Bom. L. R. 789.

(4) (1902) 27 Bom. 135; 4 Bom. L. R.

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(5) (1908) 10 Bom. L. R. 848.

(6) [1897] A. C. 719.

(7) (1889) 61 L. T. 740.



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the argument : *In re Dillet* (1), 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or [235] by some violation of the principles of natural justice, or otherwise substantial and grave injustice has been done.' In the latter case the Lord Chancellor said : "It appears to them that nothing could be more destructive to the administration of criminal justice than a sort of notion that any criminal case which was tried in any colony from which an appeal lay to this Committee can be brought here on appeal, not upon the broad grounds of some departure from the principles of natural justice, but because some form or technicality has not been sufficiently observed. That is a principle, which they believe, never has been permitted, and never, they trust, will be permitted." Therefore, before granting the certificate asked for, we must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

We are not sitting as a Court of error. It is not for us to decide whether such injustice has in fact been done. We have merely to be satisfied that a reasonable case has been made out. The petitioner was tried before Mr. Justice Davar, and a special jury on a charge framed under section 124 A, Indian Penal Code, in respect of an article published in the *Kesari*, of which he was editor and proprietor, on the 12th of May 1908, and on another charge under section 124A and one under section 153A in respect of an article in the *Kesari* of the 9th June 1908. He was found guilty and sentenced on each of the first and second charges to three years' transportation, and on the third charge to a fine of Rs. 1,000.

It is now argued that the trial was illegal as being in contravention of the provisions of section 233, Criminal Procedure Code, which lays down that for every distinct offence there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in section 234, 235, 236 and 239.

The accused was originally charged separately before the Chief Presidency Magistrate on the 29th June, under sections 124A and 153A in respect of the article of the 12th May, and under the same sections in respect of the article of the 9th June.

[236] He was committed to the High Court Sessions for trial on both sets of charges.

In the Sessions Court (as appears from the note of the official shorthand writer corrected by the learned Judge) the Advocate-General appearing for the prosecution asked that the accused should be tried on the four charges at one trial, contending that the articles forming the subject of the charge, and certain other articles intermediate in point of time, formed one transaction, in which the offences charged had all been committed, and that therefore, the joinder was permissible under section 235 (1), Criminal Procedure Code. The learned Judge objected, that if the charges were consolidated, there would be four charges. The Advocate-General then said he would not put the accused upon the charge under section 153A, in respect of the first article.

The accused, who conducted his own case, with the assistance of several well-known lawyers, objected first, that there was no provision of the Code by which different charges could be amalgamated as proposed, and, secondly, that though the articles were in the course of the same transac-

(1) (1887) 12 App. Cas. 459.



tion, yet they formed different subjects altogether, and it would be more convenient to have them tried separately, and confusing if they were taken together, that sections 234 and 235 were permissive, while section 233 was imperative, that the articles were separate articles dealing with separate aspects of the question, and did not form part of one transaction. Eventually, the learned Judge said he thought it would be extremely desirable, and in the interest of the accused himself, that there should be one trial, and that the whole question should be before one jury; the accused under section 233 was entitled to be tried separately, unless the provisions of section 234, 235, 236 and 239 came into operation. He had grave doubts as to the applicability of section 235 as there would be some difficulty in holding that separate newspaper articles written week after week would come under the same transaction, but he had no difficulty in ordering the trial under section 234 provided the charges did not exceed three. The trial then commenced on three charges, one under section 124A on the article of the 12th May, and one [237] under section 124A, and another under section 153A, on the article of the 9th June, with the result above stated.

After the verdict and before sentence the accused applied that certain points should be reserved and referred, under section 434, Criminal Procedure Code, for the decision of a Full Bench. The points mentioned are included in the points raised in the present petition. The Judge, however, declined to reserve any points.

Dealing now with the legal argument addressed to us that the trial was altogether unlawful, as having been in contravention of the terms of section 233 it is apparent that the argument involves two assumptions: (1) that the offences charged were not "committed by the same person in a series of acts so connected together as to form the same transaction," and therefore did not fall within the scope of section 235 (1); and (2) that the exceptions mentioned in section 233 are mutually exclusive. The justification for the first assumption is by no means apparent. Besides the preliminary discussion upon the point to which we have already referred, we note that at the trial in addition to the articles of the 12th May and 9th June other articles and notes published by the accused in the *Kesari*, from the 12th May to the 9th June inclusive, were put in (Exhibits E to I). The Judge in his charge to the Jury pointed out that the subject of all the articles, including those the subject of the charge, was the advent of the bomb. The accused himself when opening his defence read to the Court a written statement in which he stated that the charged articles were part of a controversy in which he had endeavoured to maintain and defend his views in regard to the political reforms required in India at the present day. In this connection we may also refer to paragraph 36 of the petition now before us. We think, therefore, that there are good reasons for the contention placed before us by the Advocate-General that the charges all fall within the scope of section 235 (1).

Assuming, however, that the Advocate-General's contention just referred to is unsustainable, the petitioner has still to make good the second assumption, namely, that the exceptions mentioned in section 233 are mutually exclusive. The words of the section do not favour this view. If it had been intended [238] that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of sections 236 or 237 could never be invoked to prevent a

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miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

For example, if A were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building the accused could not be convicted of simple theft under the powers conferred by section 237 because the applicability of section 236 would be negatived by the mere fact of the joint trial under section 234.

We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that sections 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

It is of course possible for ingenuity to suggest cases in which the full exercise by the Court of the permissive powers conferred by the sections which we have been discussing may produce embarrassment. In such cases the discretionary power of the Court still remains to decline to avail itself of its full powers.

The view which commends itself to us was also taken by another Bench of this Court in the recent case of *Emperor v. Tribhovandas* (1). In our opinion the learned Judge (though he appears to have overlooked section 234 (2)) might have allowed the trial to proceed on all four charges without violating the provisions of the law.

If we now for the purpose of argument assume that the petitioner has established the second assumption also, we have [239] still to be satisfied that reasonable grounds exist for thinking that grave and substantial injustice may have been done at the trial before we can grant the certificate. As we understood the argument on the rule it is not contended that injustice has been done except in so far as the alleged disregard of the provisions of Criminal Procedure Code in itself constitutes an injustice but we were urged to grant a certificate as the case would be important as a precedent.

We do not think the accused was in any way prejudiced by what took place at the trial. An accused person may it is clear be legally tried and convicted in one trial, under section 124 A or section 153 A, on charges framed on three disconnected articles. How then can it be said that grave and substantial injustice has been done by the arraignment and conviction of the accused on three cognate charges in respect of only two (and those not disconnected) articles?

As regards the question raised by paragraph 32 (s) and (t) of the petition with respect to the number of separate sentences imposed, the jury found the accused guilty of three distinct offences and the Judge awarded a punishment for them which in the aggregate is much below the maximum punishment allowed for one of the offences under section 124 A. There has, therefore, been no violation of the provisions of section 71 of the Indian Penal Code.

For the above reasons we discharge the rule.

Before leaving the case, however, we think it right to point out that the Advocate-General, according to the note of the official short-hand

(1) ante p. 77 : 10 Bom. L. R. 801.



writer, stated that the charges under sections 124 A and 153 A would be treated as being alternative charges or charges framed in order to meet the possibility of one or the other set of facts being proved, in which case each offence might or might not be proved. This may mean either that the second and third charges fell under section 235 (2), or that they fell under section 236. The charges as framed were not expressed to be in the alternative, and the verdict of guilty was given in respect of each charge separately. There was, we think, nothing illegal in this; but if it was the intention of the Crown that the [240] second and third charges should only operate alternatively the result intended can now be arrived at by the exercise by the Government of its powers under Chapter XXIX of the Criminal Procedure Code in respect of the sentence imposed under section 153A under the third charge.

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*Rule discharged.*

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*Before Chief Justice Scott and Mr. Justice Batchelor.*

*In re* NARASINHA CHINTAMAN KELKAR.

[29th September, 1908.]

*Contempt of Court—Criticism of Judge—Language used in criticism which strikes at the root of all respect for the Court.*

Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or to obstruct or interfere with the course of justice or the lawful process of the Court is a contempt of Court.

Judges and Court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court.

*Reg. v. Gray* (1), followed.

[Ref. 72 I. C. 17=25 Bom. L. R. 15=24 Cr. L. J. 289; 77 I. C. 436=25 Cr. L. J. 388; 72 I. C. 78; Fol. 69 I. C. 84=24 Bom. L. R. 928=23 Cr. L. J. 644.]

THIS was a rule calling upon Narsinha Chintaman Kelkar, editor of the "Mahratha," to show cause why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of defamatory passages concerning the Honourable Mr. Justice Davar, contained in an article published by him in the issue of his newspaper dated the 26th July 1908.

The rule nisi was in the following terms:—

Upon reading the affidavit of J. O. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908 and after hearing the Advocate-General, Bombay, who applies that a rule nisi be issued against Narsinha Chintaman Kelkar, Editor and Publisher of the 'Mahratha' newspaper, requiring him to shew cause, if any he has, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an [241] article published by him on pages 349, 350 and 351 of the issue of the said newspaper dated the 26th July 1908 containing certain contemptuous and defamatory matters of and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the following passages printed and published in the said newspaper.

It is ordered that the said Narsinha Chintaman Kelkar do appear before this Honourable Court on Wednesday next the 23rd of September 1908 to show cause why

(1) [1900] 2 Q. B. 36 at p. 39.



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he should not be committed in respect of the said article. And it is further ordered that this rule be served on the said Narsinha Chintaman Kelkar through the District Court of Poona.

At the hearing Mr. Kelkar put in the following affidavit:—

I, Narsinha Chintaman Kelkar, of Poona, Hindu inhabitant, at present temporarily residing at Sardar Grah, Esplanade Road, outside the Fort of Bombay solemnly affirm and say as follows. I am a regular resident of Poona and have no permanent residence or fixed place of abode in Bombay and have come to Bombay to answer the rule issued against me. I am the editor and publisher of the 'Mahratha,' weekly paper printed and published in Poona. I am not the proprietor or manager of the paper. I admit that I wrote the article forming the subject-matter of the present notice and accept full responsibility for the same. I followed the course of the trial keenly as a personal friend of Mr. Tilak and wrote the article immediately after his conviction and hence there is a certain amount of feeling in it, but I say that in writing the article I had no desire and no intention whatever to scandalise this Honourable Court or any of the Judges thereof or to defame the Honourable Mr. Justice Davar or any other Judges of this Honourable Court. I had also no desire and no intention to interfere in any way with or obstruct the course of administration of justice. The article was written after the whole trial was finished. I honestly and conscientiously believed myself called upon as a journalist to comment on certain features of the case and to offer certain expostulations about certain things said and done in the course of the case and also to protest against certain extrajudicial expressions of opinion which, I felt, did not do justice to the character and motives of Mr. Tilak. I wrote the article in the discharge of what I believed to be my duty as a journalist and an exponent of public opinion so far as I could claim to voice it. The article was intended as a fair and legitimate comment on a matter of public interest and nothing more. With this explanation of my motives and intention and the circumstances under which the article was written, I place myself unreservedly in the hands of this Honourable Court.

On 23rd September the Rule came on for hearing.

*Baptista*, to show cause:—I will divide my arguments into two parts: (1) Did the publication of the article constitute contempt of Court? And (2) if it did, was it necessary in the [242] interests of administration of justice that the Court should exercise its power to commit for contempt on the present occasion?

(1) The law is that so long as a case is pending no one can say or do anything which may be calculated to interfere with the course of administration of justice, but once the case is over both the Judge and the Jury are handed over to public criticism. The comments made on Mr. Justice Davar are criticisms upon him in his personal capacity. The writer has drawn distinction between the Judge as a Judge and the Judge in his personal capacity. Comments on a Judge in his personal capacity came within the rule laid down in *In the Matter of a Special Reference from the Bahama Islands* (1). Comments on Mr. Justice Davar as Judge do not exceed fair and legitimate criticism. There is no intention to vilify or bring the Court into contempt. We expressly repudiate any such intention in our affidavit. There is no word of aspersion on the integrity of the Judge. There is an amount of feeling imported in the article, because Mr. Kelkar is Mr. Tilak's personal friend and associate for many years, and wrote the articles under the influence of a great feeling.

(2) The power of committing a person for contempt is very sparingly exercised by Courts; it has almost become obsolete in England: see *McLeod v. St. Aubyn* (2). It has always been exercised in the interests of the administration of justice only; see *Dallas v. Ledger* (3). In this case there was no interference with administration of justice in any way, and

(1) [1893] A. C. 188.

(2) [1809] A. C. 549.

(3) (1888) 4, T. L. R. 492. at p. 494.



committal for contempt is therefore not necessary to promote due administration of justice.

*Jardine* (officiating Advocate-General) in support of the rule:—The article in question suggested that the Court was deliberately partial in the trial of the Tilak case; that the Judge was acting in collusion with the Government in hurrying the trial to a conclusion; and that the Judge deluded Mr. Tilak by protestations of his desire to protect Mr. Tilak's interest into a false security [243] which disappeared when the proceedings came to an end. Mr. Kelkar was up to the last time given an opportunity by your Lordships to express his regret but he has not availed himself of it. He must, therefore, be taken to be prepared to stand or fall by what he has written in his paper. He has directly challenged the purity of the Court. For the purpose of contempt of Court it is immaterial to consider whether the comments were made on Mr. Justice Davar as a Judge or as a gentleman. Whatever Mr. Justice Davar did or said was in his judicial capacity and in no other capacity. The Press has a full right to criticise a trial after it is finished, but the criticism should be couched in proper terms and no derogatory expressions should be used in connection with the presiding Judge. The decision in *In the Matter of a Special Reference from the Bahama Islands* (1) does not apply. The Judge there did something that was extra-judicial. In the article in question the writer has made statements which go to show that the administration of justice in the High Court is not pure.

SCOTT, C. J.—On the 16th September, we granted a rule, at the instance of the Advocate-General, calling on Narasinha Chintaman Kelkar, as editor and publisher of the "Maharatta" newspaper, to show cause why he should not be committed, or otherwise dealt with according to law for contempt of Court in respect of an article published by him in the issue of the said newspaper of the 26th of July 1908, containing certain contemptuous and defamatory matter of, concerning Mr. Justice Davar, one of the Judges of this Court. The accused has put in an affidavit in which he admits that he wrote the article, but defends it as fair and legitimate comment, on a matter of public interest (namely, the trial of Bal Gangadhar Tilak) written after the trial was finished in the discharge of his duty as a journalist.

The article, which is in English and divided into seven paragraphs, suggests very plainly in the third paragraph that at the trial the conviction of the accused was secured by Government by the collusion of the presiding Judge; that the Judge, in allowing [244] only half an hour for the midday adjournment realized the importance of finishing the trial on the day before the Indian Budget debate in Parliament, and that by means of significant hints to the Advocate-General, and unusual haste in closing the proceedings the net was woven around the life of the accused surreptitiously, in the closing vesper hours. These suggestions appear to rest upon no more solid basis than the fact that, as happens from time to time in criminal trials in the High Court, the sitting was prolonged after the usual hour of rising on the last day of the trial in order to finish the case that evening.

In the fifth paragraph of the article the honesty of the Judge is again the subject of attack. He is said to have been guilty of affectation in the solicitude he expressed for the accused during the trial and that when the moment for the charge to the jury had arrived, everything was changed,

(1) [1893] A. C. 138.

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for as soon as the Judge had found his liberty of speech, he made every point against the accused, taking upon himself to bestow a one-sided and adverse treatment on the incriminating articles and trying to make the case more complete for the prosecution, than the Advocate-General himself had done, by ferreting out hidden words and hidden innuendoes, which

were never touched by counsel for the Crown. We have had occasion recently to examine the proceedings at the trial on the application of the accused for leave to appeal to His Majesty in Council, and we consider that there is no justification whatever for such remarks.

In the sixth paragraph of the article the writer states that he is going to blame Mr. Davar the gentleman and not Mr. Davar the Judge, and then proceeds to discuss certain remarks of the Judge uttered in his judicial capacity when passing sentences; referring to the Judge as a medical quack in a red robe, as an enemy of the accused, privileged to sit upon the Bench, as an impudent glow-worm holding his torch to the Sun.

Counsel for N. C. Kelkar has not attempted to justify the passages to which I have referred, but has claimed that a Judge after the trial is over, is handed over to criticism and that the article amounts to criticism and nothing more. In my opinion the article far oversteps the bounds of fair criticism. It attacks [245] the independence and honesty of the Judge without any justification and indulges in scurrilous abuse of him in his character of a Judge presiding at the Criminal Sessions of this Court.

I can make no remarks on this case more appropriate than those contained in the following passages from the judgment of the Lord Chief Justice of England in *Reg v. Gray* (1).

"It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge...It cannot be doubted...that the article does constitute a contempt of Court...Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court...Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested.. or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge. We have therefore to deal with it...*brevi manu*."

The position of N. C. Kelkar has not been improved by the defiant attitude taken up by counsel upon his instructions. Although every opportunity was given to him to submit and apologise, it was stated to the Court that he thought it more manly and straightforward to wait and see whether the Court found him guilty before offering any apology or submission.

This is a very serious case and must be met by a suitable sentence not only as a punishment for this particular contempt, but also as a warning to other persons.

[246] BATCHELOR, J.—The article in respect of which this rule was granted, appeared in the English language in the respondent's newspaper, the "Mahratta." The article itself proves, and Mr. Baptista has admitted

(1) [1900] 2 Q. B. 36 at p. 89.



before us, that the respondent is perfectly familiar with English. The only question, therefore is, as to the meaning of the article, read as a whole and construed as it would be construed by the ordinary reader. Upon the best consideration that I can give to the article, I am clear that it constitutes a gross instance of that form of contempt of Court, by which, as it is said, the Court is scandalised. Nor is any serious attempt made to disguise this meaning. After a preparatory paragraph of no special consequence the writer proceeds at once to his thesis, and observes that "in the first place they (the public) will know that value to attach or what sense to apply to the expression that Mr. Tilak got a fair trial." Then after other allusions to the "unfairness of the trial," the writer promises to speak later of "the unfairness of the Judge." He keeps his promise in the succeeding paragraphs, which abound in scurrilous references to the "mockery of a trial," to the "affectation" of the Judge, who is represented as concealing his hostility to the prisoner until the time came to charge the jury when, we are told, he laboured, by a one-sided and adverse treatment of the articles, and by ferreting out hidden words and innuendoes unnoticed by the Advocate-General, to make the case for the prosecution more complete than Counsel for the Crown had made it. I entirely agree with that part of Mr. Baptista's address in which he insisted that, upon the conclusion of a trial, the Judge is handed over to criticism; but in my opinion, such writing as this is not criticism and is entirely beyond the reach of the argument. I agree, too, that the Court should ordinarily be slow to punish for contempt, especially where there is any ground for hope that the common sense of the many will correct the extravagance of an individual; but here I cannot doubt, that the unchecked dissemination of such views as are stated in this article, would tend to create the opinion which the respondent has expressed in his newspaper, though he does not maintain it in this Court. For among large numbers of the less instructed people of this country the groundlessness of an opinion is no obstacle to its prevalence; and it [247] is plain that nothing could well be more prejudicial to the administration of justice than the prevalence of such opinions as the respondent has published broadcast for the acceptance of the readers of his paper. As to the distinction which it was sought to establish, both by the respondent in his article, and by his counsel in argument, between the personal and judicial character of the Judge, I am of opinion that no such distinction exists, inasmuch as whatever was done and said by Mr. Justice Davar at the trial, was done and said by him in his judicial capacity alone.

Despite the force of these considerations, we hoped, up till the end of the hearing, that we might be able to extend to the respondent the same clemency which we had shown to similar offenders connected with another journal, but the respondent has put it out of our power to follow this course by the contumacious attitude which he has elected to adopt. In reply to questions and suggestions from the Bench, Mr. Baptista informed us that he had no instructions to express apology or regret, and that his client desired him to leave the matter to the Court on that footing. That being so, I think that we have no option but to mark our sense of the respondent's misconduct by the imposition of substantial punishment. The only circumstances of mitigation which I am able to discover are that the trial had concluded when the article was published and, as I am prepared to believe, that the respondent was partly misled by

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his friendship for the prisoner. On the other hand, it must be remembered that the respondent is himself a Pleader, and could scarcely have failed to realise what mischief would follow from such language as he has employed, language which strikes at the root of all respect for the Court and its authority. It must be understood that this is the ground upon which the Court is acting, and not from any desire to vindicate Mr. Justice Davar from the respondent's misrepresentations. It is in the interests of the due course of justice, and of the authority of this Court, that I conceive it to be our clear duty to take notice of respondent's misconduct. I have said that there has been no expression of regret; and that obliges me to go a little further and notice specifically the position taken by the respondent in [248] this Court. When definitely questioned upon the matter, Mr. Baptista, so far as I was able to understand him, said that his client considered it would be more honest or manly to defer any expression of regret until the Court had pronounced its judgment. The plain English of this seems to be that the respondent will wait till other means of escaping punishment have proved unavailing, before he considers the desirability of expressing regret for his misconduct. That is a course in which I can see some indication of policy; but its connection with manliness or honesty is certainly remote.

For these reasons I agree with the order (1) to be made.

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(1) The order made by the Court was as follows:—

Whereas by an order dated the 16th day of September 1908 stating that on reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay sworn on the 12th day of September 1908, and after hearing the Advocate-General of Bombay who applied that a Rule Nisi should be issued against the abovenamed Narsinha Chintaman Kelkar requiring him to show cause, if any he have, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an article published by him on pages 349, 350 and 351 of the issue of the newspaper entitled "The Mahratta" and dated the 26th July 1908, containing certain contemptuous and defamatory matters of, and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the passages set out in the said order. It was ordered that the said Narsinha Chintaman Kelkar should appear before this Honourable Court on Wednesday the 23rd day of September 1908 to show cause why he should not be committed in respect of the said article, and the said Narsinha Chintaman Kelkar attending this Honourable Court on the 23rd day of September 1908 pursuant to the said order, and the affidavits and exhibits filed in the matter being read and upon hearing Mr. Baptista of Counsel for the said Narsinha Chintaman Kelkar and the Honourable the Advocate-General of Counsel and this Court, after taking time to consider the matter, being of the opinion that the said Narsinha Chintaman Kelkar has, by publishing the said article in the said issue of the said newspaper, been guilty of a contempt of this Honourable Court, Doth Order that the said Narsinha Chintaman Kelkar do pay a fine of Rs. 1,000 and a further sum of Rs. 200 for costs and do stand committed to His Majesty's Common Prison at the Criminal Side for a period of 14 days from the date hereof and for such further term as may elapse until the said fine and costs imposed upon him by the said order have been paid and until he shall have made suitable submission and apology to this Court.



33 B. 249 (=2 I. C. 284=10 Bom. L. R. 1163).

## [249] APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*GANGASHANKAR PRABHASHANKAR, *Plaintiff*, v. BADHUR  
MADHBHAI AND OTHERS, *Defendants*.\*

[15th October, 1908.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 7 (†)—Defendant summoned for examination—Payment of batta.*

It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it.

CIVIL reference under section 617 of the Civil Procedure Code (Act XIV of 1882) by J. N. Bhatt, Subordinate Judge of Borsad, in the Ahmedabad District.

The plaintiff filed a suit against Badhur Madhbhai and others in the Court of the Subordinate Judge of Borsad in its Small Cause Jurisdiction. The defendant being an agriculturist, section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was applicable and an agriculturist summons was ordered to be issued according to Form LXXXVIII at page 201 of the High Court Civil Circulars. The form was prepared in conformity with the provisions of section 7 of the Dekkhan Agriculturists' Relief Act which requires that in every suit the defendant shall be examined as a witness. The plaintiff was required to pay *batta* [250] for the attendance of the defendant as a witness and he refused to pay it on the grounds that there was no provision in the Civil Procedure Code (Act XIV of 1882) to compel a party to pay *batta* to a witness not summoned at his request, and that it was not necessary at all to pay *batta* to a defendant for being examined by the Court. Owing to the said contentions the Subordinate Judge submitted the following questions for an authoritative determination :—

"(1) Whether it is necessary to pay *batta* to an agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act ?

"(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it ?"

The opinion of the Subordinate Judge was in the affirmative on the first question and in the negative on the second question for the following reasons :—

As regards the first question, I have the honour to observe that there are sections in the Civil Procedure Code (Proviso to section 36, section 66, section 120, which authorise

\* Civil Reference No. 4 of 1908.

(†) Section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

7. *Summons to be for final disposal of suit* :—In every case in which it seems to the Court possible to dispose of a suit at the first hearing, the summons shall be for the final disposal of the suit.

*Court to examine defendant as witness* :—In every suit the Court shall examine the defendant as a witness unless, for reasons to be recorded by it in writing, it deems it clearly unnecessary to do so.

*Explanation* :—The compulsory examination of the defendant shall not be dispensed with merely by reason of the fact that the defendant has filed a written statement.

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a Court to direct that a party shall appear in person. But the consequences of non-appearance or dismissal of the suit of the plaintiff are a decree against the defendant or some lesser punishment affecting his interest in the suit (section 107). But there seems to be no provision in the Code that a party's presence shall be enforced by arrest, or proclamation or attachment of property just as there is provision to enforce the presence of a witness summoned to give evidence or produce a document, by warrant, proclamation or attachment (sections 168, 169, 174) if he fails to appear in response to the summons. In this connection the difference between the form of summons to a witness to give evidence (Form No 125, Sch. IV, Civil Procedure Code) and the forms of summonses to a person for examination under section 267 (Form XIII at page 167, High Court Civil Circulars) and to a party for examination under section 287 (Form XXVI at page 169, High Court Civil Circulars) may be noted. In the former there is a penal clause drawing the witness's attention to the consequences of non-attendance whereas the latter two forms are silent as to the consequences. This difference in the forms indicates that the appearance under the latter two summonses is not obligatory and supports the view that there is no provision in the Code to enforce the presence of a person summoned otherwise than as a witness. If this view is correct, as I think it is, it is necessary for a Court if it has to secure the appearance of any person, be he a party to the suit or not, to issue a witness summons in the first instance. I am humbly of opinion that the Legislature had in mind this view [251] of the law when it enacted in section 7 of the Dekkhan Agriculturists' Relief Act that the defendant shall be examined as a witness. The words italicised have reference to the procedure to be adopted in securing the defendant's presence.

Whether a party ordered to appear in person and failing, can be proceeded against under section 174, Indian Penal Code, depends on the question whether the process was compulsory. A party failing to appear under the proviso to section 96 or section 66 cannot in my opinion be proceeded against criminally. Even if we assume that a party can be so proceeded against, liability to be criminally tried does not serve the direct purpose of the Court, which is to require his presence for examination. Unless the Court can issue a warrant for arrest, the presence cannot be enforced and for this purpose it becomes necessary to issue a witness summons in the first instance.

The point however does not seem to be free from doubt. For it may be argued contrary to what has been said above (1) that notwithstanding the absence of express provision as to issue of warrant in cases other than those of defaulting witnesses, a Court has inherent power to enforce its process and that the absence of such power would render the issue of summonses under sections such as sections 148, 267, 287, a futile procedure, as is not infrequently the case when a defendant is ordered to appear under section 237; (2) that section 171 seems to imply that it is not necessary to summon a party as a witness if the Court desires to examine him the words being "if the Court at any time thinks it necessary to examine any person other than a party to the suit, &c."

The next question is whether the plaintiff can be called upon to pay the *batta*. In the first place, the duty under section 7 of the Dekkhan Agriculturists' Relief Act, is imposed on the Court and not on the party. So it appears awkward that the Court of Justice should demand from the plaintiff *batta* to accomplish that which the Legislature requires of the Court. Besides to push the interests of an agriculturist to the extent of enforcing his presence in Court at the plaintiff's expense could hardly have been contemplated by the Legislature. In the second place, under the Civil Procedure Code, *batta* can be demanded from a party only if a witness summons is issued at his instance (section 160). No doubt, there are the words "subject to the rules of the Code, &c." in section 171; but they could not have been meant to make any party pay the *batta* of a Court witness. Much less, can a Court by examining a party under section 7, Dekkhan Agriculturists' Relief Act, impose on the plaintiff a liability to pay *batta* to the defendant, for section 178 must be read in conjunction with section 160. Thirdly, there would have been no necessity for such resolution as is referred to in Circular 27 of the High Court Civil Circulars at p. 13, if a party were to be made liable for *batta* of a Court witness. For all these reasons I think that a plaintiff is not liable to pay the *batta* and that his suit cannot be dismissed on failure to pay it.

This question again does not appear to be free from doubt, as it is arguable from an opposite point of view as under :—

[252] 1. In section 267 of the Civil Procedure Code, there is an indication of Court's power to throw on any party the expenses of a summons to be issued by it of its own motion. The last words of the section are "and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued."



2. Though the High Court Civil Circulars at p. 13 shows that advances are to be made by Government in the first instance, they are to be refunded under the Circular from the amount realised in execution. This means that one of the parties is ultimately to bear the expenses of summons issued by the Court of its own motion. Why not then, should the expenses be borne at the commencement in such a case as the present?

*G. N. Thakore (amicus curiæ)*, for the plaintiff.

*N. K. Mehta (amicus curiæ)* for the defendants.

SCOTT, C. J. :—The two questions referred for our opinion are :—

(1) Whether it is necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?

We answer both questions in the negative.

*Order accordingly.*

33 B. 252 (=2 I. C. 264= 10 Bom. L. R. 1169.)

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY, *Applicant*,  
v. JAGANNATH MORESHAVAR SAMANT, *Opponent*.<sup>\*</sup>  
[16th November, 1908.]

*Bombay Regulation II of 1827, section 56 (†)—Pleader—Misbehaviour—Suspension of Sanad—High Court's disciplinary jurisdiction.*

Pleaders are a privileged class enrolled for the purposed of rendering assistance to the Courts in the administration of Justice. Their position, training [253] and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Bombay Regulation II of 1827).

[Ref: 37 Bom. 354; 71 I. C. 81=35 C. L. J. 356=26 C. W. N. 539=19 Cal 732=24 Cr. L. J. 33.]

APPLICATION of the Government Pleader, Bombay, under section 56 of Bombay Regulation II of 1827, for the exercise of the High Court's disciplinary jurisdiction against the opponent with reference to his conduct.

The opponent, who practised as a pleader in the Sholapur District, presided at a public meeting held at Sholapur on the 30th July 1908 to express sorrow for and sympathy with Mr. Tilak for the punishment awarded to him by the High Court of Bombay at a trial in one of the Criminal Sessions in the year 1908. One of the resolutions passed at the meeting reflected upon and denounced the conduct of the Judge who presided at the trial. The Government Pleader of Bombay, thereupon, applied for and obtained a *rule nisi* requiring the opponent to show cause

\* Civil Application No. 523 of 1908.

(†) material portion of section 56 of regulation II of 1827 is as follows :—

A pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed.

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why he should not be dealt with under the disciplinary jurisdiction of the High Court in respect of his conduct at the meeting in connection with the said resolution.

*H. C. Coyaji* (with *G. S. Mulgaumkar*) appeared for the opponent to show cause :—We offer absolute and unqualified apology for our conduct. On the merits we submit that we have filed two affidavits which show that the facts were a little different from those mentioned in the affidavits in support of the application. We contend that the term "Misbehaviour" in section 56 of Regulation II of 1827 refers only to professional misconduct in Court.

*M. B. Chaubal*, Government Pleader, in person :—The opponent's conduct complained of is not only a misbehaviour, but it is a criminal offence, inasmuch as it constitutes a contempt of Court.

The fact that the opponent put up the resolution to the meeting is in itself evidence of misbehaviour.

[254] SCOTT, C. J. :—This matter comes before us on the petition of the Government Pleader which states :—

(1) That Mr. Jagannath Moreshtar Samant, B. A., LL. B., is a District Court Pleader, and practises in the Courts of the District and Sessions Judge of Sholapur and Courts subordinate thereto.

(2) That on the 30th July last a public meeting was held at Sholapur for the purpose of expressing sorrow for and sympathy with Mr. Tilak for the punishment awarded to him, at which nearly a thousand persons attended.

(3) That Mr. Jagannath Moreshtar Samant, Pleader abovenamed, presided at the said meeting and among other things spoke in favour of the 5th resolution passed on the occasion and was in the chair when the said resolution was put to the meeting. The said resolution was in the Marathi language and was to the following effect:—"That this meeting contemptuously denounces the Honourable Mr. Justice Davar of the Bombay High Court, who at the time of announcing sentence made unchecked and unconnected and unmeaning assertions, which even the enemies of the respected Tilak would have been ashamed to make, and thereby branded our sorrow (sore hearts)".

(4) Petitioner submits that such conduct at a Public Meeting in a Pleader in regard to a resolution contemptuously denouncing a Judge of the High Court in respect of his solemn duty as a presiding Judge is not only contempt of Court, but is further reprehensible as a misbehaviour falling within the purview of section 56 of Regulation II of 1827, and as such can and ought to be dealt with by this Honourable Court in its Disciplinary Jurisdiction.

The petition is supported by affidavits of Mr. Barve, Deputy Superintendent of Police and Mr. Dikshit, Sub-Inspector, Police, Sholapur

In showing cause against the application two affidavits were made use of by counsel for Mr. Samant from which it appears that he did not speak on the 5th resolution beyond asking if there was any objection to it. The Police Officers despose to [255] words used by him defamatory of Mr. Justice Davar, but this is denied by Mr. Samant; we will therefore assume that they were so used.

It is admitted that Mr. Samant presided at the meeting, opened the proceedings with a speech and proposed the first two resolutions. He then called on other speakers to propose the other resolutions and took the sense of the meeting upon them. He attempts to excuse his conduct



by pleading that he did not know exactly the terms of the fifth resolution until it was read out by the proposer. It is clear, however, that he not only listened to the speeches on the resolution and to the reading of the resolution without protest but also read out the resolution himself to the meeting and invited it to agree to the terms thereof.

We are of opinion that in so conducting himself at the meeting Mr. Samant was guilty of misbehaviour which renders him liable to suspension or removal from the roll of pleaders. Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. Mr. Samant, who owes his position to a Sanad issued by this Court, has invited and procured the passing at a meeting of nearly a thousand people of a resolution contemptuously denouncing or protesting against the conduct of a Judge of this Court in passing sentence at a trial at the Criminal Sessions.

This conduct calls for more serious notice than a mere expression of disapproval. We suspend Mr. Samant from practice for six months. He must deliver up his Sanad to the District Judge or the Registrar of this Court and may apply for it again in six months' time.

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33 B. 256 (=2 I. C. 283=10 Bom. L. R. 1197.)

[256] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

SUNDRABAI SAHEB (Original Opponent No. 8), Appellant, v. THE  
COLLECTOR OF BELGAUM (Original Petitioner),  
Respondent.\*

[17th November, 1908].

*Practice—Taxation—Pleader's fees—Appeals in Probate Proceedings—Scale of costs—  
Act 1 of 1846, sec. 7.*

The taxation of pleader's fees in appeals from probate proceedings, should, according to a long standing practice of the High Court of Bombay, be valued at Rs. 30.

APPEAL from an order passed by E. Clements, District Judge of Belgaum.

The Collector of Belgaum as executor of the will of one Lingappa Jayappa, applied to the District Court of Belgaum, for a probate of the will. In this proceeding, Sundrabai (widow of Lingappa) was joined as opponent No. 8. This Sundrabai was a minor; and the Deputy Nazir was, therefore, appointed her guardian *ad litem*.

Against this order, Sundrabai, represented by one Dayagowda as her guardian, appealed to the High Court.

This appeal was dismissed by the High Court; and the respondent's costs were ordered to be paid by Dayagowda, the guardian of the minor.

In taxing the bill of costs, the office taxed the pleader's fees at Rs. 30, in obedience to a long standing practice in the High Court. The respondent's pleader objected to this taxation and contended that the pleader's fee should be assessed on one-fourth the amount of fees due on

\* First Appeal No. 26 of 1908.



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the whole subject-matter of the probate petition, *viz.*, Rs. 6,08,024 under the proviso to section 7 of Act I of 1846.

The Taxing Officer was of opinion that pleader's fee was rightly taxed at Rs. 30.

The respondent's pleader thereupon applied to the Court.

*D. A. Khare* for the appellant.

The Government Pleader for the respondent.

[257] CHANDAVARKAR, J. :—The question of law raised in this case by the learned Government Pleader relates to the valuation of Pleader's fees in proceedings for probate. The Collector of Belgaum having applied to the District Judge for probate in respect of the will of Lingappa Jayappa Sir Desai of Navalgund, caveats were entered by or on behalf of several persons, one of whom was the deceased's widow. As she was a minor, the Collector applied to the District Judge for the appointment of a guardian *ad litem*. The Judge having by an order appointed the Deputy Nazir of his Court, an appeal was filed in this Court against that order by Dayagowda Leegowda Patil, who described himself as guardian of the minor. The appeal was heard and the order was confirmed with costs, which were directed to be paid by the guardian. The Registrar's office having valued the Pleader's fees at Rs. 30 as part of the costs, according to a long-standing practice of this Court, the learned Government Pleader, who had appeared in the appeal for the Collector of Belgaum, objected to the valuation, and contended before the Taxing Officer that the Pleader's fees should be calculated in accordance with the last clause of section 7 of Act I of 1846.

The point has been urged before us and its determination depends upon the question whether probate proceedings, both original and appeal, fall within the meaning of a "regular suit" so as to come within the purview of section 7 of Act I of 1846. The learned Government Pleader contends that they are and relies upon section 83 of the Probate Act (V of 1881). The language, however, of that section is far from lending support to the contention. The section does not say that proceedings for probate are "a regular suit" or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure." This would show that probate proceedings do not, under the ordinary law, fall within the description of a "regular suit"; it is by virtue of section 83 that they are brought within that category; and they are so brought, not in point of fact but only in point of *form*, for the limited purpose of applying to them "as nearly as may be" the provisions [258] of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a testamentary suit. That the Legislature intended the difference to exist is apparent from the special provisions in the Court Fees Act (VII of 1870) for the valuation of Court fee in the case of an application for probate, as distinguished from a suit. As section 83 of the Probate Act brings a probate proceeding within the description of a suit by means of a statutory fiction the purposes of which are expressly limited to the provisions of the Code of Civil Procedure, we think we should be extending the scope of that fiction beyond its legitimate limits if we were to allow the argument of the learned Government Pleader. We hold, therefore, that the long standing practice of the Court as regards the valuation of Pleader's fees in probate proceedings should continue.



33 B. 258 (=2 I. C. 271=10 Bom. L. R. 1201).

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

AMARSANG MAVSANG (*Original Defendant*) Appellant, v. JETHALAL  
MAGANLAL AND OTHERS (*Original Plaintiffs*), Respondents.\*  
[17th November, 1908.]

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*Toda Giras Allowance Act (Bom. Act VII of 1887), section 5†—Toda Giras allowance—Attachment and sale of, in execution of a decree—"Money likely to become due," interpretation—How far can the allowance be attached and sold.*

The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance, which the latter was entitled to receive periodically from the Mamlatdar's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda* [359] *giras* allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree:—

*Held*, reversing the order, that it is clear from the language of section 5 of the *Toda Giras Allowance Act* (Bombay Act VII of 1887) that it is not the life interest of the judgment-debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached.

The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

APPEAL from the decision of A. C. Wild, District Judge of Ahmedabad, confirming the decree passed by B. J. Desai, Subordinate Judge at Kaira.

## Proceedings in execution.

There was a money decree passed in favour of Jethalal Maganlal against Amarsang Mavsang. In execution of this decree, the decree-holder applied for attachment and sale of the *toda giras* allowance of Rs. 303 payable every year to the defendant from the Mamlatdar's Kacheri at Mehmabad. The allowance sought to be attached was that which was to become payable to the defendant during the following twenty years.

The defendant contended that the *giras* allowance could not be attached and sold; that the allowance for twenty years which the decree-holder sought to attach and sell as a debt had not become due; that what was uncertain and dependent upon the pleasure of Government could not be attached and sold; and that the allowance was paid to him for his maintenance.

\* Second Appeal No. 599 of 1907.

† The section runs as follows:—

"No *toda giras* allowance shall be liable to attachment or sale in execution of a decree:

"Provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death."



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The Subordinate Judge overruled the defendant's contentions and allowed the execution to be proceeded with. His reasons were stated as follows :—

It appears that the allowance in question is of a nature of a *toda giras* allowance (see the copy of the agreement, condition 1). In the case of the *Secretary of State v. Khemchand*, I. L. R. 4 Bom. 432, it has been held that a *toda giras* [260] *hak* is not exempted from attachment. Sections 5 of Act VII of 1887 (Bombay) exempts the *toda giras* allowance from liability to attachment and sale in execution of a decree but provides that any money due or likely to be due to a judgment-debtor may be attached in execution of a decree against him. It is thus evident that the money likely to be due to the judgment-debtor is expressly declared liable to attachment. I am, therefore, of opinion that the decree-holders in this case have a right to proceed in execution against the moneys likely to be due to the judgment-debtor on account of the *toda giras* allowance.

On appeal this order was confirmed by the District Judge on the following grounds :—

A 'giras' allowance which is a vested right and only to be discontinued under certain conditions is not a merely contingent or possible right or interest and section 266 (k), Civil Procedure Code, and the definition of contingent interest to be found in section 21 of the Transfer of Property Act do not come in the decree-holder's way.

It is admitted by appellant's pleader that this is a *toda giras* allowance but the ruling in I. L. R. 4 Bom. 432 of 1880 that a *toda giras* allowance is not exempted from attachment is of a date prior to the enactment of Act VII of 1887. Section 5 of this Act shows that the whole allowance is not attachable, but the proviso to the section permits cash payments likely to be due to the judgment-debtor until his death to be attached. Accordingly the 20 annual cash payments which will certainly be paid to judgment-debtor unless he first dies may be attached by the decree-holder.

In Government Resolution No. 3136 of 5th April 1906 the Legal Remembrancer expresses the opinion that the sale of a giras allowance for some years in execution of a decree is allowable under sections 268 and 284, Civil Procedure Code, but it is argued that a debt to be attached under that section must be one that is actually due not, as here one that became due from year to year. Here reference is made to I. L. R. 27 Cal. 38 and 14 Moore's Indian Appeals 40. In the first of these rulings it is laid down that the debt must be an actually existing debt not merely money that may or may not become payable at some future time; in the second it is held that the sum attached must not be inchoate but existing and definite. The liability of Government to pay the giras allowance is an existing liability though the allowance is to be paid in the future and annually. There is no uncertainty about the payment, and I, therefore, hold that the allowance comes within the definition of debt in Civil Procedure Code, section 266, and may be attached under section 268, Civil Procedure Code.

It is urged that to allow the sale of the allowance would be contrary to public policy as it is given to its recipient for services to be rendered to Government in keeping the peace and preserving order. It would appear however that the allowance is of the nature of compensation to free booters for the loss of the black-mail which they used to levy, *vide* I. L. R. 4 Bom. 432. The [261] girasia in the sanad exhibits 13 and 14 binds himself not to plunder, and to serve Government if called upon. I understand however that no service is now required from the holders of giras allowances, and they certainly in no case will be allowed to plunder. It will therefore not be impossible to permit the present allowance to be attached.

The judgment-debtor appealed to the High Court.

*T. R. Desai* for the appellant :—A *toda giras* allowance is payable on certain conditions according to the terms of the sanad conferring it. The Government have always a right to demand services from the grantee. It can be revoked at any time: it is not certain and definite and the continuance of the allowance in future is not a matter of right. It is not a debt within the meaning of section 266 of the Civil Procedure Code; and so the amount that will accrue due during the next twenty years cannot be attached and sold. Refers to *Haridas Acharjia v. Baroda Kishore*



*Acharjia* (1); and *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (2).

Section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887) expressly excludes the right from attachment and sale. There may be attachment of what is actually due; but what is yet to become due in the future cannot be attached. The words "likely to become due" in the section should be strictly construed having regard to the nature of the allowance and the policy of the statute.

*V. G. Ajinkya* for the respondent:—The right to receive allowance is a right pertaining to the judgment-debtors. It is definite and regularly payable. The right is not within the proviso of section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887).

CHANDAVARKAR, J.:—The respondents, having obtained a decree for money against the appellant, applied for its execution by sale of the *toda giras* allowance which the appellant was entitled to receive periodically from the Mamlatdar's Kacheri at Mehmabad. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the appellant during the twenty years following the application. [262] The appellant resisted the prayer upon the ground that the allowance could not be attached and sold, whether under section 266 of the Code of Civil Procedure or under section 5 of Bombay Act No. VII of 1887. This objection to the attachment and sale has been disallowed by both the Courts below.

Section 5 of Bombay Act VII of 1887 enacts that "no *toda giras* allowance shall be liable to attachment or sale in execution of a decree, provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death." The words "likely to become due" in this section have been construed by both the lower Courts to apply to the life-interest of the holder of a *toda giras* allowance. Accordingly they have held that such life-interest, computed at its valuation for 20 years, can be attached and sold in execution of a decree against the holder.

The difficulty in accepting this view of the lower Courts lies in the difference in point of language between section 5 and the preceding section. The latter (section 4 of the Act) provides that "no mortgage, charge or alienation of a *toda giras* allowance, or of any part thereof, or of any interest therein, by any recipient of the same, shall be valid as to any time beyond such recipient's natural life." That is, a private alienation by the recipient shall be valid to the extent of his life-interest but not beyond it. If the Legislature had intended the same to be the case as regards an alienation by way of attachment and sale in execution of a decree, similar phraseology would have been used in section 5. Nothing could have been simpler in that case than for the Legislature to have said in section 5 that such attachment and sale shall not be valid beyond the natural life of the holder of the allowance. But so far from using any such language, which would have been apt to show that that was their intention, the Legislature have used language in the enacting part of section 5 which prohibits in absolute terms the attachment and sale of a *toda giras* allowance in execution of a decree; and then in the proviso which follows they make an exception in the case of

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(1) (1899) 27 Cal. 38.

(2) (1871) 14 Moo. I. A. 40.



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[263] "moneys due or likely to become due" to the judgment-debtor. But even as to such moneys the proviso says that the right to attach and sell in execution of a decree shall fail if they become due on account of such allowance "after such judgment-debtor's death." The meaning of this is obvious. Suppose, to take one of several cases that might be put in illustration, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction; the judgment-debtor, however, dies before that date. Now, under the ordinary law, notwithstanding the death, when the date fixed for payment arrives, the money would become payable to the estate of the deceased as part of his assets, and it could be attached in execution of a decree against him, as a portion of his life-interest in the allowance. But the proviso to section 5 alters the ordinary law and provides that even in such a case there shall be no attachment.

It seems clear from this language of section 5 that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must, therefore, be restricted to such a case as the one we have mentioned above in illustration and other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

For these reasons we must reverse the decree appealed from and remit the present darkhast for disposal according to law with reference to the foregoing observations. Costs to abide the result.

*Decree reversed.*

33 B. 264 (=2 I. C. 268=10 Bom. L. R. 1206).

[264] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

SUBRAYA VITHAL NAIK (*Original Defendant No. 1*), Appellant, v.  
NAGAPPA SUBBAYA SHANBHOG AND OTHERS (*Original Plaintiff  
and Defendants Nos 2 to 4*), Respondents.\*  
[23rd November, 1908.]

*Hindu law—Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil Procedure Code (Act XIV of 1882), section 276.*

When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kanara, amending the decree passed by K. R. Natu, Subordinate Judge at Kumta.

One Anant Subbaya (defendant No. 2) and his two sons Martu and Anant (defendants Nos. 3 and 4) together constituted a joint Hindu family, which owned an ancestral shop.

A money decree was passed against Waman in a matter which concerned him. In execution of this decree Waman's share in the shop was

\* Second Appeal No. 885 of 1907.



attached on the 8th March 1900 and it was subsequently sold to the plaintiff at a Court sale on the 18th October 1900.

Meanwhile on the 20th August 1900, Waman's father Anant (defendant No. 2) sold the whole shop to Subbaya (defendant No. 1) in satisfaction of a family debt of Rs. 700.

The plaintiff brought the present suit for recovering, by partition, Waman's one-third share in the family shop.

In the first Court, the plaintiff's claim was decreed. The reasons were as follows :—

"The attachment of Waman's one-third share in the shop and its site took place in Darkhast No. 454 of 1899 on the 8th March 1900. The sale to defendant 1 took place on the 20th August 1900. It is not denied and does also appear from the deposition of defendant 2 that the shop and its site form part [265] of the ancestral property of defendants 2 to 4. Hence evidently defendant 4 had a third share in it. The sale to defendant 1 of the attached third share in the shop is illegal, under section 276 of the Civil Procedure Code (*vide* I. L. R. 30 Bom. 337) . . . The sale in respect of the third share of Waman is illegal under the abovementioned section 276 although the Court sale took place on the 18th October 1900 the attachment was effected on the 8th March 1900. Plaintiff Nagappa's claim is enforceable under the attachment as provided in section 276."

On appeal this decree was confirmed by the District Judge with a slight variation.

There was an appeal to the High Court.

*Nilkantha Atmaram* for the appellant :—The provisions of section 276 of the Civil Procedure Code (Act XIV of 1882) do not apply to the sale by the father. The section must be read with section 274 of the Code which expressly prohibits alienations only by the judgment-debtor and forbids any persons from taking transfer from the judgment-debtor. Here the alienor is not the judgment-debtor; and therefore the sale is not affected by section 276.

Further, the father's power of alienation is independent of the sons. In the case of *Mussamut Nanomi Babuasin v. Modun Mohun* (1), their Lordships of the Judicial Committee hold that as a matter of fact the son's vested right by birth is destroyed by the obligation upon him to pay the father's debts.

*S. S. Patkar* for respondent No. 1 :—The son's share in the house was admittedly under attachment at the date of the sale of the whole to the appellant by the father. The effect of the attachment was to arrest the power of the father to make any alienation of it : see *Madho Parshad v. Mehrban Singh* (2). The father's power of alienation is not independent of the son. He cannot alienate it without the authority of the son either express or implied. When the share is once attached, the son himself cannot alienate it much less could the father do so. The attachment constitutes a valid charge on the land : see *Suraj Bunsu Koer v. Sheo Proshad Singh* (3). It prevents even the right of survivorship in the joint family. The attachment under section 276 like the rule of *lis pendens* makes the alienation subservient to the [266] rights of the attaching creditor. The alienation is void as against all claims enforceable under the attachment.

*Sumitra S. Hattiangdi* for respondent No. 2.

CHANDAVARKAR, J. :—Under the Hindu law a father has the right to sell or mortgage ancestral property, including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to

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(1) (1885) L. R. 13 I. A. 1.

(2) (1890) L. R. 17 I. A. 194, pp. 196-

197.

(3) (1878) L. R. 6 I. A. 88.



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dispose of the ancestral property so as to include and affect the shares of the sons arises, according to Hindu law, in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words, when the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him: he is virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu law. When once this principle of Hindu law is grasped, it follows that when the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. And that is so, because, the son's power of alienation having been taken away by the Court, there is no power left in him on which the father's power could rest after the Court's order. For these reasons we think the lower Court is right and its decree is confirmed with costs.

*Decree confirmed.*

33 B. 267 (=10 Bom L. R. 778= 2 I. C. 249).

[267] ORIGINAL CIVIL.

*Before Mr. Justice Knight.*

SHIVAJIRAO MADHAVRAO AND ANOTHER *Plaintiffs*, v. VASANTRAO  
MADHAVRAO *Defendant*.\*

[20th July, 1908.]

*Hindu Law—Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers.*

M., a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5,000. At the time of this release M. had one son living. On this son suing the co-parcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M. had another son born who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

*Held*, that the second son was not entitled to any share in the property.

[Ref. 26 M. L. J. 460=24 I. C. 696; 67 I. C. 210=34 C. L. J. 323.]

ONE Vithoba Mankojee, a Hindu inhabitant of Bombay, and the great-grandfather of the first plaintiff and of the defendant herein acquired considerable moveable and immovable property under the will and codicil of his grandfather Kashinath Bhikhaji. This said will and codicil were afterwards held void and inoperative as dealing with property which was ancestral in the hands of Kashinath Bhikhaji.

Vithoba Mankoji died on the 22nd of April 1873 leaving him surviving one son Kashinath Vithoba and two grandsons Ganpatrao Kashinath and Madhavrao Kashinath. The said Kashinath and his said son and grandsons contracted to live together after the death of the said Vithoba as an united Hindu family joint in food, worship and estate. The first plaintiff and the defendant are the sons of the said Madhavrao Kashinath.

\* Suit No. 424 of 1907.



The defendant was born in 1884. Kashinath Vithoba died on the 23rd June 1901.

On the 20th January 1889 Madhavrao Kashinath became involved in debt and in consideration of his father paying the sum of Rs. 5,000 in settling his debts and for various other [268] considerations executed a release of all his interest in the family property in favour of his father. Ultimately Madhavrao Kashinath became insolvent in or about the year 1892 and by virtue of the vesting order under section 7 of the Insolvent Act all his estate became vested in the Official Assignee.

In 1901, Vasantao Madhavrao, the defendant herein, filed a suit in the High Court of Judicature at Bombay, being Suit No. 423 of 1901, for partition of certain joint and ancestral properties. The Appeal Court at Bombay reversing the decision of Tyabji, J., held that the properties were joint and ancestral and that the said Vasantao Madhavrao was entitled to a half share therein.

The Appeal Court further remarked "Madhavrao has released his share and in answer to an enquiry from the Court it was stated that neither he nor his assignee in insolvency questions the release as against himself. But it follows that the release must be treated not as for the benefit of Kashinath alone but of the co-parcenary and so the shares must be determined as though Madhavrao was dead."

The Privy Council confirmed the decree of the Appellate Court on the 8th February 1907.

After the date of the decree of the Appellate Court and pending the appeal to the Privy Council the first plaintiff was born to the said Madhavrao on the 8th May 1905, and in this suit claims a share in the moiety of the properties to which the defendant has been declared entitled.

By a consent Judge's order dated the 11th April 1908 the suit was directed to be set down for trial of the following preliminary issue:—

"Whether the first plaintiff is entitled to any and what interest in the defendant's share of the properties to which he is declared entitled in Suit No. 423 of 1901 in the plaint mentioned."

*Padsha* and *Dastur*, for the plaintiff:—There has been no partition of the joint family property before the birth of the plaintiff. In 1889 all that happened was that the father retired [269] from the family. It was a personal relinquishment. The rest of the family was joint, that is why Vasantao was allowed one half and not one quarter. The Appeal Court declares the release is for the benefit of the whole family, yet it has operated solely for the benefit of Vasantao. In effect it is a gift by the father to his son and that with the consent of the co-parceners. Viewed in that light the case nearly approaches *Rai Bishen Chand v. Mussumat Asmaida Koer* (1) and so long as the father has not kept enough to give an afterborn son as much as the earlier born sons received, an equal share must be made good to the afterborn son by the brothers: *Krishna v. Sami* (2), *Chengama Nayudu v. Munisami Nayudu* (3).

Where the father leaves nothing to himself and the afterborn son has no source from which to maintain himself he can claim from the separated brothers a share equal to theirs.

Our second point is that the judgment of the Privy Council says that the release enures for the benefit of the other branch. The judgment

(1) (1884) L. R. 11 I. A. 164.,

(2) (1885) 7 Mad. 64.

(3) (1896) 20 Mad. 75.

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treats Madhavrao as civilly dead but this does not break up the coparcenary. Madhavrao is personally disqualified by the release but this does not prevent the son of a disqualified person from inheriting property. The afterborn son is in the same position as his brothers.

*Sethna* (with *Setalvad*), for defendant :—*Krishna v. Sami* (1) has not been followed in Bombay. See *Bapuji v. Pandurang* (2), *Balkrishna Trimbak Tendulkar v. Savitribai* (3), *Bailur Krishna Rau v. Lakshmana Shanbhogue* (4), *Naval Singh v. Bhagwan Singh* (5), *Vir-Mitrodaya*, p. 492.

KNIGHT, J.:—This suit is a pendent to the case of *Wasantrao v. Anandrao*, (6) decided by the Appellate Court in September 1904, and subsequently by the Privy Council (7).

[270] The facts of the case, so far as they concern the question now before me, are the following :—In 1889 there was a joint Hindu family consisting of one Kashinath, his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasantrao. This family was possessed of considerable ancestral property. In January 1889, Vasantrao being then some five years of age, Madhavrao found himself heavily involved in debt; and in consideration of his father's Kashinath paying Rs. 5,000 "in settling the debts and for various other considerations," Madhavrao executed a deed of release in his favour relinquishing all interest in the family property.

In 1901 Vasantrao instituted a suit against Ganpatrao's sons (Ganpatrao and Kashinath both being dead) to obtain a share in the ancestral property. Among the various grounds raised by the then defendants, I need only refer to the contention that by the release Madhavrao forfeited not only his own interest in the ancestral property but that of his descendants. It was held, however, and the Privy Council confirmed the finding, that the release operated to extinguish only Madhavrao's own personal interest and did not bind his son, and that it must be treated as enuring, not as for the benefit of Kashinath alone, but for that of the whole coparcenary. Vasantrao, therefore, as representing one of the two sons of Kashinath, was held entitled on partition to a half share of the property, Ganpatrao's children taking the other half.

Now the present plaintiff is a second son of Madhavrao's, born in 1905, nearly a year after the decree for partition, and more than sixteen years after the date of the release. He sues his brother Vasantrao for a moiety of the ancestral property that has fallen to the latter's share, and the preliminary issue has been raised whether he is at all entitled to participate in the property.

The answer to this question must in the main depend on the determination of Madhavrao's precise position. He is still alive, he claims no further share in the property himself, nor was any claim on his behalf by the Official Assignee who represented him in the previous suit. The only direct allusion [271] to his status made in the judgment of the Appeal Court is in a passage towards the end, where it is said that "the shares must be determined as though Madhavrao were dead"; but this, although clear and adequate for the purposes of that judgment, is of little present assistance. The learned counsel for the plaintiff however

(1) (1885) 9 Mad. 64.

(2) (1882) 6 Bom. 616.

(3) (1878) 8 Bom. 54.

(4) (1881) 4 Mad. 302.

(5) (1883) 4 All. 427.

(6) (1904) 6 Bom. L. R. 925.

(7) (1907) 9 Bom. L. R. 595.



sought to make it the basis of an argument that Madhavrao must be regarded merely as one civilly dead, as if he had turned to the ascetic life, or at the most as one disqualified from sharing in the family estate. But this supposition is not in accord with the facts and it needs but few words to demonstrate its impropriety. Hindu law bases exclusion from participation on certain clear and well defined grounds, none of which can be applied to Madhavrao either literally or metaphorically. He is not afflicted with insanity or other congenital infirmity, and it is not pretended that he has "assumed another order." Whatever be the true history of the transactions culminating in the release of 1889, the facts accepted by the parties in the present suit are these, that Madhavrao received Rs. 5,000 from his father, directly or indirectly, and that he thereon resigned all his interest in the ancestral estate. No doubt this sum seems exiguous in comparison to the three-quarters of a lakh to which he was then apparently entitled, but small as it was, he accepted it in satisfaction of his claims, and he has never sought to recede from the arrangement. I can only look upon him, therefore, as a coparcener who has elected to take his portion and recede from the family and it is thus as I understand that he was regarded in the earlier suit.

The question then resolves itself into this: what are the rights as against the joint family of the son of a separated coparcener born subsequent to his father's separation? So stated, the question bears its answer upon its face: there is no known rule or principle which can entitle such a son to claim aught from the coparcenary. Vasantrao's example affords plaintiff no assistance. He was alive when his father executed the release, and the latter was powerless to divest him of rights already vested in him. But the plaintiff stands in entirely different [272] case; he was not even *en ventre sa mere* when his father quitted the family. The various authorities cited by his learned counsel—I may more particularly instance *Ganpat v. Gopalrao* (1), *Rai Bishen Chand v. Mussumat Asmaida Koer* (2), and *Chengama Nayudu v. Munisarn Nayudu* (3)—amount to no more than this: that where there has been a partition between a father and his sons, an afterborn son may claim a share from his brothers, if his father reserved no property for himself or is unable to provide for him. The Madras case bears a bastard resemblance to that now before me, in that Madhavrao is destitute of means and unable to provide for the plaintiff; but there the similarity ceases. These cases proceed upon the special principle of Hindu Law that the unborn son cannot be deprived of his share in the paternal estate by a prior partition. "Sons with whom the father has made a partition shall give a share to another son who is born after it" (Vishnu, 2 Colebrooke, II, 268). But the application of this principle is expressly limited to the case of partition between sons and father, and there is no warrant for its extension to a son born to a separated coparcener, other than the father of the family, after partition. Indeed, it is only necessary to reflect upon the confusion that such an extension of the principle would entail, to realize its impracticability.

There is little need to reinforce the argument. The texts of Vishnu and Yajnavalkya which direct separated brothers to cede a share to the afterborn brother have been explained by the commentators as applicable only to posthumous sons (*Ganpat v. Gopalrao* (1)), and even this direction

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(1) (1899) 23 Bom. 686.

(3) (1896) 20 Mad. 75.

(2) (1884) L. R. 11 I. A. 164; 6 All. 580.



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is restricted, it would seem, to the case of the son *en ventre sa mere* at the date of the partition (Mayne, section 472, 7th edn.). Relatively to the head of the family with whom Madhavrao effected partition, plaintiff is not a son but a grandson; he was not *en ventre sa mere* at the date of the partition, and he was not posthumously born. The circumstances that the father has dissipated the small patrimony that he received and is now unable to provide for him is an accident that does not bear upon the argument.

[273] I, therefore, decide that plaintiff is not entitled to claim a share of the property in suit.

Attorneys for the plaintiff:—*Mesers. Jehangir, Gulabbhai and Billimoria.*

Attorneys for the defendant:—*Messrs. Bicknell, Merwanji and Romer.*

33 Bom. 273 (=2 I. C. 246=10 Bom. L. R. 1037.)

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

SIR JEHANGIR COWASJI JEHANGIR (*Plaintiff*) v. THE HOPE MILLS, LIMITED (*Defendants*).\*

[19th September, 1908.]

*Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.*

An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

*Ajudhia Pershad v. Baldeo Singh* (1) and *Nandram v. Babaji* (2), followed.

#### PROCEEDINGS IN CHAMBERS.

The plaintiff, a mortgagee in possession of the property belonging to the defendants, instituted this suit to recover the money due to him under his mortgage and prayed that in default of payment the right to redeem might be foreclosed or the mortgaged premises sold. After the mortgage the plaintiff had entered into an agreement with the defendants under which they could work the Mills.

[274] On 26th January 1904 the plaintiff obtained a decree which was defective because *inter alia* there was no reference to the Commissioner and no direction whatever for taking accounts although the decree contemplated an account.

On 9th August 1904 the plaintiff applied for a decree for foreclosure or sale which was refused on the ground that the exact amount due to him was not ascertained.

On the 19th October 1907 the defendants' agents obtained a rule *nisi* calling upon the plaintiff to show cause why he should not pass his ac-

\* Suit No. 490 of 1908.

(1) (1894) 21 Cal. 818.

(2) (1897) 22 Bom. 771.



counts as first mortgagee in possession of the defendants' property before the Commissioner for taking accounts.

The rule came on for argument before Davar, J., on 21st November 1907 who made it absolute (1) ordering the plaintiff to pass his accounts before the Commissioner. On appeal this order was set aside (2) by the Appeal Court on 3rd March 1908.

On the 15th August 1908 the defendants issued a notice to the plaintiff on the following terms :—

"Take notice that you are hereby required under section 244 of the Code of Civil Procedure to appear in person or by Advocate or Attorney of this Court before the sitting Judge in Chambers on the 29th day of August 1908 at 11-15 in the forenoon, to show cause why you should not render an account of moneys due and payable to you under the decree *nisi* passed herein on the 26th day of January 1904 less the value of the stock and stores in hand or the sale proceeds thereof and any sum that may be found on account to be in your hands as first mortgagee in possession after deducting from such value or sale-proceeds all such charges, expenses and emoluments that you may be entitled to with respect to the mortgaged premises and the working thereof and execute a reconveyance of the mortgaged premises in Schedule A to the said decree *nisi* specified in favour of the 1st defendant Company on making payment of the said amount or such further or other order should not be made or directions given as to this Honourable Court may seem proper under section 244 of the Civil Procedure Code and if need be but not otherwise why issues should not be tried as to the first defendant Company's right thereto and heard along with Suit No. 650 of 1908."

The notice came on for argument on 5th September 1908.

*Kirkpatrick* with *Setalvad* for defendants.

[275] *Robertson*, Advocate-General, with *Coyaji* for plaintiff :—Our first preliminary objection is that no notice has been given to us as provided by section 248 of the Civil Procedure Code.

*Per Curiam*.—This point was not taken on the last occasion when the plaintiff applied for a week's adjournment and being a purely technical objection may be taken to have been waived.

*Robertson* :—Our second preliminary objection is that the decree in this case cannot be executed under section 244 of the Civil Procedure Code as it is a decree *nisi*.

Our third preliminary objection is that the defendants cannot apply for execution of this decree. No relief has been granted him against anyone. If he claims any relief he must apply to the Court under the Transfer of Property Act.

*Kirkpatrick* :—In reply to the second objection the plaintiff would remain in possession till the year 1916 and then the defendant could not redeem him.

As to the second objection we say the decree directs the plaintiff to reconvey the property and that is precisely what we ask for here.

We ask to be allowed to raise issues in this matter now.

*Robertson* :—This application has been misconceived. We refer to *Ajudhia Pershad v. Baldeo Singh* (3), *Nandram v. Babaji* (4), *Akikunnissa Bibee v. Roop Lal Das* (5), *Tara Pado Ghose v. Kamini Dassi* (6), and sections 88, 89 and 91 of the Transfer of Property Act.

*Kirkpatrick* :—We submit our procedure in this case is the only one we could adopt. Execution only means enforcement of a decree; the Code defines a decree in section 2. This would include a decree *nisi*. Section 235 of the Code speaks of decrees generally. Cf. sections 260, 261 of the

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(1) See 9 Bom. L.R. 1380.

(2) See *ante* p. 216.

(3) (1894) 21 Cal. 818.

(4) (1897) 22 Bom. 771.

(5) (1897) 25 Cal. 133.

(6) (1901) 29 Cal. 844.



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Code and Rule 75 of the High Court Rules. We refer to *Karim Mahomed Jamal v. Rajooma* (1). We have now served the plaintiff with notice under section 248 of the Code.

[276] *Robertson* :—It is now suggested for the first time that this matter may be treated as a motion in Court under the Transfer of Property Act. This cannot be done.

[MACLEOD, J. :—Mr. Kirkpatrick you might move under section 76 of the Transfer of Property Act.]

*Kirkpatrick* :—We desire such accounts taken as would enable us to proceed with the decree.

*Robertson* :—We submit that to allow the defendants that relief would be to reverse the decision of the Appeal Court and this Court cannot in these proceedings rectify the decree of the Appeal Court. The case of *Karim Mahomed Jamal v. Rajooma* (1) might have been cited to the Appeal Court but it has no relevancy here.

MACLEOD, J. :—This is an application by the first defendant Company for the execution of a decree *nisi*, dated the 26th January 1904, passed in this suit which was brought by the plaintiff as first mortgagee of the defendant Company. Under that decree it was ordered that upon the defendants or any of them paying into Court on behalf of the plaintiff, etc.

There was no provision made in the decree for the way in which the account contemplated should be taken. On the 3rd December 1907 an order (2) was made by Mr. Justice Davar on a rule taken out by the defendant Company that the plaintiff should pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and the Commissioner was directed to take such accounts. This order was not to be enforced for two months and if the plaintiff within that time filed a suit to establish an agreement made by him with the defendant Company on the 3rd October 1905 the order was to be suspended until that suit was determined. This order was reversed by the Appeal Court (3) on the 3rd March 1908. The defendant Company now say that they are anxious to redeem the plaintiff-mortgagee but they cannot ascertain what amount should be paid into Court to [277] enable them to get a reconveyance of the mortgaged property. They are ready to pay into Court any ascertained sum. A mortgagor in such a position demands the sympathy of a Court of Equity. Unfortunately for the defendant Company the Court of Appeal has decided that the omission in the decree to provide how the account should be taken was intentional and that the decree left it open to the parties to have the account taken and settled privately by some person of their nomination. Further it appeared to the Appeal Court that an account had been taken by a person appointed jointly by the parties with the result that a certain sum had been found due by the defendant Company to the plaintiff.

Under these circumstances I am asked by the defendant Company in execution proceedings to make an order calling upon the plaintiff to render an account of moneys due and payable to him under the decree *nisi* passed herein, and to execute a reconveyance of the mortgaged premises in the said decree in favour of the defendant Company on making payment of the said amount. The question at once arises whether there is a decree which can be executed. It has been held that an application for redemption or foreclosure of a decree *nisi* is not an application in execution under the

(1) (1887) 12 Bom. 174.

(2) (1907) 9 Bom. L. R. 880.

(3) See ante p. 216 : 10 Bom. L. R. 480.



Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and that until a decree *nisi* is made absolute there is no decree capable of execution: *Ajudhia Pershad v. Baldeo Singh* (1) referred to in *Nandram v. Babaji* (2). But it is argued that a decree directing accounts to be taken is a decree under section 2 of the Civil Procedure Code and can therefore be executed. The answer to that is that this decree *nisi* does not direct accounts to be taken. While it contemplated an account being taken it was silent on the question how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction. I am asked now in execution-proceedings to order the plaintiff to do something which he is not directed to do by the decree. That would be out of the question under any circumstances. There is nothing whatever in the decree *nisi* which is capable [278] of execution and the application must be dismissed with costs. Counsel certified.

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*Application dismissed.*

Attorneys for plaintiff:—Messrs. Bhaishanker, Kanga and Girdharlal.

Attorneys for defendant:—Messrs. Mulla and Mulla.

83 B. 278 (=1 I. C. 331=11 Bom. L. R. 58.)

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

MADHUSUDAN PARVAT STYLING HIMSELF SHANKARACHARYA OF DHOLKA (*Original Defendant*), Appellant, v. SHRI SHANKARA-CHARYA SWAMI OF SHARADA MATH (*Original Plaintiff*), Respondent.\*  
[11th November, 1908.]

*Civil Procedure Code (Act XIV of 1882), section 11—Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts.*

The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarat, sued the defendant, Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarat in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math; (2) for an account of the money received by the defendant as a Shankaracharya in Gujarat with a decree for payment to the plaintiff of the sum found to have been so received by the defendant; and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarat and from claiming and receiving offerings in Gujarat as Shankaracharya of the Jyotir Math or a branch of that Math.

The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant.

[279] Held, dismissing the suit, that to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the

\*First Appeal No. 45 of 1907.

(1) (1894) 21 Cal. 818.

(2) (1897) 22 Bom. 771.



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Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with.

For interference with mere dignity no suit can be maintained.

For voluntary offerings received no suit will lie.

*Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (1), *Sangapa v. Gangapa* (2), and *Rama v. Shivram* (3), referred to.

*Boyle v. Dodsworth* (4), followed.

[Ref. 60 I. C. 907 : 23 Bom. L. R. 75=45 Bom. 590]

FIRST appeal against the decision of Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad, in Suit No 640 of 1901.

The plaintiff, a Shankaracharya of the Sharada Math at Dwarka in Gujarath, sued (1) for a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarath either in his assumed capacity of a Shankaracharya or of Shankaracharya of the Jyotir Math or of a branch of the Jyotir Math at Badrinath; (2) for a true and correct account of the proceeds that the defendant might have received during his sojourn at places mentioned in the plaint by virtue of his assumed capacity of a Shankaracharya; and (3) for a perpetual injunction restraining the defendant from styling himself a Shankaracharya in Gujarath as also from claiming or receiving offerings from the people of Ahmedabad and other places in Gujarath as a Shankaracharya or as a Shankaracharya of the Jyotir Math, or of a branch of the Jyotir Math of Badrinath.

The plaintiff alleged that he was the present occupant of the *Gadi* (seat) of Shri Shankaracharya at Dwarka in Gujarath called the Sharada Math, which was one of the four sees originally established in four directions by the well known and illustrious Shankaracharya, the restorer of the Vedic religion on the Advaita system of philosophy. The four sees so established were styled (1) the Jyotir Math, (2) the Govardhan Math, [280] (3) the Sharada Math, and (4) the Shringeri Math. The first was situate in the Himalayas in Northern India, the second at Puri in Cutback in Eastern India, the third at Dwarka in Western India, and the fourth at Shringeri in Southern India. Each of the said four Maths was given exclusive jurisdiction over the provinces surrounding it and the Shankaracharya of the respective Maths was enjoined to minister to the spiritual, theological, religious and social wants of the congregations within his jurisdiction and he was invested with the exclusive right to the status, style and position of a Shankaracharya as also the right as such to call for and receive pecuniary and other offerings from the people under his charge. The plaintiff duly and lawfully succeeded to the *Gadi* of the Sharada Math at Dwarka in 1901 and thus he became entitled to and had been in enjoyment of the said status, style and position of a Shankaracharya and to all the rights, titles, privileges and dignities as aforesaid appurtenant to the *Gadi* of the Sharada Math which possessed exclusive jurisdiction over Cutch, Kathiawar, Gujarath and other districts in Western India. The line of succession to the *Gadi* of Shankaracharya of the Jyotir Math at Badrinath had long become extinct and it was universally recognized that any lawfully constituted Shankaracharya of that Math was not in existence. Notwithstanding this circumstance the defendant fraudulently

(1) (1843) 3 Mod. L. A. 193.

(2) (1878) 2 Bom. 476.

(3) (1892) 6 Bom. 116.

(4) (1796) 6 T. R. 681



assumed the title of Shankaracharya and was falsely alleging that his so-called Math at Dholka was a branch of the Jyotir Math at Badrinath. Under his assumed title he called for and received pecuniary and other offerings from people at several places in Gujarath which was exclusively within the jurisdiction of the plaintiff to the serious detriment of the plaintiff's revenue and in derogation of his status, style and dignity as Shankaracharya and as occupant of the *Gadi* of the Sharada Math. The defendant was repeatedly warned to desist from arrogating to himself the title of Shankaracharya of the Jyotir Math or a branch of that Math in Umreth, Dholka, Nadiad, Matar, Mehmadabad, Sarkhej, Ahmedabad and other places in Gujarath and from collecting offerings from the people at said places but he failed to do so and his failure gave to the plaintiff the cause of action for the suit.

[281] The defendant denied the plaintiff's status as Shankaracharya of the Sharada Math and contended that the plaintiff had no right to the style, position and dignities of a Shankaracharya and was therefore not entitled to the injunction sought for against the defendant, that the plaintiff's suit for the establishment of his right to the mere enjoyment of the dignities and position of a Shankaracharya was unsustainable in law, that the plaintiff's prayer that the defendant should be enjoined not to receive offerings from the people of Gujarath could not be entertained because the whole of Gujarath was not within the jurisdiction of the Court, that the Sharada Math and the Jyotir Math were two different Maths, there was no relation between them and it was not pretended that there was any other Shankaracharya of the latter Math, that the plaintiff was not entitled to call for an account of the voluntary offerings made to him as Shankaracharya of the Jyotir Math, that centuries ago, disputes having arisen between a former Shankaracharya of the Jyotir Math at Badrinath and the ruling authorities of that place, the then Shankaracharya left the Math enjoining his disciples not to reside in that Math thereafter, therefore the Shankaracharyas of that Math did not thereafter permanently live in the Math but they went about in Gujarath and other parts of India for the purpose of imparting religious instruction and the people believed that they were Shankaracharyas of that Math, that the Math was therefore not extinct and the ascendant preceptors of the defendant were always treated and respected as Shankaracharyas of the Jyotir Math and they established branches of that Math at several places in Gujarath, that the defendant and his preceptors were acknowledged as Shankaracharyas by several ruling Chiefs in Gujarath and even by the British Government which gave them licenses to carry arms, that the defendant and his preceptors had been preaching in Gujarath and other places and had been receiving offerings from the residents of those places for several years without any objection on the part of the plaintiff and his predecessors and so the plaintiff's claim was time-barred, that the territorial limits of the Maths being not fixed, the plaintiff was not entitled to claim exclusive jurisdiction to preach and collect offerings in Gujarath and that the [282] plaintiff and his predecessors travelled out of Gujarath and received offerings within the territorial limits of the jurisdictions of the other Maths and that if the defendant and his preceptors did the same in Gujarath, the plaintiff suffered no injury and was not entitled to claim damages and injunction.

The Subordinate Judge found that his Court had jurisdiction to try the suit so far as it referred to the district of Ahmedabad and the people residing in that district; that the plaintiff was the lawfully appointed

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Shankaracharya of the Sharada Math of Dwarka and being the present Shankaracharya of that Math, he was entitled to bring the present suit; that the Jyotir Math of Badrinath had been without a Shankaracharya for more than a century and there could be no branch of it in Dholka according to the rules laid down or intended to be laid down by the founder of that Math and the defendant was not a Shankaracharya of that Math or a branch of that Math; that the defendant could not found a branch or branches of the Jyotir Math at Dholka or any other place in the Ahmedabad District and he was not entitled to go round as a Shankaracharya of the Jyotir Math or of the Dholka branch of it for offerings in places within the limits of the jurisdiction of the Court and to collect such offerings from people residing therein as such Shankaracharya; that the claim was in time; and that the plaintiff could not sue for an account and could not recover those offerings or their value which had been voluntarily made to the defendant. The Subordinate Judge, therefore, passed the following decree:—

I therefore declare that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so-called branch of it at Dholka and that he do restrain himself from calling himself as Shankaracharya of the Jyotir Math or of the so-called branch of it at Dholka and from claiming or receiving such offerings from the people of the district of Ahmedabad as such Shankaracharya of the Jyotir Math or of the so-called branch of it at Dholka. The rest of the plaintiff's claim is disallowed hereby.

The defendant appealed.

*C. N. Thakore* (with *G. N. Thakore*) appeared for the appellant (defendant):—Section 21 of Bombay Regulation II of 1827 [283] provides that no interference by Courts of law in caste questions is warranted. The plaintiff's suit is a caste question within the meaning of the Regulation and hence is not maintainable. The plaintiff calls him a Shankaracharya of a Math called the Sharada Math at Dwarka. The defendant is a Shankaracharya of the Jyotir Math which has its branch at Dholka. The followers of the religion propounded by the original Shankaracharya constitute a sect some of whom may attach themselves to the plaintiff as one of the successors of the original *Guru*, while some may be devoted to the defendant who is another successor, while others may be attached to both. In the present suit the plaintiff has opened up the question of the right of devotees to attach themselves to the *Guru* to whom they feel themselves drawn. This right is purely a religious right involving the internal autonomy of the members of the sect or caste in matters religious. Such a right could not be rendered the subject of litigation in a Court of law. The term caste in the Regulation is not restricted to caste as used in a strictly limited sense. It has been held that the term is not necessarily confined even to the Hindus: *Abdul Kadir v. Dharma* (1). The followers of the religion of Shankaracharya are therefore clearly included within the definition of the term. The circumstance of offerings being occasionally made to the religious head will not avail to take the case out of the category of caste questions. The principle of the Regulation is followed in other provinces. *Roodurmun v. Damoodur* (2). The prohibition contained in the Regulation is held applicable to numerous cases in some of which the emoluments were in the nature of fixed periodical fees.

(1) (1895) 20 Bom. 190.

(2) (1862) 11 May. 365.



See also *Sankara v. Hanma* (1), *Murari v. Suba* (2), *Dayaram Hargovan v. Jethabhat Lakhmiram* (3), *Murar Daya v. Nagria Ganeshia* (4). The Regulation is, therefore, very clearly a bar to the maintenance of the present suit.

Next we contend, that, even apart from the Regulation, the suit is not one of a civil nature and is therefore beyond the cognizance of Civil Courts. No straining of language can bring [284] the present suit within the description of suits referred to in the explanation to section 11 of the Civil Procedure Code of 1882 as being of a civil nature. What the plaintiff claims is a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and a further declaration that the defendant is not entitled to collect offerings in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of its branch at Dholka. The other reliefs claimed are either subsidiary to the above or are merely consequential. No objection is taken to the defendant's collecting offerings without calling himself a Sankaracharya. Such a claim could not have been made by the plaintiff in the absence of any grant from the Crown; certainly not in the absence of a grant from the original Shankaracharya. The suit, therefore, resolves itself into a suit in respect of style, title and dignities. In *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (5) the Privy Council doubted whether an action could be maintained in a Civil Court by the grantee of a dignity from the Crown against a person who without a grant would assume the like dignity. On remand the High Court of Bombay held that such an action could not be maintained. See also *Shankara v. Hanman* (6). In the present case there is even no allegation of a grant. Besides, the name or title of Shankaracharya has not been let down as a heritage by the original *Guru*: Ghose's Hindu Law, p. 784 (2nd edn.). The suit is, therefore, clearly not maintainable as being one brought to vindicate a right to mere dignity: *Sangapa v. Gangappa* (7).

The office of the Shankaracharya of the Sharada Math at Dwarka has nothing to do with the right to assume the title of a Shankaracharya within particular limits. Even if the right to this dignity be assumed to be in any way connected with the office at Dwarka, that circumstance makes no difference: *Rama v. Shivram* (8).

The office, if it is called one, of Shankaracharya consists, strictly speaking, of the right to exercise moral and spiritual supervision [285] over the followers of the original *Guru*. No suit could lie for the enforcement of claims appurtenant to such an office: *Tholappala Charlu v. Venkata Charlu* (9).

The suit is in effect to compel a particular kind of religious observance from certain people which being an obligation of a moral kind is not enforceable: *Striman Sadagopa v. Kristna Tatachariyar* (10). The circumstance of pecuniary presents being received by the occupant of the office hardly makes any difference, as these are not any fixed and certain emoluments attached to any office but are voluntary offerings in the nature of fluctuating gratuities: *Boyster v. Dodsworth* (11), *Muhammad Yussub v.*

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(1) (1877) 2 Bom. 470 at pp. 472, 473.

(2) (1882) 6 Bom. 725.

(3) (1895) 20 Bom. 784.

(4) (1869) 6 Bom. H. C. R. A. C. J. 17.

(5) (1848) 3 Moo. I. A. 198 at p. 217.

(6) (1877) 2 Bom. 470.

(7) (1876) 2 Bom. 476.

(8) (1882) 6 Bom. 116 at p. 121.

(9) (1895) 19 Mad. 62 at p. 64.

(10) (1863) 1 Mad. H. C. R. 301.

(11) (1796) 6 T. R. 681.



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*Sayad Ahmed* (1), *Tholappala Charlu v. Venkata Charlu* (2), *Narayan Vithe Parab v. Kishnaji Sallashiv* (3).

It is not alleged that the defendant ever moved about calling himself Shankaracharya of the Sharada Math. No fees are claimable as of right by any Shankaracharya from his followers within any given area. The plaintiff's office, being confined to duties of a moral and spiritual kind, is in no way interfered with by the defendant's claiming similar functions in a distinct capacity. No cause of action can accrue under such circumstances to the plaintiff.

The cases relied on by the Subordinate Judge are not on all fours and are clearly distinguishable. In none of them a claim to mere dignities was made. The case of *Gursangaya v. Tamana* (4) was a case in which there was a contest in respect of fees claimable as of right by the plaintiff in virtue of the office he was holding. In *Sayad Hashim Saheb v. Huseinsha* (5) there was direct interference with the exclusive right to perform the duties and enjoy the privileges specifically appertaining to the office of the Vatandar Kazi and Khalif of Gadag, which was held by the plaintiff. In *Srinivasa v. Tiruvengada* (6) it is expressly stated that, where the claim is for a mere dignity or for damages caused by loss of voluntary offerings, no relief can be given. In [286] *Sri Sadagopa Ramanuja Pedda v. Sri Mahant Rama Kishore Dossjee* (7) relief was granted as the defendant's action amounted to an attempt to deceive by misrepresentation implied in the use of the word "vegayre."

We further contend that no exclusive right to assume the title of Shankaracharya and to receive the offerings in that capacity has been proved by the plaintiff. The onus on this point was on the plaintiff. No work proved to have been written by the original Shankaracharya himself confers or refers to such right. The works of Anandgiri, Madhav and other authoritative biographers of Shankaracharya's life prove the absence of such a right. Aiyar mentions no such right as having existed. Mathamnaya, on which the plaintiff relies, is not a work of Shankaracharya and could not have come down from him.

It is extremely unlikely that limits would be fixed by one who was himself an itinerant preacher and who wanted to spread his own religion. If *Sanyasis* could go everywhere, then why not the head of the *Sanyasis*? No right as such to receive gifts had accrued to Shankaracharya and he could not hand it down, fixing limits for the exercise of the right. Different Vedas, Gods and Goddesses having been assigned to each principal Math and the followers having the liberty to elect either in all the parts of India, the fixing of territorial limits would be absurd and anomalous. In no analogous institution do we find such limits fixed. The fixing of territorial limits would be inconsistent with an increase in the number of the Maths. The Maths have undoubtedly increased numerically: *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (8), Ghose's Hindu Law, p. 778 (2nd edn.). People of the Shringeri Math have been going to the remotest corners of India: Hunter's *Imperial Gazetteer*, Vol. XIII, page 79. A branch Math has grown up at Sankeshvar: *Bombay Gazetteer*, Vol. 21, pp. 601 and 602.

(1) (1861) 1 Bom. H. C. R. App. xviii, pp. xxxv, xxxvi.

(2) (1895) 19 Mad. 62 at p. 64.

(3) (1885) 10 Bom. 283.

(4) (1891) 16 Bom. 281.

(5) (1888) 13 Bom. 429.

(6) (1888) 11 Mad. 450.

(7) (1898) 22 Mad. 189.

(8) (1843) 8 Moo. I. A. 198 at p. 217.



D. A. Khare (with U. K. Trivedi) appeared for the respondent (plaintiff):—There is conclusive evidence in the case to show that the defendant is not entitled to the style, title and dignities [287] of a Shankaracharya of the Jyotir Math. For several hundred years past there has been no Shankaracharya on the *gadi* of the Jyotir Math and the affairs of that *gadi* are in the hands of a Brahmin. The defendant cannot trace his descent from any actual occupier of the *gadi*. One is entitled to be called a Shankaracharya only if he occupies one of the four *galis* founded by the original Shankaracharya. The four seats were endowed with separate and exclusive jurisdictions, the extent of which has been set forth in the Mathamnaya.

The jurisdictions being exclusive, the defendant, even if he be a genuine Shankaracharya, has no right to establish himself in Gujarath which is within the jurisdiction of the plaintiff. All plaintiff's witnesses and several of defendant's witnesses admit that Gujarath is within the jurisdiction of the plaintiff's Sharada Math.

The defendant's predecessors in title established themselves at Dholka so recently as 1873. Since that time to this their rights have been repeatedly challenged in Civil Courts and they have failed to establish those rights.

Shankaracharya's is a high religious office with *quasi*-judicial functions on questions of religion, law and ritual in the Hindu society, and the organization of the four Maths with exclusive jurisdictions was necessary to prevent conflicts of authority and jurisdiction.

The question has to be looked to from the standpoint of a Hindu sovereign. Would a Hindu sovereign tolerate an impostor and allow him to feign the office and dignities of Shankaracharya?

The plaintiff has cause of action as the office is instituted for public benefit. Although the emoluments consist of merely voluntary gifts the plaintiff has a cause of action because according to the rules of ascetic life admitted by the defendant no *Sanyasi* can accept a pecuniary gift unless he is a Shankaracharya. The defendant himself admits that nobody would give him any gift if he did not style himself Shankaracharya. The defendant being not entitled to the style and privileges of Shankaracharya, his act in assuming the same is fraudulent and [288] wrongful, and the cause of action so accrued to the plaintiff, he being the rightful claimant of the privileges of Shankaracharya in Gujarath. We do not, however, press the claim for damages, but we maintain that the decision of the lower Court as to the other relief, declarations and injunction is correct, and as given by a Hindu Judge of high learning and experience is entitled to great weight.

SCOTT, C. J.:—The plaintiff brought this suit for a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and that he is not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarath either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of a branch of that Math; for an account of the money received by the defendant as a Shankaracharya in Gujarath with a decree for payment to the plaintiff of the sum found to have been so received by the defendant, and for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarath and from claiming or receiving offerings in Gujarath as a Shankaracharya or as a Shankaracharya of the Jyotir Math or of a branch

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of the Jyotir Math of Badrinath. The Subordinate Judge made a declaration that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so-called branch of it at Dholka; and an injunction against the defendant so styling himself and claiming or receiving offerings. He held, however, that the claim for an account and recovery of offerings received by the defendant was unsustainable, as the offerings might or might not have been made to the plaintiff. From the decree of the Subordinate Judge the defendant has appealed to this Court.

It is not disputed that the religious reformer Shankar, about the 8th century A. D., established four Maths or Monasteries for Sanyasis or Ascetics in the North, South, East and West of India, namely, the Jyotir Math at Badrinath in the Himalayas, [289] the Shringeri Math in Southern India, the Sharada Math at Dwarka in Gujarath and the Govardhan Math at Puri in Cuttack.

The name Shankaracharya, which means 'the preceptor Shankar, properly belongs to the reformer Shankar alone, but after his death some of his leading followers appear to have adopted the name as a title, probably, as Mr. Ghose in his work on Hindu Law (p. 784) suggests, because they thought themselves incarnations of the reformer.

The doctrines of Shankar having obtained a permanent footing in India there naturally arose in the course of centuries other preachers besides the Mohants of the original Maths who claimed to be incarnations of the founder and established new Maths in his honour. On the other hand, the original Maths did not continuously preserve their early prestige. Thus we find the Mohant or head of the Shringeri Math writing in Shake 1774 (A. D. 1852) to the Mohant of the Sharada Math a letter (exhibit 333) in which he thought it necessary to make "a statement of the conventional practice bearing in mind the disrespect with which it is treated in the present generation." He relates how the Acharyas of the Govardhan and Jyotir Maths degraded themselves to the position of Gosains and thus these two Maths remained without any Acharya although the Govardhan Math was subsequently revived by a Sanyasi from Gougak Nakhil. He describes how Sanyasis of the Shringeri Math have established Maths and set themselves up falsely as independent Acharyas and he combats the doctrine that any branch Maths can exist. He then proposes that certain areas should again be recognized as the territories of the respective Maths. We note from the report in 3 Moore's Indian Appeals, p. 199, that it was proved or alleged in the case of *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (1) that the Shringeri savasthan had by 1835 A. D. been divided into five or six Maths, the Swamis of each of which claimed equal privileges as successors of Shankar.

It is claimed on behalf of the defendant that his predecessor in 1872 established or re-established the Jyotir Math at Dholka. [290] This was not the first time that rival Shankaracharyas had appeared in Gujarath; thus the witness Maneklal Keshowlal (exhibit 244) states that in Gujarath before Raj Rajeshwaranand, the defendant's predecessor, two other Shankaracharyas had come but as they proved to be false they went away.

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(1) (1849) 3 Moo. I. A. 198.



The establishment of the Math at Dholka followed by visitations and preaching by its Mohunt in various parts of Gujarath caused dissension amongst the Smart Brahmins, particularly at Sidhpur, and soon aroused opposition from the Mohunt of the Sharada Math.

The opposition was based upon practical as well as sentimental grounds, for it is customary for a successful preacher to receive money offerings from his admirers, and the attraction of followers to the Dholka Mohunt involved the withdrawal of probable or possible donors of offerings from the Dwarka Mohunt. In order to put a stop to the competition of the Dholka Mohunt the plaintiff in 1887 with the concurrence of his preceptor the then Mohunt of the Dwarka Math filed a criminal complaint at Sidhpur against Raj Rajeshwaranand, the then head of the Dholka Math, charging him with cheating by personating the Shankaracharya of the Jyotir Math. This complaint was dismissed and three other complaints of a similar nature brought against Raj Rajeshwaranand by Brahmin followers of the Dwarka Mohunt suffered the same fate.

The present suit is the first attempt made in a Civil Court to challenge the right of the occupant of the Dholka Math to preach as a Shankaracharya in Gujarath.

It is contended on the plaintiff's behalf that he has, throughout that part of India where Gujarathi is spoken, the exclusive privilege of preaching as a Shankaracharya and receiving the offerings of the followers of Shankar. This contention is based upon passages in certain versions of the Mathamnaya or traditional precepts of the Maths produced by some of the plaintiff's witnesses.

There is no authoritative version of the Mathamnaya and witnesses for the defendant have produced other versions of it [291] which differ in material particulars from those relied upon by the plaintiff. Thus, the plaintiff's versions after prescribing certain territorial limits for each Math contain the following precepts (see exhibit 335, paragraphs 25 and 26) :—"The head preceptors should never enter into each other's territories, that is the rule. Good rules would be violated by transgression of the boundaries. It gives rise to an abode of quarrels; one should avoid that."

The defendant's versions do not contain these precepts nor any definition of territorial limits. It is not argued that the Mathamnaya was composed by Shankar himself and a learned witness for the plaintiff, Anandshankar Bapubhai, says that he has not read any work of the first Shankar in which he has defined the territories of the Maths. If there ever was any strict reservation of areas for the Mohunts of the different Maths certain facts proved in the case indicate that the reservation has long been disregarded. Thus, in recent times the Mohunt of the Shringeri Math and the deputy of the Mohunt of the Govardhan Math have visited Gujarath and taken offerings from their admirers while the plaintiff's predecessor visited Mathura and Benares and received offerings in those places. Again, when Raj Rajeshwaranand, the defendant's predecessor, came to Sidhpur in Gujarath as a Shankaracharya it is on record that the plaintiff who was then a disciple of the Mohunt of the Sharada Math made a mental obeisance in his honour.

It is clear from the above references to the evidence that the plaintiff has not succeeded in proving any exclusive and unbroken customary privilege for himself and his predecessors to preach and receive offerings as Shankaracharya in Gujarath. But, even if he had succeeded in discharging this burden, his suit would still fail, unless he could show that his

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claim was of a civil nature such as the Court will entertain : see Civil Procedure Code, section 11.

To decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please, [292] provided no office or property is disturbed or interfered with. The Subordinate Judge has treated the case as one of disturbance of an office, namely, the office of Mohunt of the Sharada Math, although his decree is to restrain the defendant from styling himself Shankaracharya of the Jyotir Math and from claiming or receiving offerings in that capacity. Here there is clearly a confusion of ideas. The office of Mohunt of the Sharada Math is in no way endangered by the defendants' action in claiming to be a Shankaracharya of the Jyotir Math, nor are voluntary offerings made to Shankaracharyas in Gujarath fees claimable as of right by the holder of the plaintiff's office. The office, its property and appurtenant fees remain absolutely unaffected by the defendant's action. The defendant has never tried to represent himself or pass himself off as the Mohunt of the Sharada Math. The conclusion arrived at by the Subordinate Judge that the defendant was not truly the Shankaracharya of the Jyotir Math could not help the plaintiff's case. Even if we assume that conclusion to be correct it was irrelevant, for if the plaintiff had an exclusive privilege of preaching which could be enforced in a Civil Court, it could not matter what the real status of the defendant might be, while if he had no such privilege his suit must fail. The appearance of the defendant and his predecessors as Shankaracharyas in Gujarath may have affected the prestige as preachers of the heads of the Sharada Math, but for interference with a mere dignity no suit can be maintained : see per Lord Campbell in *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (1), *Sangapa v. Gangapa* (2), *Rama v. Shivram* (3). Their appearance may also, by attracting offerings to themselves, have reduced the sums which would have been received by the Sharada Mohunts as voluntary offerings ; but for voluntary offerings received no suit will lie : see *Boyster v. Dodsworth* (4). On this ground the Subordinate Judge seems to have refused an account though he inconsistently granted an injunction to restrain the receipt of further offerings.

[293] For the above reasons we hold that this suit is not maintainable. We allow the appeal, set aside the decree, and dismiss the suit with costs throughout on the plaintiff.

Cross-objections dismissed with costs.

*Decree reversed.*

(1) (1843) 3 Moo. I. A. 198 at p. 217.  
(2) (1878) 2 Bom. 476.

(3) (1882) 6 Bom. 116.  
(4) (1796) 6 T. R. 681.



33 B. 293 (=11 Bom. L. R. 34=5 M. L. T. 230=1 I. C. 120.)

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

UMABAI KOM MANGESHRAV AND ANOTHER (*Original Plaintiffs*),  
*Appellants v. VITHAL VASUDEV AND OTHERS (Original Defendants),*  
*Respondents.\**

[19th. November 1908].

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*Civil Procedure Code (Act XIV of 1882), section 23—Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial.*

The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale, mortgage or lease from the widow of the last male holder. In the lower Courts the suit was dismissed for misjoinder of parties or causes of action.

*Held*, on second appeal, that though the lands were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgment may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

*Ishan Chunder Hazra v. Rameswar Mondol* (1) and *Nundo Kumar Nasker v. Banomali Gayan* (2) approved.

[294] *Sami Chetti v. Ammani Achy* (3), *Vasudeva Shanbhaga v. Kuleadi Narnapai* (4), *Mahomed v. Krishnan* (5) and *Parbati Kunwar v. Mahmud Fatima* (6), referred to.

*Kachar Bhoj Vaija v. Bai Rathore* (7), distinguished.

[Dist: 24 I. C. 813; Ref: 6 I. C. 577; 63 I. C. 482=35 C. L. J., 530.]

SECOND appeal against the decision of C. C. Boyd, District Judge of Kanara, dismissing an appeal against the decree of R. R. Gangolli, First Class Subordinate Judge of Karwar.

The plaintiff Annapurnabai sued to recover possession of an equal half share in the properties specified in the schedule annexed to the plaint and mesne profits of the said share for the years 1900, 1901 and 1902. It was alleged in the plaint that the plaintiff, defendant 24 Lakshmibai, and Radhabai, deceased, were the daughters of Mangesh alias Mangba, who died leaving no sons. After his death, his widow Parvatibai enjoyed the properties till her death which took place on the 30th July 1900. Since then the plaintiff and defendant 24 became entitled to the properties in two equal shares as heirs, their sister Radhabai having died during their mother's life-time. Defendants 1—23 asserted title to the said properties on the ground that the plaintiff's mother had sold, mortgaged or let the lands on *mulgeni* (perpetual lease) to them, but the said transactions became invalid after the death of their mother, therefore they should be

\* Second Appeal No. 232 of 1906.

(1) (1897) 24 Cal. 831.

(2) (1902) 29 Cal. 871.

(8) (1873) 7 Mad. H. C. R. 260.

(4) (1874) 7 Mad. H. C. R. 290.

(5) (1887) 11 Mad. 106.

(6) (1907) 29 All. 267.

(7) (1883) 7 Bom. 289.



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set aside. The plaintiff and defendant 24 had in the year 1900 obtained a declaratory decree to the effect that the plaintiff, defendant 24 and their sister Radhabai, who was then alive, were entitled to the properties held by the defendants and that the alienations made in their favour by the deceased Parvatibai could not affect the title of the plaintiff and her sisters after the death of their mother Parvatibai. Defendant 25 was the transferee of the right, title and interest of defendant 24. Defendants 1—23 refused to give up the plaintiff's share in the properties though they were called upon to do so, hence the present suit.

Defendants 1—23 claimed to hold the properties as mortgagees, purchasers or *mulgeni* tenants under the plaintiff's mother [295] Parvatibai and contested the claim on the ground of limitation and misjoinder of parties or causes of action.

Defendant 24 answered that though she had transferred her half share to defendant 25, the transfer was fraudulent and without consideration, therefore, it should be set aside and her share should be given to her.

Defendant 25 asserted his title under the deed of transfer passed to him by defendant 24 on the 8th December 1891.

The Subordinate Judge raised in all fifteen issues, but he found on issues 6, 7 and 15 only. His findings on those issues were:—

(6) The claim was within time.

(7) The suit was bad for misjoinder of parties or causes of action.

(15) The plaintiff was not entitled to any relief.

The Subordinate Judge therefore dismissed the suit. The following is an extract from his judgment:—

*Issues 6, 7 and 15.*—These issues are the most important ones in this case, and go to the root of the plaintiff's claim. The property described in the plaint admittedly belonged to the plaintiff's deceased father Mangesh *alias* Mangba bin Dulba Shenvi. He died in the year 1852, leaving a widow Parvatibai *alias* Manakbai and 2 sons, Subraya and Pundi *alias* Pundlik. Subraya died in the year 1853 or 1854, leaving a widow Mathura \* \* Mathura died in the year 1869 or 1870. Parvati died on the 30th July 1900. Exhibits 4, 5, 6 and 7 show that Pundlik was adopted by Raghunath Krishna Shenvi, a brother of the deceased Parvatibai. It is in evidence that Pundlik too died some years ago, though the exact year of his death cannot be ascertained. Although the plaintiff ingeniously describes this claim as a suit for partition, yet it is evident that her intention is to obtain a declaratory decree that the several alienations made by her mother to many of the defendants in this case are invalid against her after her mother's death.

The suit as framed is not maintainable, as it includes within it several distinct causes of action which could not be joined together in the same suit—*Kachar Bhaj Vajja v. Bai Rathore* (1); *Ganesh Lal v. Khairati Singh* (2). In *Sadu bin Raghu v. Rama bin Govind*, the Bombay High Court has approved of the decision at page 289, I. L. R. 7 Bombay, though it has been doubted in Madras—*Mahomed v. Krishnan* (3); vide I. L. R. 16 Bombay 608 at p. 611. The [296] Allahabad decision (I. L. R. 16 All. 279) is on all fours with the present case. This Court is not bound to follow the decisions of the Madras High Court on this point, as it is bound by the decisions of the Bombay High Court in cases of difference of decisions (I. L. R. 17 Bombay, page 555, at page 556). There are ample materials in the evidence recorded in this case to show that the plaintiff's mother Parvatibai held the property in suit adversely to her son Subba, and the latter's widow Mathura who died in the year 1869. She must, therefore, be treated as absolute owner of the property in suit even before the death of Mathura, the widow of Subba *alias* Subraya. It is admitted in the plaint itself that the plaintiff's mother Parvatibai enjoyed and dealt with the property from the very day of the death of Mangba in 1852. The evidence afforded by exhibits 284, 300 and 310 is a sufficient indication that Parvatibai's possession of the property in suit before its alienation was adverse to her son Subbaya, and the latter's widow Mathura. Under the circumstances

(1) (1893) 7 Bom. 289.

(2) (1894) 16 All. 279.

(3) (1887) 11 Mad. 106.



disclosed in this case, I find that the suit is bad for misjoinder of different causes of action against different defendants, in spite of the fact that it is ingeniously designated as a suit for partition, and that it is not in time. The plaintiff was asked to adopt the course indicated in *I. L. R. 16 All. 279*, but she did not do so in time.

The plaintiff having appealed, the District Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). His reasons were as follows:—

I fully agree with the remarks in the judgment that there is every indication that Parvatibai's possession of the property after the death of Mangba was hostile to Subraya and his widow and plaintiff.

It is proved that Parvatibai dealt with parts of the property in her own name instead of in the name of the owners whose guardian she was. The contention that she did not mean, by putting her name, to make herself out owner, will not stand. No guardian acting honestly would behave so. In the plaint in the present suit plaintiff admits that Parvatibai "enjoyed and disposed of" the property since the death of Mangba.

Things being so, clearly the object of this suit was to obtain declaratory decrees against each of the various alienees of Parvatibai; and thus the facts are the same as in *Ganeshi Lal v. Khairati Singh* (16 All. 279) which has been twice approved by our own High Court. Mr. Shantaya (appellant—plaintiff's pleader) did not deal with this point at all, but contented himself with arguing that in a suit for partition interested third parties, taking their right from some member of the family, may be added as parties (16 Bom. 608). That is not the point here. This last-mentioned decision upholds the Allahabad ruling above mentioned.

Another decision cited by Mr. Shantaya, reported at p. 925 of Vol. VII, Bombay Law Reporter, does not apply; for the plaint itself in this case shows plaintiff's object.

[297] The plaintiff preferred a second appeal and she having died pending the appeal her daughters Umabai and Radhabai were brought on the record as her heirs.

*Raikes* (with *N. A. Shiveshvarkar*) for the appellants (heirs of the plaintiff):—We contend that the lower Courts erred in law in holding that our suit was bad for misjoinder of parties or causes of action. The plaintiff's cause of action arose on the death of her mother Parvatibai and then she found that several persons were in possession of the properties of which she wanted to recover possession. It is true that the defendants claim under different titles, such as purchasers, mortgagees and lessees. But the cause of action has no relation whatever to the defences which may be set up by the defendants. Nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the Court to arrive at a favourable conclusion: *Mussummat Chand Kour v. Partab Singh* (1). In the present case the plaintiff had one cause of action only, namely, the right to recover her share of the property on the death of her mother. The cause of action accrued to her on her mother's death. We rely on section 28 of the Civil Procedure Code and *Isham Chunder Hazra v. Rameswar Mondol* (2), *Nundo Kumar Nasker v. Banomali Gayan* (3), *Sami Chetti v. Ammani Achy* (4), *Vasudeva Shanbhaga v. Kuleadi Narnapai* (5), *Mahomed v. Krishnan* (6), *Parbati Kunwar v. Mahmud Fatima* (7). The lower Court relied upon *Kachar Bhoj Vaija v. Baikathore* (8) and *Ganeshi Lal v. Khairati Singh* (9) for holding that the suit was bad for misjoinder.

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(1) (1888) L. R. 15 I. A. pp. 157-158.

(2) (1897) 24 Cal. 831.

(3) (1902) 29 Cal. 871.

(4) (1873) 7 Mad. H. C. R. 260.

(5) (1874) 7 Mad. H. C. R. 290.

(6) (1887) 11 Mad. 106.

(7) (1907) 29 All. 267.

(8) (1883) 7 Bom. 289.

(9) (1894) 16 All. 279.



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But the first case is clearly distinguishable. It was not a suit for possession. Therein a declaration was claimed during the lifetime of the widow and the cause of action accrued to the reversioner for a declaration with respect to each of the aliena-[298]tions that was made. The second ruling is no doubt against us, but it does not seem to have been followed in any later case. It is a ruling of the Allahabad High Court and that Court refused to follow it in *Parbati Kunwar v. Mahmud Fatima* (1).

The finding of the Judge in appeal as regards adverse possession is clearly wrong. Neither of the exhibits relied upon by him supports the finding. He finds that Parvatibai was the guardian of her son and daughter-in-law. If that be so, then evidently her possession could not be adverse to her wards until she renounced her character as their guardian and held adversely to them. Moreover, the Judge has recorded the finding of adverse possession under the issue as to limitation. This is wrong. Under that issue we had only to shew that our suit was in time under Article 141, Schedule II, of the Limitation Act. The Judge should have raised a distinct issue relating to adverse possession and should have given an opportunity to the parties of adducing evidence thereon. It raises a question of title and requires a specific issue.

S. S. Patkar for respondents 1, 6, 20, 21 and 22 (defendants 1, 6, 20, 21 and 22):—The suit is bad for misjoinder of causes of actions. The defendants are interested in different lands and the causes of actions against them are not triable jointly, severally or in the alternative in respect of the same matter. Section 28 of the Civil Procedure Code cannot apply because the right to relief is not alleged severally against the defendants in respect of the same matter. The defendants claim under different alienations. The plaintiff alleges in the plaint that the different alienations are not binding on her. The expression "in respect of the same matter" in section 28 means one entire subject-matter in the whole of which the defendants are liable jointly, severally or in the alternative. We rely on *Kachar Bhoj Vaija v. Bai Rathore* (2) which rules that the different alienations by the widow are distinct causes of action which could not be joined together in one suit. The case of *Ganeshi Lal v. Khairati Singh* (3) which follows *Narsingh Das v. Mangal* [299] *Dubey* (4) is on all fours with the present case. The expression "cause of action" comprises not only the plaintiff's title when in issue, but amongst other things the wrongful possession of the separate sets of defendants or any two of the sets in the alternative in respect of the same matter: *Ganeshi Lal v. Khairati Singh* (5). With regard to the view of the Madras High Court as to the desirability of deciding the whole question in order to secure soundness of the particular decision and avoidance of discordant decisions in different cases on facts nearly the same, the Allahabad High Court observes on the other hand in *Ganeshi Lal v. Khairati Singh* (5) that the decision as to the rights of one person might be affected by the rights of another alienor. The ruling in *Kachar Bhoj Vaija v. Bai Rathore* (6) is opposed to *Salu bin Raghu v. Ram bin Govind* (7). We rely also on *Sudhendu Mohun Roy v. Durga Dasi* (8) and *Ram Narain Dut v. Annoda Prosad Joshi* (9). In the present case there is no allegation of collusion between the defendants. We also rely

(1) (1907) 29 All. 267.

(2) (1883) 7 Bom. 289.

(3) (1894) 16 All. 279.

(4) (1882) 5 All. 163.

(5) (1894) 16 All. 279.

(6) (1883) 7 Bom. 289.

(7) (1892) 16 Bom. 608 at p. 612.

(8) (1887) 14 Cal. 485.

(9) (1887) 14 Cal. 681.



on *Musammatt Gopal Devi v. Jai Narain* (1). Then again there are different causes of actions against several alienees and these causes of actions are joined with the cause of action against defendant 24 for partition.

We take our stand on sections 31, 45 and 53 clause (3), of the Civil Procedure Code. The suit is therefore bad for misjoinder of causes of action.

With regard to the question of adverse possession the issue that was raised in the first Court was—"Is the claim within time?" If the claim of Subraya and Mathurabai was barred as against Parvati, she got title by prescription under section 28 of the Limitation Act and there was a statutory conveyance to her. Therefore the alienees of Parvati got absolute title. The Subordinate Judge found that Parvati's possession was adverse to her son Subraya and his widow Mathura. In the appeal Court, the appeal being summarily dismissed, the defendants [300] were not heard; therefore the finding that Parvati was guardian is not binding on us. The Judge in appeal, however, found as a fact that Parvati's possession was adverse. Exhibit 284 says that when Subraya died he was about 20 years old. So the time having once begun to run in Subraya's lifetime it could not be stopped by the minority, if any, of Mathura. Further, the plaintiff admits in her plaint that Parvati enjoyed and disposed of the property since the death of Mangba, which took place in 1852. Further, Pundlik being adopted by Parvati's brother, the adoption was invalid and Pundlik remained the son of Mangba. Therefore the possession of Parvati was adverse to the two owners Subraya and under him his widow Mathura and also Pundlik. Besides, Parvati had got the *khata*s transferred to her name. Lastly, the plaintiff should not be allowed to elect according to *Kachar Bhoj Vaija v. Bai Rathore*.<sup>(2)</sup>

*S. A. Hatyangadi* for respondents 18 and 19 (defendants 18 and 19):—The determination of the question of misjoinder must depend for the most part upon the frame of the plaint. In the present case the plaintiff sets out briefly the various alienations under which the defendants claim and wants to have them set aside. This is, therefore, in substance a suit for a declaration that the several alienations are bad as against the plaintiff. The lower Courts were thus right in applying the case of *Kachar Bhoj Vaija v. Bai Rathore* (2). It was contended that the plaintiff's claim against the several defendants was "in respect of the same matter" and that the suit was allowed by the terms of section 28 of the Civil Procedure Code. According to that contention "the same matter" would mean the estate to which the plaintiff was entitled as heir. If that is so, then the contention is not sound. We submit that "the same matter," that is, the estate is, as it were, a constant quantity, and as each of the defendants, according to the statement in the plaint, is interested in a fragment of the estate, it cannot be said that the right to relief is claimed against the defendants severally in respect of "the estate," that is, the whole estate, unless the words such as "the whole or part of" are interpolated after the words "in [301] respect" in section 28. It is not suggested that any relief is claimed against the several defendants in the alternative. Nor can it be argued that they are jointly liable because no combination or conspiracy is alleged: *Sudhendu Mohun Roy v. Durga Dasi* (3), *Ram Narain Dut v. Annoda Prosad Joshi* (4). The rulings in *Ishan Chunder Hazra v. Ram-*

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33 B. 293=11  
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C. 120.

(1) (1905) P. R. No. 1 of 1905 (Civ. J.).

(2) (1883) 7 Bom. 289.

(3) (1887) 14 Cal. 435.

(4) (1887) 14 Cal. 681.



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*eswar Mondol* (1), *Nunio Kumar Nasker v. Banomali Gayan* (2) and *Parbati Kunwar v. Mahmud Fatima* (3), which were relied on, do not apply because therein the suits were differently framed. The *ratio decidendi* of those cases would appear to be that the question of misjoinder would not arise simply because different defences are raised by the defendants. Here, however, the plaint itself wants that the several alienations should be set aside. Those cases are therefore distinguishable on this ground. The reason of the decision in *Vasudeva Shanbhaga v. Kuleadi Narnapai* (4) is that it is desirable to go into several alienations at once and the same time because one might affect the propriety or legality of the other or others. In the present case, however, the alienations range over such a long period and the interval between the several alienations is so great that that consideration does not arise. Moreover, it is not correct to say that there is one cause of action in the present case. The plaintiff's title to the whole property is, no doubt, the same. But that circumstance does not constitute the cause of action. The cause of action against each of the defendants is by virtue of his independent wrongful possession, and no combination having been alleged to exist among the defendants, the causes of action are different. They cannot therefore, be joined in one suit: *Ganeshi Lal v. Khairati Singh* (5), *Kachar Bhoj Vaiji v. Bai Rathore* (6), *Sudhendu Mohuu Roy v. Durga Dasi* (7).

As regards the finding that the widow Parvatibai was the guardian of the owners who were minors, there is no legal evidence on the point. The only legal evidence is to the effect that they were not minors. Therefore the finding of adverse possession is good.

[302] *S. V. Palekar* for respondents 10, 16, 21 and 22 (defendants 10, 16, 21 and 22):—As to misjoinder it was contended that, inasmuch as the defence of all the defendants is the same, there was no misjoinder. But all the defendants may not choose to put forward the same defence, and as a matter of fact, in the present case, they have not put forward the same defence. It is not that a widow as such has absolutely no power of alienation. If that were so, then the position would have been simple. But the law is that a widow has the power of alienation provided there are certain justifying circumstances and those justifying circumstances may be different in different cases. It is a common experience that even in a suit, which is concerned with only one or two alienations by a widow and therefore with proving only a few justifying circumstances, the proceedings lengthen over a considerable period, entailing upon the parties unnecessary expense, trouble and waste of time. How much more would be the inconvenience to which the parties would be exposed if their own individual matter is tacked up with others with which they are not at all concerned? Each co-defendant has to prove a certain set of justifying facts, the truth or untruth of which in no way depends upon the truth or untruth of the justifying facts put forward by another defendant in support of the alienation made to him. This is what has happened in the present case. Therefore we submit that the lower Courts were perfectly justified in not allowing the plaintiff to join together all the defendants in one suit. The principle laid down in *Kachar Bhoj Vaija v. Bai Rathore* (6) is based upon common experience and governs the present case: *Ganeshi Lal v. Khairati Singh* (5).

(1) (1897) 24 Cal. 831.  
 (2) (1902) 29 Cal. 871.  
 (3) (1907) 29 All. 267.  
 (4) (1874) 7 Mad. H. C. R. 290.

(5) (1834) 16 All. 279.  
 (6) (1883) 7 Bom. 289.  
 (7) (1887) 14 Cal. 485.



SCOTT, C. J.:—The plaintiff alleges that one Mangba died without male issue, leaving three daughters, namely, the plaintiff, the defendant 24 and Radhabai deceased, and that after his death his widow Parvati being entitled to his property went on enjoying it and died on the 30th July 1900.

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[303] These recitals are admittedly inaccurate, the fact being that Mangba left two sons—Subraya and Pundlik. Pundlik was adopted into another family and the estate of Mangba descended to Subraya. Subraya was succeeded by his widow Mathura and after her death by his mother Parvati, his reversionary heiresses being his sisters, the plaintiff and the defendant 24.

33 B. 293=11  
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The defendants 1—23 claim to be alienees by sale, mortgage or lease from Parvati. The plaintiff claims to recover the estate from the defendants 1—23 and to partition it between herself and defendant 25 as assignee of the interest of her sister (defendant 24).

In the first Court fifteen issues were raised and evidence was taken upon the whole case but the Subordinate Judge only recorded findings on 3 issues, namely:—

6. Is the suit in time?
7. Is the suit barred for misjoinder of parties or causes of action?
15. Is the plaintiff entitled to any relief?

His finding on issues 6 and 15 was in the negative and on issue 7 in the affirmative and he dismissed the suit. An appeal was presented to the District Judge but he summarily dismissed it under section 551 of the Civil Procedure Code, 1882—holding that Parvati has acquired a title by adverse possession prior to the date of her alienations and that the suit was bad for misjoinder of parties of action. The plaintiff in second appeal to this Court contends, first, that the suit is not bad for misjoinder, and, secondly, that no issue of adverse possession was fairly raised and that if such a question was open to the lower Courts the judgment of the lower appellate Court is bad in law.

We will first deal with the question of misjoinder. Section 28 of the Civil Procedure Code provides that “all parties may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative in respect of the same matter.”

The words “in respect of the same matter” are more general than the words “in respect of the same cause of action” in the corresponding section 26 relating to joinder of plaintiffs. But [304] for the purposes of this suit the difference is, we think, not material. The course of decisions in the different High Courts as to the propriety of joining in one suit for possession alienees of different portions of the same estate claiming under the same alienor has not been uniform, but according to the present state of authority the High Courts of Calcutta, Madras and Allahabad would permit such a suit to proceed. See *Sami Chetti v. Ammani Achy* (1), *Vasudeva Shanbhaga v. Kuleadi Narnapai* (2), *Mahomed v. Krishnan* (3), *Ishan Chunder Hazra v. Rameswar Mondol* (4), *Nundo Kumar Nasker v. Banomali Gayan* (5), *Parbati Kunwar v. Mahmud Fatima* (6).

(1) (1873) 7 Mad. H. C. R. 260.  
(2) (1874) 7 Mad. H. C. R. 290.  
(3) (1887) 11 Mad. 106.

(4) (1897) 24 Cal. 831.  
(5) (1902) 29 Cal. 871.  
(6) (1907) 29 All. 267.



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33 B. 293=11  
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34=5 M. L.  
T. 230=1 L.  
C. 120.

The lower Courts and the respondents in this appeal have relied upon *Kachar Bhoj Vaija v. Bai Rathore* (1), but that was not a suit for possession. As pointed out in *Gledhill v. Hunter* (2), an action for the recovery of land, or as it is called in the Civil Procedure Code, section 44, "a suit for the recovery of immoveable property," is possessory and of a different nature to a suit for the establishment of title not claiming possession, although a claim for declaration of title as part of the machinery for establishing the right to possession might be joined with a suit for recovery of land. "The claim for a declaration of title and the claim for possession are not the cause of action: they are only a statement at full length of what the cause of action really is, namely, to recover the land."

In our opinion the law applicable to the present case is correctly stated in the two Calcutta cases we have above referred to. In the latter of the two it is said: "The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact [305] gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments." (3)

In the present case the land in suit is situated in several different villages, but provided the venue for the trial is the same, the right of the plaintiff to have his claim tried in one suit is the same as if the different holdings were all in the same village. It was never any bar to a suit in ejectment that many persons were in possession. The only possible objections were on the ground of inconvenience. "When the tenements claimed, and the tenants thereof, are numerous, it is frequently advisable to bring two or more distinct ejectments, rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble." See Cole on Ejectment, p. 76.

In the lower Court any difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Compare the rules of the Supreme Court in England, O. xii, rule 28.

As regards the question of adverse possession we think it should not have been discussed at all upon the 6th issue. It is a question of title requiring a specific issue. The discussion of the question in the judgment of the first Court was very unsatisfactory probably for want of evidence resulting from the absence of a definite issue. The Subordinate Judge mentions exhibits 284, 300 and 310 as justifying his conclusions. As regards exhibit 284 the record of the Court in Canarese differs from the Judge's note. The Canarese says that after Mangba's death the *vahivat* was carried on by Parvathi till her death. This is quite consistent with

(1) (1883) 7 Bom. 289.

(2) (1880) 14 Oh. D. 492 at p. 500.

(3) (1902) 29 Cal. 871, at p. 880.



management as guardian or as senior member of the family without any adverse possession. Exhibit 300 is a [306] rent-note passed in 1858 to Parvathi by a yearly (*chalgenti*) tenant. Exhibit 310 is an entry in the revenue records of payment to Parvathi in 1865 for land taken up for a railway. These exhibits are quite consistent with a management of Parvathi on behalf of junior members of the family. In the lower appellate Court the point was still more inadequately dealt with. The District Judge assumes that Parvathi was guardian of the owners at the dates of the alienations effected by her. If this was so, the presumption would be that she effected the alienations honestly as guardian and not dishonestly in breach of her trust. The Subordinate Judge had held, and we assume that in dismissing the appeal summarily the District Judge adopted the finding of the first Court, that Subraya had died in 1853 or 1854, i.e., prior to any of the alienations. But alienations by the guardian during the lifetime of Subraya's widow who was the owner of only a limited estate would not prejudice the reversioners unless justified by necessity.

We set aside the decree and remand the case for re-trial. The lower Court should not fail to raise a specific issue as to adverse possession and should consider whether any inconvenience will result from trying the suit against all the defendants at once or whether it should direct the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may if the plaintiff succeeds be given against the different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case. Costs costs in the cause.

*Decree set aside and case remanded.*

33 B. 307 (=11 Bom. L. R. 30=5 M. L. T. 230=1 I. C. 108).

[807] APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

VACHHANI KESHABAI AND OTHERS (*Original Plaintiffs*), Applicants v.  
VACHHANI NANBHA BAVAJI AND OTHERS (*Original Defendants*)  
*Opponents.\**

[26th November, 1908.]

*Suits Valuation Act (VII of 1897), section 8—Suit for declaration and consequential relief—Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint.*

In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

*Hari Sanker Dutt v. Kali Kumar Patra* (1), followed.

*Dayaram v. Gordhandas* (2), distinguished.

[*Fol*: 15 Bom. L. R. 1123=22 I. C. 71; *Ref*: 34 Bom. 267; 36 Bom. 628; 63 I. C. 316=1922 Pat. 337; 73 I. C. 48=4 P. L. T. 71=2 Pat. 198; 79 I. C. 668; 80 I. C. 563=3 Pat. 640; *Dist*: 4 Pat. 198;]

APPLICATION under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of N. R. Majmudar, Joint First Class Subordinate Judge of Ahmedabad with appellate powers, confirming the order passed by N. V. Desai, Second class

\* Application No. 64 of 1908 under extraordinary jurisdiction.

(1) (1905) 32 Cal. 734.

(2) (1906) 81 Bom. 73.

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33 B. 298=11  
Bom. L. R.  
34=5 M. L.  
T. 230=1 I.  
C. 120.



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NOV. 26.

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CIVIL.

33 B. 307=11  
Bom. L. R.  
80=8 M. L.  
T. 230=1 I.  
C. 108.

Subordinate Judge of Dhanduka and Ghogho, returning a plaint for presentation to the proper Court.

The plaintiffs brought a suit against the defendant in the Court of a Second Class Subordinate Judge and prayed for the following reliefs:—

- (a) A declaration that they were owners of a three-fourths share of certain lands called the *Bhathadani Pati* and the income thereof that might be in deposit with the Talukdari Settlement Officer and also a three-fourths share of  $8\frac{3}{4}$  *dokdas* of the village site and of every other sort of income from the village of Marchand;
- (b) Recovery of Rs. 637-8-0 on account of their share in the income of the said *Pati* for the Samvat years 1956 to 1960; and
- (c) A perpetual injunction restraining the defendants from preventing them from jointly managing the property in dispute.

[308] The first relief was valued at Rs. 130, while the second and the third were valued at Rs. 637-8-0 and Rs. 25 respectively.

The defendants answered that as the value of the property in suit was over Rs. 5,000 the Second Class Subordinate Judge's Court had no jurisdiction to entertain the suit. The Subordinate Judge allowed the defendant's contention and returned the plaint for presentation to the proper Court.

On appeal by the plaintiffs the Appellate Court confirmed the order for the following reasons:—

But the important question is whether the jurisdiction of the lower Court is ousted on this account. The answer to this question depends upon the interpretation that might be put upon section 8 of the Suits Valuation Act, 1887. The suit is governed by section 7, paragraph 4, clauses (c) and (d), of the Court-Fees Act as it is a suit for declaration coupled with consequential relief see (I. L. R. 10 Bom 60, I. L. R. 17 Bom. 56), and the plaintiff is at liberty to value the reliefs he seeks at any amount he chooses and to pay the Court-fee on such amount (I. L. R. 19 Bom. 193 and I. L. R. 17 Bom. 56). Section 3 of the Suits Valuation Act, 1887, empowers the Local Government to make rules determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-Fees Act, 1870, section 7, paragraphs v and vi, and paragraph x, cl. d); and section 4 provides that when a suit mentioned in the Court-Fees Act, 1870, section 7, paragraph 4, or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which, for purposes of jurisdiction, the relief sought in the suit is valued, shall not exceed the value of the land or interest as determined by those rules. Section 8 lays down that when in suits, other than those referred to in the Court-Fees Act, 1870, section 7, paragraphs v, vi and ix, and paragraph x, cl. (d), Court-Fees are payable *ad valorem*, under the Court-Fees Act, 1870, the value as determinable for the computation of Court-fees and the value, for purposes of jurisdiction shall be the same. It seems to me that when rules are framed under section 3 of the Suits Valuation Act, 1887, the plaintiff, who asks for a declaration and consequential relief, though he is at liberty to value the relief at any amount he likes and pay Court-fee on that amount, cannot put a higher value upon his suit than that determined by those rules. Where no such rules are made the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction is to be the same. No rules have been promulgated by our Local Government under section 3 of the Suits Valuation Act, 1887, and the discretion of the plaintiff is left unfettered. In I. L. R. 17 Bom 56, which was a case of declaration and consequential relief it was held as I have already said that the valuation of the relief sought for computing Court-fees rested with the plaintiff and not with the Court; and in other suits falling under section 7, paragraph 4, of the Court-Fees Act, 1870, the plaintiff [309] was allowed to put his own value upon the reliefs claimed, and it was held that the amount paid by him also determined jurisdiction (I. L. R. 12 Bom 675, I. L. R. 19 Bom. 198). It would seem therefore that according to those decisions the amount paid by the plaintiff in a suit, in which a declaration and consequential relief is prayed for, should determine the jurisdiction; and the High Court of Calcutta has so held (I. L. R. 32 Cal. 734). But our own High Court in 8 Bom. L. R. 885 has recently held that though a suit in which declaration and consequential relief are sought is governed



by section 8 of the Suits Valuation Act, 1887, the term "determinable" used in that section means "determinable by the Court which has to try the case," and I am bound to follow this decision.

Plaintiffs preferred an application under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882).

V. G. Ajinkya for the applicants (plaintiffs):—We come up in revision on the ground that the first Court, which alone had the jurisdiction to try the suit, was wrong in passing the order for the return of the plaint for presentation to the proper Court. That Court refused to exercise the jurisdiction which was vested in it to entertain the suit. Our suit is one for declaration and injunction which has been held to be a proper consequential relief. Our claim is therefore governed by section 7, sub-section (4), clause (c), of the Court-Fees Act, which lays down that the *ad valorem* Court-fee leviable in suits coming within the clause would be determined by the valuation put down by the plaintiff. Along with the said section may be considered section 8 of the Suits Valuation Act which shews that in suits falling under section 7, sub-section (4), clause (c), the valuation for Court-fees and jurisdiction would be the same. It has been ruled over and over again by this Court that the amount put by the plaintiff in a suit in which declaration and consequential reliefs are prayed for should determine the jurisdiction: *Khushalchand Mulchand v. Nagindas Motichand* (1), *Great Indian Peninsula Railway Company v. Rissett Chandmull* (2). In the present case no rules as contemplated by section 4 of the Suits Valuation Act have been framed by Government, and so long as no rules are framed the suit would be governed by section 8 of the Act, and that section lays down that the value determinable for Court-fees and jurisdiction [310] would be the same, and as the plaintiff is the person who is to value the claim for the purposes of Court-fees, the value put down by him would determine the jurisdiction. The whole law on the point is discussed by the Calcutta High Court in *Hari Sankar Dutt v. Kali Kumar Patra* (3). We therefore submit that the lower Courts wrongly held that the suit was not within the pecuniary jurisdiction of the Second Class Subordinate Judge.

M. N. Mehta for the opponents (defendants):—We submit that though the suit is one for declaration and injunction, the plaintiff is not the sole arbiter of the valuation to be put down for determining the jurisdiction of the Court. The word "determinable" occurring in section 8 of the Suits Valuation Act would mean as determinable by the Court. The Court is not deprived of its jurisdiction to go into the question whether the value put down by the plaintiff is sufficient or not: *Boidya Nath Adya v. Makhan Lal Adya* (4), *Musst. Bibi Umatul v. Musst. Nanji Koer* (5). There is a ruling of our Court in *Dayaram v. Gordhandas* (6), which lays down that the valuation to be determined under section 8 of the Suits Valuation Act should be determined by the Court, and so long as that ruling stands the lower courts are bound to follow it. Besides, section 12 of the Suits Valuation Act gives ample power to the Court to go into the question of valuation, and in this case the Court has exercised that power and has, after taking evidence, come to the conclusion that the value of the subject-matter was over Rs. 5,000, and therefore under section 24 of Act XIV of 1869 the Court of the Second Class Subordinate Judge had no jurisdiction to entertain the suit.

(1) (1888) 12 Bom. 675.

(2) (1894) 19 Bom. 165.

(3) (1905) 32 Cal. 734.

(4) (1890) 17 Cal. 680.

(5) (1907) 11 Cal. W. N. '705.

(6) (1906) 31 Bom. 73.

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83 B. 307=11  
Bom. L. R.  
80=8 M. L.  
T. 230=11.  
C. 108.



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33 B. 307=11  
Bom. L. R.  
30=5 M. L.  
T. 230=1 I.  
C. 108.

*Ajinkya* in reply :—The case of *Boidya Nath Adya v. Makhan Lal Adya* (1) was for partition. The ruling in *Musst. Bibi Umatul v. Musst. Nanji Koer* (2) was not under the Suits Valuation Act. The case of *Dayaram v. Gordhandas* (3) is clearly distinguishable as in that case possession was one of the consequential reliefs asked for.

[311] SCOTT, C. J.:—The question that we have to decide is whether in a suit for a declaration and consequential relief the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

We think that the words of section 8 of the Suits Valuation Act VII of 1887 lead to that conclusion; and we find that this was the view taken by the Calcutta High Court in *Hari Sankar Dutt v. Kali Kumar Patra* (4).

We have been pressed by a decision of the Court in *Dayaram v. Gordhandas* (3), but that is a case which is clearly distinguishable, because the learned Judges there treated it as a suit in which there was a claim for possession.

We, therefore, make the rule absolute and set aside the order of the lower Court with costs.

*Rule made absolute.*

33 B. 311=(11 Bom. L. R. 26=5 M. L. T. 228=1 I.C. 106.)

APPELLATE CIVIL.

*Before Chief Justice Scott and Mr. Justice Chandavarkar.*

GANESH MORESHWAR JOSHI AND ANOTHER (*Original Defendants 3 and 4*), Appellants, *v.* PURSHOTTAM BALKRISHNA RODE AND OTHERS (*Original Plaintiffs and Defendants 5 and 6*).<sup>\*</sup>  
[1st December, 1908.]

*Civil Procedure Code (Act, XIV of 1882), sections 278, 282, 288 and 287—Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor.*

Plaintiffs obtained a money-decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage. [312] Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment-creditors but purchasers and that what was attached and sold was equity of redemption, therefore, the purchasers could not claim more than they bought.

*Held*, that, as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment-creditors and not purchasers.

*Held* further, that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would

<sup>\*</sup> Second Appeal No. 186 of 1907.

(1) (1890) 17 Cal. 680.

(2) (1907) 11 Cal. W. N. 705.

(3) (1906) 31 Bom. 78.

(4) (1905) 32 Cal. 734.



have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

[Ref : 50 I. C. 772=17 A. L. J. 617 ; 47 Cal. 446=55 I. C. 189=30 C. L. J. 496 ; 66 I. C. 694=34 C. L. J. 338 ; 68 I. C. 741=24 Bom. L. R. 911 ; 80 I. C. 428 ]

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana with appellate powers, amending the decree of G. K. Kale, Subordinate Judge of Roha.

The facts of the case were as follows :—

On the 30th November 1899 the plaintiffs Ganesh Balkrishna Rode and his brothers got a money-decree against Vishnu Bapat father of the minor defendants 1 and 2 for the recovery of his money-debt, namely, Rs. 116 and costs. In execution of the decree the property in suit along with the other property of the judgment-debtor was attached in the year 1901. Thereupon defendant 3, Ganesh Moreshwar Joshi, applied to the Court for the removal of the attachment or for an order that the property be sold subject to his mortgage on the ground that the plaintiff's judgment-debtor had mortgaged the property to him with possession for Rs. 2,000 on the 12th February 1900. On the 15th November 1902 the Court ordered that the attached property should be sold subject to the mortgage lien of defendant 3. The auction-sale took place on the 23rd October 1903 when the property in suit was purchased by plaintiffs with the leave of the Court and the sale was confirmed on the 24th November 1903. In the meanwhile, that is, after the purchase by the plaintiffs but before the sale was confirmed, the plaintiffs brought the present suit on the 13th November 1903 for a declaration that the property in suit was liable to be attached [313] and sold in execution of his money-decree, the mortgage of defendant 3 being a sham and colourable transaction without consideration. They further prayed that the order directing them to purchase the property subject to defendant 3's mortgage be set aside. Defendant 4 was the undivided brother of defendant 3 and defendants 5 and 6 were mortgagees of some of the properties in suit from defendant 3.

The guardian of defendants 1 and 2, who were minors, stated that he knew nothing about the claim.

Defendants 3 and 4 contended *inter alia* that their mortgage for Rs. 2,000, dated the 12th February 1900, was a genuine transaction accompanied with possession and supported by valuable consideration, that as the mortgage was passed one year before the plaintiffs' attachment it was binding on the plaintiff, that the plaintiffs' allegations were false and malicious, and that the property in dispute was not liable to attachment and sale in execution of the plaintiffs' decree so long as the mortgage was not paid off.

Defendants 5 and 6 did not appear.

The Subordinate Judge found that the mortgage in suit was not a sham transaction and was supported by consideration, that the mortgage was proved, and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

The plaintiffs having appealed, the Appellate Court found that the mortgage was a colourable transaction without valuable consideration and that the plaintiffs' purchase at the auction-sale did not amount to an acquiescence on their part in the genuineness of the mortgage and did not estop them from praying for the declarations sought. The following is an extract from the appellate Court's judgment :—

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33 B. 311=11  
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33 B. 311=11  
Bom. L. R.  
26=8 M. L.  
T. 228=1 I.  
C. 106.

It is, however, clear to my mind that the fact of the plaintiffs having bid at the Court-sale and become purchasers of the plaint property with full knowledge and notice of the retention of the mortgage lien on the foot of exhibit 53 in favour of defendant No. 3 cannot and does not prejudice their right, even though they were the decree-holders at whose instance the property was put up to sale, to challenge the genuineness and *bona fides* of the mortgage.

[314] The sale of the property subject to the mortgage incumbrance was ordered by the Court in spite of the decree-holders' protest and opposition which were disallowed by the Court after a summary investigation in a miscellaneous proceeding under sections 278 to 281 of the Code of Civil Procedure. The very nature of the inquiry and the frame of the issues to be raised in it make it evident that the order passed does not finally dispose of the questions and the law clearly provides a remedy by way of a regular suit to render it nugatory and ineffectual, if not to revise and reverse it. It is of a temporary nature, and all the important questions regarding the *bona fides*, consideration, validity, etc., of the mortgage can be and are raised for determination in the suit by the dissatisfied party to the miscellaneous proceeding, may the aggrieved party be an intervener or the decree-holder. The order has not the effect of *res judicata* on either side, and it does not seem lawful or equitable to find that because a decree-holder abides by the Court's order for the time being, allows the attached property to be sold subject to a lien and himself purchases it, he has acquiesced in the order and is ever after estopped from impeaching the *bona fides* of want of consideration for the mortgage. The law leaves him open two remedies for getting the questions regarding the mortgage wholly finally tried and adjudicated on—one by a regular suit for a declaration of the nature sought in the present suit, and the other by a suit of redemption, and what would be the use and object of that suit if the party suing were to be held as bound and silenced by the result of the miscellaneous inquiry which from its very character embraces two issues, one about the possession of the property attached and the other as to on whose behalf the possession was held at the time of the attachment? The incidental inquiry into consideration, if one should be at all held, would be summary and to determine only *prima facie* which of the parties should be compelled to file a regular suit. Such an inquiry therefore and the Court's order in it cannot be binding on a party to the regular suit, and it is therefore that the plaintiffs cannot be held as having acquiesced in the Court's order directing the retention of lien.

They should certainly have shewn diligence and not allowed the execution matter to be pushed on to sale by instituting the suit at an earlier date and obtaining a temporary injunction prohibiting the sale under section 492, Civil Procedure Code, or a stay order in the execution matter itself. It is this supineness on their part that has placed them as purchasers in an awkward position, but it cannot tend to the conclusion that they cannot challenge the mortgage on the grounds of want of consideration and *bona fides*.

The appellate Court therefore passed a decree as follows :—

The question as to what relief could be awarded to the plaintiffs in this suit is not difficult to answer. Though they have succeeded in shewing that the mortgage-deed (exhibit 53) does not evidence a real and *bona fide* transaction they could not, but admit that the property attached at their instance was at the time of its attachment subject to the mortgage of Rs. 1,000 in favour of the [315] Paranjpes (defendants 5 and 6) by virtue of their deed (exhibit 88). It is not in dispute that on the date of exhibit 53 the whole amount due on the foot of exhibit 88 was Rs. 1,186-1-6.

The Paranjpes have been joined as co-defendants from the beginning and they have not urged that they were entitled to more. On the contrary their deed for Rs. 4,000 (exhibit 91) contains their admission that the sum of their mortgage dues was Rs. 1,186-1-6 and not a pie more.

I therefore grant the appeal and amend the lower Court's decree. The amended decree is that it be declared that the plaint property was subject to a lien of Rs. 1,186-1-6 in favour of defendants 5 and 6 on the date of its attachment by the plaintiffs and that the mortgage of the same by exhibit 53 in favour of defendants 8 and 4 is not binding on them (plaintiffs).

Defendants 3 and 4 preferred a second appeal.

M. B. Chaulbal (Government Pleader and G. K. Dandekar for the appellants (defendants 3 and 4).

N. M. Samarth for respondents 1-3 (original plaintiffs).



P. P. Khare for respondents 5 and 6 (defendants 5 and 6).

SCOTT, C. J.:—The plaintiffs obtained a decree for money in the Pen Court against Vishnu Bapat, father of the defendants 1 and 2, and in execution attached *inter alia* the property described in the plaint being an eight-anna share of a *khoti* village. The defendant 3 Ganesh Joshi then applied to the Pen Court for removal of the attachment or for an order that the property be sold subject to his mortgage lien, alleging that Vishnu Bapat the judgment-debtor passed to him a mortgage with possession of the attached property on the 12th February 1900 for Rs. 2,000. The Pen Court upon that application ordered that the property be sold subject to the mortgage. This order was passed on the 15th November 1902.

The property was accordingly put up for sale subject to the mortgage and the plaintiffs with the leave of the Court became the purchasers. On the 13th November 1903 the plaintiffs brought this suit, praying that it may be declared that the deed of mortgage is without consideration and made with intent to defraud the plaintiffs and as hollow and ineffective and that therefore the property is liable to attachment and sale. The [816] plaintiffs obtained a decree in the lower appellate Court. Against that decree the defendant 3 brings this second appeal.

It is contended on behalf of the appellant that the suit is not maintainable on the ground, first, that such a suit can only be brought by a person who is still a judgment-creditor and that the plaintiffs whose decree is satisfied are no longer judgment-creditors but only purchasers; and, secondly, that what was attached and sold was an equity of redemption only and that the purchasers cannot claim more than they bought.

As regards the first point it is sufficient to say that the suit was brought by the plaintiffs before the sale had been confirmed, and before the decree had been satisfied and while the plaintiffs were still judgment-creditors.

The latter branch of the argument is based upon a false assumption, for what was attached was the immoveable property believed to be unincumbered and not the equity of redemption. An equity of redemption may be attached and sold (see *Parashram Harlal v. Govind Ganesh* (1)) but that was not done in the present case. The claim made to the attached property was upon the investigation under section 278 decided in favour of a person claiming to be mortgagee in possession. Under these circumstances the attached property should have been released under section 280 (see *Kassirav R. Saheb Holkar v. Vithaldas Mangalji* (2)) and the judgment-creditors should have been left to the suit allowed by section 283. The order passed by the Pen Court was irregular, as section 282 only applies to cases of mortgages or liens created in favour of a person not in possession.

We must therefore discuss this case on the footing of a purchase at the Court-sale of attached property believed to be incumbered, a case contemplated by section 287. The purchaser under these circumstances is not bound by estoppels which would have bound the judgment-debtor. See *Dinendronath Sannial v Ramkumar Ghose* (3), *Lala Parbhu Lal v. Mylne* (4) and *Bashi Chunder Sen v. Enayet Ali* (5). There is nothing to prevent [317] him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee.

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33 B. 311=11  
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(1) (1895) 21 Bom. 226.

(2) (1873) 10 Bom. H. C. R. 100.

(3) (1881) 7 Cal. 107.

(4) (1887) 14 Cal. 401.

(5) (1892) 23 Cal. 236.



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26=3 M. L.  
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The decision of the lower appellate Court was also attacked on the ground that the onus of proof had been wrongly thrown upon the defendant and that the finding that the mortgage was a sham transaction could not therefore stand. I, however, think it is clear that the whole of the evidence was fully discussed and considered by the lower Court. The learned Judge came to the conclusion that the surprising nature of the transaction itself and the suspicious circumstances attending it outweighed the inferences which might be suggested by the evidence of some payments having been made by the defendant to creditors of Vishnu Bapat.

It is a judgment upon a pure question of fact which is binding upon us in second appeal.

I see no reason to interfere with the decree passed by the lower Court. I would therefore confirm it and dismiss the appeal with costs.

CHANDAVARKAR, J. :—I concur.

*Decree confirmed.*

33 Bom. 317 (=11 Bom. L. R. 51=1 I. C. 322).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

AMRITA RAVJI RAO (*Original Defendant*), Appellant, v. SHRIDHAR NARAYAN OKE AND OTHERS (*Original Plaintiffs*), Respondents.\*  
[9th December, 1908.]

*Adverse possession—Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.*

The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V sought to take possession of the property he was obstructed by G. and he had to [318] file a suit against G. to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1898. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant : the latter contended that the claim was barred by adverse possession :—

*Held*, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G's possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against G. during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other.

The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

[Ref: 35 Bom. 79; 37 Bom. 64.]

SECOND appeal from the decision of F. X. De Souza, District Judge of Thana, reversing the decree passed by S. A. Gupte, Subordinate Judge at Murbad.

\* Second Appeal No. 729 of 1907.



Suit to recover possession of land.

The land in dispute was originally the joint property of two brothers Gangadhar and Damodar. Of these, Damodar was sued on a mortgage-bond, as manager of the joint Hindu family, by one Narayan, the father of the plaintiffs, in 1873. The suit was decreed; in execution of the decree the property was put up for sale and purchased by one Vishnu Ganesh. When Vishnu attempted to recover possession of the property, he was obstructed by Gangadhar: and he had eventually to file a suit against the latter to remove the obstruction. The Court decided in that suit on the 29th November 1886 that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. In execution of this decree Vishnu gave a *darkhast* to recover possession of a moiety. It was sent to the Collector for execution, who effected a partition and handed over possession of lands to Vishnu on the 11th December 1895.

[319] On the 22nd January 1897, Vishnu sold the property to one Vinayak, who in turn sold it to the plaintiff on the 18th March 1898.

Meanwhile, on the 4th October 1894, Gangadhar sold the land to Ravji Rao (father of defendant).

The plaintiff filed this suit on the 4th October 1906 to recover possession of the property from the defendant.

The Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred by time. He was of opinion that the defendant and his predecessor-in-title had been in adverse possession from the 29th of November 1886, the date of the partition-decree.

On appeal the District Judge arrived at a contrary conclusion. He held that the suit was not barred. The following were his reasons:—

The Subordinate Judge holds in the alternative that time must be held to run against the plaintiff from the date of the decree (exhibit 22), viz., 29th November 1886. I am unable to follow this argument. The effect of the decree was to make plaintiff's predecessor-in-title Vishnu Ganesh, virtually a co-parcener with Gangadhar in place of Damodar, entitled to joint possession or rather a tenancy-in-common in the family property, and till the joint tenancy was severed by partition, Gangadhar's possession was joint with, and not adverse to, the decree-holder or the auction-purchaser. The adverse possession of the defendant began, if at all, from 11th December 1895, the date of partition; and computed from that date, the period falls considerably short of the statutory period.

This view is based on the assumption that Article 144 of Schedule II to the Limitation Act XV of 1877 applies to the present case, and that I think is the article applicable; but even if Article 127 or Article 137 applied, the suit would be in time; for, on the former hypothesis, the exclusion of the plaintiff would not begin till 4th October 1894, and, on the latter, the judgment-debtor would not be entitled to exclusive possession till the date of the partition.

It is thus clear that plaintiff has proved his title and that his suit is in time. But at first it seemed to me that it would be inequitable to award possession as against the defendant, who is a *bona fide* purchaser for value from one of the co-parceners and has been in possession by virtue of his purchase for nearly twelve years. But on more careful consideration I am of opinion that the defendant cannot be maintained in possession for the following reasons:—

[320] The only ground on which the defendant can resist this suit is that he has the equity of a *bona fide* purchaser for value without notice in his favour. But no evidence was adduced to prove that he can claim this equity in the present case. If he purchased the land with the knowledge that it formed part of an undivided co-parcenary estate, he must have known that he was purchasing what his alienor had no right to sell, and he would thus have actual notice of the defect in his title. If he purchased in ignorance, then due enquiry would have apprised him of the true character of the property he was buying, and the law would impute to him constructive notice of the flaw in his title. In either case, the equity now claimed on his behalf would be non-existent.

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33 B. 317=11  
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But even assuming that the equity can be successfully claimed, the plaintiff has an equal equity on his side, and the legal title being in him, his title must prevail. The law is settled that a purchaser from an undivided co-parcener acquires no title to specific property; he merely acquires a right to claim a partition in which he has an equity to have the family property so marshalled as to allot the specific property to the share of the co-parcener from whom he derives his title, provided this can be done without injustice to the other co-parceners (*vide Udam v. Rana*, 11 B. H. C. 76; and *Aiyagari v. Aiyagari*, I. L. R. 25 Mad. 690). In the present case, the property purchased by the defendant was not allotted to the share of his alienor Gangadhar, and it is suggested that this was due to the fraud of Gangadhar himself. Be this as it may, it has been decided that in the analogous case of a mortgage the mortgagee's sole remedy in similar circumstances is to proceed against the share which has been allotted to his mortgagor in lieu of the property mortgaged. (*Byjnath v. Ramoodeen*, 1 I. A. 106; *Hem Chunder v. Thako Moni*, 20 Cal. 533; *Amolak v. Chandan*, 24 All 483). By parity of reasoning, I would hold in the present case that defendant's sole remedy is to proceed against the share of Gangadhar for compensation.

The defendant appealed to the High Court.

*B. V. Vidwans* for the appellants :—We are entitled to tack Gangadhar's possession to our own adverse possession. Gangadhar did not hold the property on Vishnu's behalf, and the passing of the partition decree did not change the character of that possession. He was in the position of a vendor who remains in possession after the sale: such a possession has been held to be adverse to the purchaser: *Anant Coomari v. Ali Jamin*(1).

In the present case the *darkhast* under which Vishnu obtained the symbolical possession was presented subsequently to our purchase, and so the *darkhast* and the granting of symbolical [321] possession do not affect us who are third parties: see *Juggobundhu Mukerjee v. Ram Chunder Bysack* (2) and *Harjivan v. Shivram* (3).

The view of the lower appellate Court that Vishnu by his decree became virtually a co-parcener with Gangadhar and that Gangadhar's possession would not be adverse till Vishnu came to know of his ouster or exclusion is obviously not correct, because a stranger cannot become a co-parcener and cannot claim his privileges: *Ram Lakhi v. Durga Charan* (4).

*J. R. Gharpure* for the respondents :—We submit that the decree of the lower appellate Court is right. The appellant is a purchaser from Gangadhar. He will either be subject to the equities and legal defences that existed against Gangadhar or will take free from all such equities. In the former case, as Gangadhar's physical possession itself was not enough to complete his title against us, defendants claiming through him cannot be in a better position. In the latter case if he claims independently of Gangadhar and in his own right, his possession not being for twelve years is not adverse.

None of the cases cited for the appellant apply here as they are cases before execution.

CHANDAVARKAR, J.—The facts upon which the question of adverse possession, arising on the second appeal, turns, are found and stated as follows in the judgment of the lower appellate Court:—

"The plaint-land (S. No. 17, Pot No. 1) along with other lands was originally the joint property of two brothers, Gangadhar and Damodar.

One Narayan, the father of the plaintiffs, obtained a decree in Regular Suit No. 735 of 1873 against Damodar on a mortgage-bond; and in execution of that decree, in *Darkhast* No. 699 of 1875, he brought the property to sale. The property was purchased by Vishnu Ganesh. The suit had been instituted by Narayan against

(1) (1885) 11 Cal. 229.

(2) (1880) 5 Cal. 544.

(3) (1894) 19 Bom. 620.

(4) (1885) 11 Cal. 680.



Damodar as manager of the joint Hindu family. Gangadhar, however, obstructed the purchaser, Vishnu Ganesh, in taking possession, whereupon the latter instituted Regular suit No 178 of 1877 against Gangadhar to remove the obstruction. The District Court decided in appeal in that [322] suit that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. The date of this decision was 29th November 1886 (*vide* exhibit 22).

In execution of this decree, Vishnu gave a Dakhast No. 344 of 1894 to recover possession of a moiety. The Dakhast was sent to the Collector for execution and the Huzur Surveyor, in effecting a partition, handed over to Vishnu possession of the plaint-land (Survey No. 17, Pot No. 1) and other survey numbers on 11th December 1895. Exhibit 23 is the possessory receipt passed by Vishnu in token of having obtained possession.

On 22nd January 1897 Vishnu sold the property to one Vinayak Mahadev, and he in turn sold it to plaintiff 1 on 18th March 1898 under a sale-deed (exhibit 16). That is the title-deed under which the plaintiff claims.

Meanwhile, on 4th October 1894, Gangadhar has sold the plaint-land to the defendant's father under a sale-deed (exhibit 26)."

The learned Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred, because the defendant, and before him his vendor, had been in adverse possession from the 29th of November 1886, the date of the partition decree. On appeal by the plaintiff, the learned District Judge, differing from the Subordinate Judge, has held that the period commencing from the 29th of November 1886 and ending with the 11th of December 1895, when the partition was effected by the Collector in execution of the decree, should not be taken into account, because the effect of that decree was to make the plaintiffs' predecessor in title, Vishnu Ganesh, "virtually a co-parcener with Gangadhar in place of Damodhar, entitled to joint possession or rather a tenancy-in-common in the family property," and that the possession of Gangadhar could not be adverse to the decree-holder until the joint tenancy was severed by partition.

I am unable to agree with the learned District Judge, if by this he means that, where two or more persons hold property jointly as tenants-in-common and one of them is out of possession, the possession of the rest does not in any case become adverse until the property is partitioned. It has been held by a Division Bench of this Court in *Bandacharya v. Shrinivasacharya* (1) on the authority of Lord Denman's remarks in *Culley v. Doe dem Taylerson* (2), [323] followed in *Gangadhar v. Parashram* (3), that "to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster," and "exclusive receipt of profits continuously for a long period may point to an ouster but the Court must be satisfied that such taking of profits is an indication of denial of rights in the other co-tenant to receive them." The question of adverse possession depends, therefore, not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

In the present case, the decree for partition which was obtained by Vishnu Ganesh (under whom the plaintiff claims) on the 29th of November 1886 against Gangadhar, established his right to a moiety of the property and to get that moiety separated and allotted to him. Under ordinary circumstances the continuance of Gangadhar in possession to the exclusion of Vishnu Ganesh would have been adverse from that date, and the defendant, who claims under a purchase from Gangadhar, would have been

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33 B. 317=11  
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51=1 I. C.  
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(1) (1907) 5 Bom. L. R. 743.

(2) (1840) 11 Ad. & E. 1008 at p. 1014.

(3) (1905) 29 Bom. 300 : 7 Bom. L. R.

252.



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83 B 317=11  
Bom. L. R.  
51=1 I. C.  
322.

entitled to tack on the period of the latter's exclusive occupation to his own, so as to perfect his title to the property by adverse possession for more than twelve years as against Vishnu Ganesh and those claiming under him. But to entitle the defendant to add to the period of his own adverse possession (which is admittedly less than twelve years before the date of the present suit) the period of his vendor Gangadhar's possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against Gangadhar during the period of his exclusive occupation, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other. Suppose during the period that the decree was alive and capable of execution, the judgment-debtor Gangadhar, who was in possession, had repudiated his liability thereunder and claimed the property as his own. That could not have given Vishnu Ganesh [324] a fresh cause of action or the right to sue him afresh in ejectment, because, his right having been established by the decree, he could proceed in execution without any fresh suit. It is not contended before us, nor does it appear to have been urged in either of the Courts below, that on the 11th of October 1894, when Gangadhar sold the property to the defendant, the decree had been barred so as to become incapable of execution and to free Gangadhar from his liability under it. As a matter of fact, the decree was subsequently executed by the Collector according to law, with the result that, as against Gangadhar, Vishnu Ganesh was allotted his divided moiety and put in possession on the 11th of December 1895. No doubt that possession was symbolical and would not bind the defendant, who was then in actual possession under his deed of purchase of a prior date. But so far as Gangadhar was concerned, it was otherwise; his possession of the property was subject to his liability under the decree and could in no sense become adverse to the decree-holder during the period when his right to execution of the decree had not become barred. The defendant cannot, therefore, invoke the aid of the possession of his vendor to support his plea of a title acquired by adverse possession. Such possession could begin, if at all, only when Gangadhar, in spite of his liability under the decree, sold the property to the defendant, and the defendant's occupation of the land commenced. Whether, even then, the defendant's possession became adverse from that date, need not be decided, because assuming it was, the suit was brought within twelve years from then. For these reasons the decree must be confirmed with costs.

HEATON, J.—The predecessor of the plaintiff, who sues for possession, obtained a decree for possession, after partition, of the half of a property. This decree was against one Gangadhar who was in possession of the whole property and who after the partition decree, but before its execution, sold the property to the defendant and placed him in possession. So defendant was in actual possession of the whole, when partition was made in execution of the decree and plaintiff's predecessor was formally placed in possession of the half he was under the decree entitled to. Thereafter neither the plaintiff nor his predecessor converted the [325] formal into actual possession and the defendant remained in actual possession of the property. The latter had not had actual possession for twelve completed years when the suit was filed but seeks to add on to his own actual possession that of Gangadhar and call the whole adverse.



The facts being as they are he cannot do this. When plaintiff's predecessor executed the decree by having his share of the property separated and formally given over to him he perfected his claim.

From that moment a new condition of things came into existence; new rights arose and amongst them, that of the decree-holder to take actual possession of his separated share. This was not a right continued or derived from any previous holder of the land but a new right unlike any which previously existed. No possession prior to its inception could be adverse to that right. Therefore no case of title in the defendant based on adverse possession is established.

*Decree confirmed.*

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33 B. 317=11  
Bom. L. R.  
51=1 L. C.  
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33 B. 325 (=3 L. C. 273=10 Bom. L. R. 660.)

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

*In re* LAND ACQUISITION ACT (ACT I OF 1894), CAUSE IN  
THE MATTER OF 1 GOVERNMENT OF BOMBAY, 2  
KARIM TAR MAHOMED.\*

[18th June, 1908.]

*Land Acquisition Act (I of 1894), section 18—Compensation—Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to Surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award.*

In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.

[326] The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots.

Where no evidence has been adduced of sales in the neighbourhood of such a large block of land as the one under reference the evidence before the Court of sales of small pieces of land in the neighbourhood enables the Court to give an opinion regarding the values of different portions of the block, and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument.

The practice which has grown up in References under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence.

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost; and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

*PER CURIAM*:—"Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that an hypotheti-

\* Reference No. 32 of 1907.



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33 B 825=8  
I. C. 273=10  
Bom. L. R.  
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cal scheme can be a guide to market values ascertained by other means is equally fallacious."

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle.

[Fol: 70 I. C. 82=16 L. W. 891=1023 M. W. N. 54; Ref: 79 I. C. 74=5 Lah. 227;]

THE facts appear in the judgment.

*Kirkpatrick* (with *Scott*, Advocate-General) for Government.

*Robertson* (with *Strangman* and *Weldon*) for the claimant.

MACLEOD, J.—This is a reference from the Collector of Bombay, under section 18 of the Land Acquisition Act, to determine the amount of compensation to be awarded to 'Karim Tar Mahomed' for certain land on Mazagon Road, which has been notified for acquisition by Government on behalf of the Municipality of Bombay on the 17th November 1904. The land is shown in pink on the plan (Exhibit A). It measures 3,475 square yards with [327] a frontage of 165 feet on Mazagon Road and 148 feet on Valpakhadi Road and a mean depth of 170 feet on the Mazagon Road. At the date of the notice there was a bungalow and out-houses on the land, but it is admitted that the land should be valued as vacant building land. The Collector has offered Rs. 15 a square yard and the claimant considering his land to be worth Rs. 25, applied to the Collector for a reference to this Court.

The valuation cannot be based on what the property was producing at the time of the notice, nor have there been any recent sales of the land to guide the Court.

The market value must, therefore, be determined by sales of similar land in the neighbourhood. From Exhibit A and other evidence that has been given it is clear that small holdings are the rule in the locality. The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots. He has not attempted the latter course. I have therefore to decide what was the market value of this plot of land as a whole on or about the 17th November 1904. No evidence has been adduced of sales in the neighbourhood of such a large block of land, but the evidence before the Court of sales of small pieces of land in the neighbourhood can enable the Court to give an opinion regarding the values of different portions of the block and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary however to distinguish opinion from argument. And the practice which has grown up in References under the Land Acquisition Act of surveyors making long reports and providing copies to the opposite side before the hearing appears to me open to grave objection. A surveyor's opinion by itself is good evidence. What value the Court will put on it depends entirely on the effect of the cross-examination, but there is no reason why the witness should himself provide the material for his cross-examination. It will save the time of the Court if a surveyor prepares a concise description of the property to be valued, but if he is a wise man he will add nothing [328] more except his opinion of its value. If however he does give his reasons they must be based on facts and not on hypothesis.

Fortunately there is no difficulty in this case in arriving at the approximate values of frontage land on Mazagon and Valpakhadi Roads in November 1904. Plots 2 to 6 on Exhibit A all front on Mazagon Road with a depth of about 80 feet. In March 1903 Nos. 4 and 5 very similar



plots measuring about 78 square yards realised at auction Rs. 15 and Rs. 23 a square yard respectively. The divergence in the price cannot be explained but only demonstrates public caprice. In November 1902 plot 6 measuring 390 square yards realised at auction Rs. 21 a square yard. Plot 2 realised in August 1906 Rs. 37; and plot 3 in November 1907 Rs. 47. There is nothing to show that land value had increased between 1902 and 1904 but undoubtedly from early in 1905 prices of land began to rise owing to the boom in the mill industry, until, as Mr. Stevens said, by the end of the year almost fabulous prices were being given. This will account for the prices realised by plots 2 and 3. But sales after the date of notification must be discarded when it is proved that values have been affected one way or the other by circumstances which have arisen after that date. I have also been asked to take into consideration the amount awarded by the High Court for the property marked I on Exhibit A, but obviously I could not do so without considering all the evidence on which that award was founded. The award by itself is not evidence of the market value. Plots 8 and 9 are situated on Jail Road and though the distance from the land in reference may not be great the character of the locality is so different that the sales of those plots can be no guide in this case. When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality but in an ordinary shop and chawl locality like the one I have to deal with it has been the custom for surveyors to calculate the depth at 100 feet. In the next place the value of a building frontage must depend on the higher rents that can be obtained for the shops or rooms facing the street, and as the proportion of these rents to the lower rents of the back rooms decreases so does the value of the whole frontage land decrease. As Mr. Stevens [329] said, the value of frontage land with a depth of 40 feet would be 50 per cent. more valuable than if the depth were 100 feet, but the value of the 60 feet behind would decrease in greater proportion. A depth of 100 feet therefore has been admitted to give the best average and I am satisfied on the evidence that frontage land on Mazagon Road with a depth of 100 feet was not worth more than Rs. 20 a square yard in November 1904. It follows that similar frontage land on Valpakhadi Road, a *coul-de-sac* with a nightsoil depot at the end, would be worth less. In March 1903 plot No. 7 measuring 313 square yards was sold for Rs. 4,672 by Ahmadbhoy Habibhoy to Kassum Rahimtulla Joonas. At first the purchaser thought he was buying 242 square yards for Rs. 3,872 but on measurement the plot was found to measure 72 square yards more, and as the vendor disputed that this area had been sold, the matter was settled by an additional payment of Rs. 800. This may be regarded as an excellent instance of a bargain between a vendor who was not likely to give anything away, and a purchaser who was anxious to buy the land on account of his owning the adjoining plot.

Taking the price paid at Rs. 16 as argued by Mr. Robertson, it would be impossible to give a higher value for the Valpakhadi frontage of the land. But in spite of its triangular shape it will be seen that plot 7 with an average depth of less than 40 feet could be built on so that practically all the rooms front on the road, therefore a lower value must be given to frontage land having a depth of 100 feet. This may be partly balanced by the fact that the Valpakhadi frontage on the land in reference is more favourably situated and nearer Mazagon Road than plot 7. Its value

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33 B. 328=3  
I. C. 273=10  
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would therefore be between Rs. 12 and Rs. 15 a square yard. With reference to the purchase of the property facing the claimant's land on the south side of Valpakhadi Road from Karmali Pirbhoy, I agree with Mr. Robertson that it cannot be relied upon, as it is a purchase of land and buildings, and the purchase price must have been fixed by what the property was producing. This cannot be taken as an instance of sale of land, though it may turn out that the balance of the purchase-money after calculating the value of the building may approximate what a witness considers to be the value of the land. That would be a coincidence and not evidence. It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

If I take into consideration these high values for the frontage land in valuing the whole plot I have over 1,000 square yards of land at the back as shown on Mr. Stevens' plan (Exhibit 7). If this land is to have any value, it must have access to the road and this will diminish the amount of frontage land, but I doubt very much whether the back land would have any value except as an amenity if a depth of 100 feet is allowed for frontage land. In any event if the frontage land were fully occupied a large proportion of the back land would have to be kept open. This is more probable when I consider Mr. Chambers' plan (Exhibit C) of laying out the ground, as he has taken a 40 feet frontage in order to utilise the back land to the best advantage. The purchases made by Kassum Rahimtulla Joonas of three plots of land with frontages on Chinchbunder and Valpakhadi Road in 1902 are a very fair guide to the value of ordinary chawl land in this vicinity. In 1902 Kassum bought three narrow plots adjoining each other at an average of Rs. 9-4-0 and built a chawl on them with shops on the frontages. I consider that the advantage of a double frontage was set off by the disadvantage due to the narrowness of the plots, and that it is fair to deduce from these sales that chawl land in this locality in 1902 was worth Rs. 9 or Rs. 10 a square yard provided it could be as fully built on as the land bought by Kassum Rahimtulla. Both Mr. Chambers and Mr. Stevens were of opinion that back land could be valued at one-half the value of frontage land but it is obvious that the application of this rule depends on the character of the back land.

There are two alternatives in this case, either to take a deep frontage which must have a piece of back land of very little value, or to take a lesser frontage, which while increasing the value of the back land would at the same time increase the proportion of back land to front land. But I must decline to accept as a hard and fast rule that back land must be worth [331] half the frontage land. That would only lead to absurdities. Mr. Robertson has argued that even accepting Mr. Stevens' division of the land as shown in Exhibit 7 the Collector's award should be increased as Mr. Stevens arrives at his all over figure of Rs. 15 by taking the plot C at Rs. 6 whereas he says in para. 10 of his report (Exhibit 6) that the back land would be worth anything between Rs. 6 and Rs. 10 and the claimant should be entitled to the highest figure given by a witness on the opposite side. This is a perfectly fair argument which only illustrates the danger I have referred to above of a surveyor giving reasons in his report. However I understand Mr. Stevens to mean that the back land in this case might be worth Rs. 10 but his all over figure of Rs. 15 only allows it to



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be valued at Rs. 6 since if a frontage depth of 100 feet is taken, the back land becomes reduced to the lowest figure. If the frontage depth were reduced it would follow the back land might be worth up to Rs. 10. I think Rs. 6 a very full value for the back land. I regret I cannot accept Mr. Chambers' opinion that this land is worth all over Rs. 25. Mr. Chambers before the Collector valued the land at Rs. 24, solely on the basis of an hypothetical building scheme. I have already decided in an interlocutory judgment in this reference (which can be incorporated herewith) that evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. It is difficult to suppress the belief that seems to exist almost universally amongst surveyors in Bombay that market values can be ascertained in this way. Otherwise it should not be necessary to keep on giving reasons to the contrary. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious. However much conclusions may differ, the road which leads to the determination of land values is short and straight. By the ingenuity of Counsel and surveyors attempts, often successful, are made to divert the road on the grounds that the diversions will lead to an infallible result. They only lead to waste of time.

Mr. Chambers in his report, put in before me (Exhibit B), values the land at Rs. 25. Apart from his scheme which seems to have been altered since it appeared before the Collector (another illustration of how complaisant these schemes are to the will of the [332] moulder) he bases his opinion, like Mr. Stevens, on sales, but this opinion based on sales was evidently subordinate to his opinion based on his scheme. It is impossible to deduce from the evidence of sales that this large block of land could be worth anything like Rs. 25 a square yard.

Whether the depth of the frontage is taken at 40 feet and higher retail values allowed with a larger proportion of back land or the depth is taken at 100 feet and lower values allowed with a greater proportion of front land the totals come to much the same as the Collector's offer. But valuing the land as a whole it would not be correct to add up the retail values of the parts as derived from the instances of sales of small plots without making some deduction both on general principles and because the wastage must be greater than in those instances from which the retail values have been deduced. Apart from that I agree with Mr. Kirkpatrick that the Court would be slow to differ from the Collector's offer over a matter of a few rupees except for very strong reasons such as an error on a question of principle. In this reference I am satisfied that the Collector has offered the full market value of the land and I dismiss the reference with costs.

One set of costs between the Government and the Municipality to be allowed as against the claimant.

The interlocutory judgment was as follows:—

MACLEOD, J.—I have already decided this question in what I thought sufficiently plain language in the reference of *In re Dhanjibhoy Bomanji* (1) and everything I said in that judgment on this question may be taken as incorporated in this. Mr. Robertson argues that though that decision might be right in the case of a piece of land of 21,000 square yards, it would not follow that it would apply to the case of a piece of land measuring 3,500 square yards. I can see no distinction. In the first place there can be no relation between the capitalized rent of land and actual buildings

(1) (1907) 10 Bom. L. R. 701.



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and the market value of the land. It follows that there can be no relation between the capitalized imaginary rents of imaginary buildings and the market value of the land. Mr. Robertson has cited *In re Merwanji* [333] *Cuma* (1). That case is not binding on me, though I would follow it if I could possibly agree with the decision. If it does decide that hypothetical building schemes are relevant, I have already expressed my view on that question in *Dhunjibhoy's case*. These hypothetical calculations are not founded on fact. There are a number of factors each of which can be varied to an indefinite extent and therefore the permutations and combinations of these factors are practically infinite. I happen to know exactly how those calculations are made and I am perfectly aware that if Mr. Chambers thought the land was worth Rs. 15 a square yard he could turn out an equally plausible scheme to support that figure. Mr. Robertson argues that if I disallow this scheme as irrelevant it follows I must hold any hypothetical building scheme is irrelevant. In my opinion it is. As long as opinions may differ as to the building to be put on a piece of ground, there can be no certain factor on which the valuation can be founded. That is the root of the matter. If the building is certain, *i.e.*, one of which there cannot be two opinions, and there may possibly be cases in which it can be, then there is no longer an hypothetical building scheme. The failure to recognize this guiding principle can only result in enormous waste of time and money.

Attorney for Government:—Mr. J. C. G. Bowen, Government Solicitor.

Attorneys for claimant:—Messrs. Ardsehir, Hormusji, Dinshaw and Co. Messrs. Crawford, Brown and Co.

33 B. 334 (=10 Bom. L. R. 821=3 I. C. 361).

[334] ORIGINAL CIVIL.

Before Mr. Justice Macleod.

LALBHAI TRICAMLAL AND OTHERS *Plaintiffs v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, *Defendant*.\*

[9th July, 1908.]

*City of Bombay Municipal Act (Bom. Act III of 1888), section 354†—Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the*

\* Suit No. 166 of 1908

† Section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888)—*Dangerous Structures*

354. (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

(2) The Commissioner may also, if he thinks fit, require the said owner or occupier, by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers-by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence.

(1) (1907) 9 Bom. L. R. 1232.



**V.] LALBHAI v. THE MUNICIPAL COMMISSIONER OF BOMBAY 33 Bom. 336**

power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.

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The primary object of section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888), is the safety of the public to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

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The word 'appear' in the section does not involve 'appear to the eye.' It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive [335] Engineer because it had previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary: *Paskall v. Passmore* (1); *Ganajibhoy v. The Municipal Corporation of Bombay* (2). But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion. in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued, based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner has not exercised his discretion. The Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice.

[Ref : 36 Mad. 120; 61 I.C. 497=1920 M. W. N. 748=40 M.L.J. 91=44, Mad. 156.]

SUIT for an injunction restraining the Municipal Commissioner of Bombay, his servants and agents, etc., from pulling down the plaintiffs' house under sections 354 and 488 of the City of Bombay Municipal Act (Bom. Act III of 1888), as being in a dangerous and ruinous condition.

[336] The house in question consisted of a ground floor and one upper floor and was situated in Chakla Street in Bombay and faced to the west. It ran back towards the east for more than a hundred feet and on its north side was a narrow street or lane only seven or eight feet wide called Cumbhar-

(1) 15 Pa. St. D. 304.

(2) (1899) 1 Bom. L. R. 754 at p. 764.



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wada Cross Lane. Ten shops on the ground floor of the house opened in this lane which was a busy thoroughfare. The front of the house opening on Chakla Street only afforded a space for two shops on the ground floor. These shops, as also those opening on the lane, were used for the sale of grain and spices. The rooms on the upper floor were used for storage except four rooms which were occupied by tenants who lived in them. The whole height of the house was only fourteen or fifteen feet. The house was said to be fifty or sixty years old and was a wooden framed building, the space between the posts of the framework being filled in with masonry, chunam, etc.

The plaintiffs who were the trustees of Godiji Maharaj's temple in Bombay had purchased the said house in 1904 and they applied the rents to the maintenance of the temple.

On the 6th January 1908 the plaintiffs were served with a notice under section 354 of the City of Bombay Municipal Act which stated that a portion of their said house "was in a ruinous condition, likely to fall and dangerous to any persons occupying, resorting to, or passing by the same," and required them to pull down the whole of the first floor including the flooring and the roof. This notice came from the Municipal Executive Engineer's office and was signed by the Municipal Commissioner (the defendant).

On receipt of the said notice the plaintiffs had the house examined by their engineer who after examination reported that the house was in a sound condition and not at all ruinous or likely to fall. Thereupon the plaintiffs' solicitors, on the 1st February 1908, wrote to the Municipal Commissioner stating the result of the engineer's examination of the house and saying that they believed some mistake had been made in sending the notice. They requested that the house should be examined by the Engineering Department of the Municipality in order to ascertain its real condition. Their letter concluded as follows :—

[337] Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department, who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

The plaintiffs received no reply to the said letter, but on the 19th February 1908 a further notice of that date was received by them signed by an officer (an Inspector) in the Executive Engineer's Department purporting to be issued under section 488 of the City of Bombay Municipal Act and stating that on the 27th February 1908 pursuant to that section he would enter the said house with workmen in order to pull down the whole of the first floor thereof including the flooring and roof as required by the previous notice of the 6th January 1908.

The plaintiffs then had the house again examined by another surveyor who also reported it to be in a sound condition. Thereupon the plaintiffs on the 25th February 1908 filed the present suit praying for an injunction restraining the Municipal Commissioner, his servants and agents from proceeding under the aforesaid notices. An *interim* injunction pending the hearing of the suit was granted on the application of the plaintiffs.

After the plaint was filed the plaintiffs obtained inspection of the Municipal documents and discovered that for a considerable time there had been a desire on the part of the Municipal Engineering Department to remove the plaintiffs' house in order to widen Cumbharwada Cross Lane which was *much too* narrow for the traffic. The plaintiffs thereupon obtained leave to amend the plaint by adding two paragraphs, alleging that



the notices of the 6th January and the 19th February 1908 had been issued capriciously and oppressively without giving the plaintiffs an opportunity of satisfying the defendant that the house was not in a dangerous condition, and that they were not issued in good faith but were really issued in order to widen the Cumbharwada Cross Lane.

The case came on for hearing in June 1908.

Issues were framed raising the following points, viz.:—

1. Whether the actual condition of the house on the 6th January 1908 justified the issue of the notice of that date "to [338] pull down" part of the house as being ruinous, etc., under section 354?

2. Whether under the said section the Commissioner's order was not final and conclusive, and whether it could be questioned in a suit?

Whether the notices were issued in good faith?

On the second point it was contended for the plaintiffs that in any case both the orders were bad as both were made by the Commissioner without first giving the plaintiffs the opportunity of being heard.

*Kirkpatrick* (with *Setalvad* and *Bhandarkar*) for the plaintiffs :—Section 354 allows a notice to pull down only in cases of urgent and immediate danger. In other cases the notice issued under this section should be to secure or to repair. It is now six months since notices complained of were issued and the house is still standing and is occupied and used just as it always has been. This is conclusive proof that there was no urgent danger in January and February last and therefore there was no justification for the notices. The evidence given now at the hearing shows that the house though possibly needing some slight repair is quite sound and not dangerous or ruinous. The principles laid down in *Metropolitan Asylum District v. Hill* (1) are applicable here.

No doubt the Commissioner under section 354 may issue a notice if it appear to him that a building is dangerous. But there is nothing in the statute which takes away the right to question the propriety of his action by a suit. Section 471 recognizes that right for it speaks of any requisition lawfully made. How can the legality of a requisition be ascertained except by a suit? That point, however, has been decided by *Jardine, J.*, in *Hajee Essa Hajee Fudla v. Charles* (2) which was a case on the corresponding section of the previous Municipal Act.

It is, of course, impossible for the Commissioner to have personal knowledge of all the matters arising in all the departments of the Municipality. He must rely on his subordinates. In their zeal to improve the City by widening the street they have misled him. The documents in evidence show their designs on the plaintiffs' house for several years previous to the notice of the 6th January 1908. The Commissioner signed that notice on the reports laid before him. In so doing he acted judicially and both sides should have been heard. But plaintiffs had no opportunity of stating their case. *Cooper v. Wandsworth District Board of Works* (3); *Hopkins v. Smethwick Local Board of Health* (4); *Attorney-General v. Hooper* (5). Judicial authority cannot be delegated to subordinates, see *Broom's Legal Maxims*, page 639, 7th edition.

*Jardine* (with *Weldon*) for the defendant :—Under section 354 of the City of Bombay Municipal Act the Commissioner's opinion is final and the

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(1) (1881) 6 App. Cas. 193.

(2) Suit No. 225 of 1887 (unreported) referred to in *Scott and Robertson on the Bombay Municipal Act*, 1888, p. 122.

(3) (1863) 14 C. B. N. S. 180.

(4) (1890) 24 Q. B. D. 712.

(5) [1893] 3 Ch. 488.



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notice issued by him in accordance with that opinion cannot be questioned in a suit unless bad faith can be shown: *Gangjibhoy v. Municipal Corporation of Bombay* (1); *Cheetham v. Mayor, &c., of Manchester* (2). So also in cases arising under section 231 of the Act, the Commissioner's opinion is conclusive: *Goverdhandas Gokuldas Tejpal v. The Municipal Commissioner* (3). Section 354 does not require that the person on whom notice is served shall be called on to show cause against it if he has any. Some sections of the Act do prescribe that procedure, e.g., 357 clause (1), sub-clause (b), but no similar words appear in section 354. The omission must be intentional. See also Maxwell on Statutes, page 335, 7th edition.

The case of the Managers of the *Metropolitan Asylum District v. Hill* (4) only applies where the Act authorized by the statute can be done without injury to property. It is not applicable here for the acts authorized by sections 354 and 488 necessarily involve injury to property and loss to the owner of it.

We contend that the evidence shows that the condition of the house justified the issue of the notice. It was and is in a dangerous condition and ought to be pulled down.

[340] The following sections of the City of Bombay Municipal Act were referred to and commented upon:—Sections 298, 336, 342, 438, 471, 489, 491 and 503.

MAULEOD, J.:—The plaintiffs as trustees of Godiji Maharaj's temple in Bombay are the owners of a house at the corner of Chakla Street and Cumbharwada Cross Lane, consisting of a ground floor and one upper floor. The rooms on the ground floor are used for shops and the rooms on the upper floor are partly used for living purposes and partly for storing goods. The gross rental is Rs. 316.

On the 6th January 1908 the plaintiffs were served with a notice from the defendant, the Municipal Commissioner for the City of Bombay (Exhibit A), requiring them, under section 354 of the City of Bombay Municipal Act, 1888, to pull down the whole of the first floor of the said house including the flooring and the roof and pull down or secure the remainder of the said structure, on the ground that the structure was in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to or passing by the same. The plaintiffs in consequence of this above notice instructed their Engineer Mr. N. D. Kanga to inspect the building and he expressed the opinion that no portion of the building was dangerous or in a ruinous condition or likely to fall. The plaintiffs through their solicitors Messrs. Bhaishankar and Kanga then wrote to the defendant on the 1st February a letter (Exhibit A 3):—

Our clients, the Trustees of the Godiji temple, in whom is vested the house No. 145 situate at Chakla Street have placed in our hands Notice No. 893 of 1907-08, dated the 6th ultimo, issued under section 354 of the City of Bombay Municipal Act, 1888, and we are instructed to state in reply that on receipt of your said notice our clients showed the same house to their engineer who after careful examination found that the said house was in quite a sound condition and was not in a ruinous condition or likely to fall down or dangerous to any person occupying, resorting to or passing by the same, and we believe that some mistake has been committed in issuing the said notice in regard to the said house.

We therefore request that you will be good enough to have the house examined by the Engineering Department of the Municipality with the view of ascertaining its real condition and our clients are satisfied that it will be found quite unnecessary to

(1) (1899) 1 Bom. L. R. 754.

(2) (1875) L. R. 10 C. P. 249.

(3) (1890) Chitty and Patell's Small

Cause Court cases, p. 381.

(4) (1881) 6 App. Cas. 193.



pull down the whole of the first floor [341] including the flooring and the roof and in the meantime oblige our clients by suspending action on the said notice.

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

On the 17th February the defendant wrote to the plaintiffs' solicitors (Exhibit A5) forwarding the memo. of the Executive Engineer. It was as follows :—

The house in question has been examined by this department and certain portions of the same having been found in an unsafe condition, a notice under section 354 of the Municipal Act has been issued for the removal of the same.

The solicitors may be informed that a month's time was given to comply with the notice which time has already expired and as their clients have done nothing in the subject, Municipality will now take further steps in the matter.

On the 19th February 1908 notice was given to the plaintiffs under the signature of Mr. A. B. Vaidya, Inspector of Streets and Buildings, B. Ward South, that he would enter on the premises at 8-30 on the 27th February to pull down the first floor as required by the notice of the 6th January. This notice is Exhibit B. The history of the notice is as follows : Mr. Katrak, Superintendent of Streets and Buildings, sent A3 to Mr. Vaidya with a memo A17 asking him to report. Mr. Vaidya returned it with his remarks A4. He says : "The building was examined by the Engineering Department and the notice was issued after careful inspection." No further inspection was made by Mr. Vaidya before he reported. Mr. Katrak on getting Exhibit A4 prepared a draft (Exhibit A18) for Mr. Hall's, the Executive Engineer's approval. Mr Hall approved the draft on 11th February and on the 14th Mr. Katrak gave instructions on his own responsibility to issue the notice B. It was drawn up and signed by Mr. Vaidya before the defendant replied on the 17th February by Exhibit A5 to plaintiffs' solicitors' letter A3, though it was not served until the 19th February. The plaintiffs then asked Mr. Chambers, the well known Architect and Surveyor, to inspect the building. He did so on the 24th February and made a report on the same day (Exhibit A6), in which he expressed the opinion that the building was not [342] dangerous or in a ruinous condition or likely to fall. The plaintiffs' solicitors then wrote to defendant on the 24th February (Exhibit A7) forwarding a copy of Mr. Chambers' report and asking defendant to reconsider the matter, otherwise they would be obliged to file a suit for an injunction. No answer being received this suit was filed on the 25th February. On the 15th April, plaintiffs obtained an *interim* injunction restraining the defendant from pulling down or trespassing upon the premises in the plaint mentioned until the 8th May, on their undertaking not to do any work to their building. Clearly there was no imminent danger then. On the 6th May the injunction was extended for a fortnight and was finally, on the 22nd May, after considerable argument, extended to the hearing of the suit. The defendant filed his written statement on the 9th April. He says that when Exhibit A was issued it appeared to him and it still appeared to him that the condition of the upper story of plaintiffs' house was such that the said structure was dangerous to persons occupying, resorting to or passing by it, that the danger would be enhanced if the said structure were not removed before heavy rain fell, and under the above circumstances the plaintiffs were not entitled to the injunction prayed for. By an order of the 14th April 1908 the plaintiffs were allowed to amend their plaint by adding clauses 11a and 11b in which they

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alleged the defendant in issuing the said notice did not exercise his powers in a proper, reasonable or considerate manner and that his object was not a *bona fide* one, his real object being to acquire the property for widening Cumbharwada Cross Lane. The defendant replied to these allegations by an affidavit of the 5th May.

Before dealing with the circumstances under which the notice of the 6th January 1908 came to be issued I must refer to the previous history of the plaintiffs' house and the correspondence between the owners and the Municipality relied upon by the plaintiffs as showing the real object of the defendant in issuing the notice under section 354. The plaintiffs bought the house on the 6th October 1904. On the 8th October 1901 the previous owner had applied to the Executive Engineer of the Municipality to add a story (Exhibit C). On the 7th November 1901 the [343] Executive Engineer disapproved by Exhibit D on the ground that the whole of the proposed work was within the regular line of the street as shown in the plan sent therewith. On the 17th November the owner's Engineer wrote Exhibit E asking that his client should either be allowed to build or the property should be acquired by the Municipality. On the 25th March 1902 the Executive Engineer declined to entertain the proposal (Exhibit G). There was also a further objection that the building was not strong enough to bear another story. In 1905 the plaintiffs executed certain repairs within the regular line of the street without Municipal approval, and were fined Rs. 9 in the Police Court. Thereafter a notice was served on them (Exhibit H) of the 22nd July to remove the alterations. Proceedings to enforce the notice, however, were not taken as according to a minute appearing on Exhibit J the work done had been very trifling. On the 13th July 1905 the Divisional Health Officer issued a notice (Exhibit K) requiring plaintiffs to provide a privy of two seats and as plaintiffs did not comply with the requisition a summons was taken out on the 7th December (Exhibit L). On the 3rd February 1906 plaintiffs' Engineer wrote to the Health Officer (Exhibit N) stating that they had submitted plans for the privies to the Executive Engineer and asking for the summons to be withdrawn. The same day the plaintiffs submitted plans to the Executive Engineer (Exhibit O). On the 24th February 1906 the Executive Engineer wrote Exhibit Q to the Municipal Commissioner stating that as the works intended to be constructed according to the said plan were within the regular line of the street he proposed to require the building to be set back. On the same day the Executive Engineer sent a notice of disapproval (Exhibit R) to the plaintiffs. On the 19th March 1906 the Divisional Health Officer wrote Exhibit S to the Executive Engineer in respect of the summons taken out against the plaintiffs for not building the privies. By the memorandum of the 29th March (Exhibit P) prepared by Mr. Vaidya for the Executive Engineer the Divisional Health Officer was to be informed that the plaintiffs' plans for the privies could not be approved, as the whole property was intended to be acquired for the improvements of the road and [344] the question of compensation was under consideration. On the 24th March the Executive Engineer reported to the Commissioner (Exhibit V) advising that the whole property should be acquired and the Commissioner's sanction was solicited. On the 29th March the Divisional Health Officer was informed that the question of set back was under consideration. The question of obtaining the set back seems to have remained in abeyance in the Commissioner's office in spite of reminders from the Executive Engineer.



That Officer wrote again on the 14th November 1906 (Exhibit Z) asking for the Commissioner's early instructions. On the 29th November the Commissioner wrote Exhibit A 1, in reply to Z saying that the acquisition of the set back may be allowed to stand over until the owner of the property gives the Municipality an opportunity of taking it, and in the meantime the Health Department were to take no further action in the matter of privy accommodation. While this correspondence was going on there was no suggestion whatever that plaintiffs' house was in a dangerous condition. On the 29th November 1907 Mr. Vaidya, Inspector, and Mr. Katrak, Superintendent of Streets and Buildings for this ward, were on a round of inspection. To the north of plaintiffs' house one Harichand Kapurchand was erecting a building with a ground floor and three upper floors, and the erection of this building had to be supervised by the Municipal officers. Mr. Vaidya said that he and Mr. Katrak were passing down Coombharwada Cross Lane when he drew Mr. Katrak's attention to the way in which plaintiffs' house leaned over towards the north. Thereupon they both went into plaintiffs' house and after inspecting it Mr. Katrak gave the witness instructions to examine the house more in detail and report to him. Mr. Katrak said that he and the Inspector while looking out from Harichand's house noticed the lean over of plaintiffs' house, but it is not very material from where the lean over was first noticed, though I do not think that Mr. Katrak could have seen anything more than the roof of plaintiffs' house from Harichand's window. Mr. Vaidya examined the plaintiffs' house on the 6th and 9th December making rough notes of the result of his inspections (Exhibit 5). He reported to Mr. Katrak and they both visited the house on the 11th December. [345] Mr. Vaidya brought his rough notes and a form of report marked A2 in which he had filled in the Inspector's remark column with a summary of his rough notes. Mr. Katrak then filled in the Superintendent's remark column in pencil and also the directions on the second sheet for the Notice Clerk. The two sheets were then returned to Mr. Vaidya to get the notice drawn up. The report and the notice were afterwards sent by Mr. Vaidya to Mr. Katrak who initialled the notice and forwarded the papers to Mr. Hall, the Executive Engineer. Mr. Hall signed the notice and sent it alone to the defendant. Defendant signed the notice and a duplicate copy was served on the plaintiffs on the 6th January. Before that they had no notice that their house was being inspected by the Municipal Officers. It is not suggested that either the defendant or Mr. Hall had seen the house or formed any opinion of their own regarding its condition before the suit was filed. Defendant signed the notice because he relied on Mr. Hall's signature and Mr. Hall signed it because he relied on Mr. Katrak's initials.

The third issue deals with the defendant's contention that this notice is conclusive unless the plaintiffs can prove *mala fides*. It is not suggested by the plaintiffs that there is any *mala fides* on the part of the defendant personally but they contended in their plaint as originally framed that they were entitled to show that the condition of their house was not such as to warrant the issue of the notice, and that if they succeeded in doing that they were entitled to the injunction, as it could not possibly have appeared to the defendant that the house was in a dangerous condition or likely to fall. It could well be implied from this that plaintiffs had raised the question whether the defendant had exercised the powers

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vested in him under the said section in a proper, reasonable and considerate manner or whether he had acted capriciously or arbitrarily. After inspection of the defendant's documents it seemed probable to the plaintiffs that the notice was issued owing to a desire on the part of the defendant to acquire their property for the purpose of widening Coombharwada Cross Lane. They therefore applied for and obtained leave to amend their plaint by adding two clauses definitely raising these questions :

[346] (1) Whether the defendant had exercised his powers in a proper, reasonable and considerate manner and not capriciously or arbitrarily ?

(2) Whether the defendant had been actuated by an improper motive ?

Section 354 of the Municipal Act of 1888 is the only section under which the Commissioner can act in respect of buildings in a ruinous and dangerous condition. It is headed—"*Dangerous structures.*"

Sub-section (1) is as follows :—

If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to, or projecting from, any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

The primary object of the section is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the rights of individuals.

In the first place it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to, or passing by such structure. Then the Commissioner may by written notice require the owner or occupier to pull down, secure or repair. It is admitted that the word 'appear' need not involve 'appear to the eye'. It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. In this case the Commissioner merely signed the notice which was sent to him by the Executive Engineer because it had previously been signed by that officer. The Commissioner on the strength of that signature concluded that a proper decision had been arrived at as regards the house. From 400 to 500 of these notices are issued [347] every year and it is obviously impossible for the Commissioner to do more than trust to the discretion of his subordinates, but it is only by aid of a fiction that it can be said a notice signed in this way by the Commissioner complies with the section. It should be considered as a notice to show cause. It is not invalid ; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. The Executive Engineer signed the notice because it was initialled by Mr. Katrak. It is not contended that Mr. Hall ever considered whether the requisition in the notice was the proper one under the circumstances. Neither the defendant nor Mr. Hall had seen the premises before the suit was filed. It is further admitted that Mr. Katrak was alone responsible for the framing of the notice and that he never considered whether the injury apprehended from the dan-



gerous condition of the structure might not be prevented by securing or repairing the structure instead of pulling it down. There may of course be cases in which the danger is so imminent that the only obvious requisition to make on the owner is to pull down, in others the danger may be averted by less stringent measures.

Now danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. It is not suggested in this case that the danger was imminent; up to the end of the hearing no hoarding has been put up round the building, nor have the tenants been warned to vacate, and therefore a duty was imposed on the defendant to decide judicially what should be done to assure the safety of the public, having due regard to the interests of the owner. The time for exercising his discretion personally arrived when the plaintiffs complained against the notice. It was certainly very unfortunate that no attempt was made to meet the very reasonable request made in the last two paragraphs of plaintiffs' solicitors' letter of the 1st February 1908 (Exhibit A3). The letter [348] came down to Mr. Vaidya for report. He did not go to examine the house again; the only question he considered was whether the notice was issued against the plaintiffs' house by mistake instead of against some other house, and he reported there was no mistake. That may have been all that was necessary for Mr. Vaidya to do, but nothing can excuse the neglect of the defendant to deal with plaintiffs' request for an opportunity to be heard on the question whether the notice to pull down was necessary. I do not imagine the defendant was personally to blame for this, as from the endorsement on A3 it appears to have been dealt with by his assistant; the fault lay with the Executive Engineer's Department. Legally, however, it affects the discretion of the defendant.

Discretion must not be arbitrary. "The very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contradistinguished from unthinking folly, heady violence or rash injustice." See *Paskall v. Passmore* (1). Mr. Jardine relied on the remarks of Jenkins, C. J., in *Ganjibhoy v. The Municipal Corporation of Bombay* (2). "The Legislature has in the view I take of the Act vested in the Municipal Commissioner a discretion in this matter and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith." I entirely agree; but in the first instance the Court is entitled to inquire whether the discretion has been exercised. This brings me to the question raised by Mr. Kirkpatrick whether the Commissioner having to exercise his discretion can do so through an agent. Discretion has to be exercised, first, in coming to a conclusion as to the state of the structure, and then in fixing upon the appropriate remedy. It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore in my opinion it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open

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(1) 15 Pa. St. D. 304.

(2) (1899) 1 Bom. L. R. 754 at p. 764.



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to the [349] owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. Otherwise the owner has no remedy. The Commissioner has only to say: "I have appointed a competent person to report to me; that person reported the structure was dangerous and must be pulled down. I issued a notice accordingly and you cannot dispute it."

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner had not exercised his discretion. When the Commissioner has perforce to act on advice of his expert advisers it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner, can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

The case of *Cheetham v. Mayor, &c. of Manchester* (1) does not assist the defendant. In that case the defendant acted in alleged execution of powers given them by an Act of Parliament 30 Vict. c. 36. Under section 38 of that Act if the City Surveyor certified in writing that there was imminent danger from any building the Corporation was bound without notice to cause the same to be taken down or repaired or secured. The City Surveyor certified that there was imminent danger from plaintiff's building. The Corporation directed the surveyor to pull down, secure or repair the building as he should think fit. The Surveyor then informed the plaintiff of the directions given to him and proposed that the plaintiff should pull down his front wall. The plaintiff refused. The Surveyor then did the work himself. It was held that the certificate of the Surveyor was conclusive. Keating, J., says:—

"The provision in s. 38 is, no doubt, a very stringent one, vesting in the surveyor, as it does, absolute power to say that a man's house shall be [340] pulled down. The legislature, however, appears to have thought it necessary to confer upon him the power; and it is our business to see that their intention is carried out."

It will be seen that section 38 of 30 Vict., c. 36 only dealt with cases of imminent danger. Sections 58 and 59 of the Manchester Police Act of 1844 prescribed the measures to be taken by the Council of the Borough in the case of ruinous and dangerous houses. Such premises had to be regularly and lawfully proceeded against by presentment of the grand jury at the Sessions. On presentment the Council could have the premises surveyed and a notice served on the owner. The powers given by the Legislature in section 38 of 30 Vict., c. 36 being of a totally different nature to the powers given by section 354 of the Municipal Act, the decision in the case referred to cannot be considered as an authority in this case.

On the other hand, Mr. Kirkpatrick relied on *Cooper v. The Wandsworth Board of Works* (2). The 76th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, empowered the District Board to alter or demolish a house where a builder had neglected to give notice of his intention to build. Plaintiff began to build without giving notice. The defendants then entered and pulled down the building. It was held the defendants were bound to give the plaintiff an opportunity of being heard before demolishing the building. Willes, J., says (at p. 190):—

(1) (1875) L. R. 10 Q. P. 249.

(2) (1863) 14 C. B. N. S. 180.



"I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds : and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J. says (at p. 194):—

"It seems to me that the Board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's case* (1) and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party should be heard, yet the justice of the common law will supply the omission of the legislature."

[351] Though the facts were different the above principles seem to be of present application. No doubt under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but in the case before me where there is no suggestion of imminent danger, the plaintiffs were entitled to be heard as a matter of common justice.

In *Vestry of St. James and St. John, Clerkenwell v. Feary* (2) Lord Coleridge, C. J., agreed that *Cooper v. Wandsworth Board of Works* (3) was an authority for the proposition that an opportunity should be given of questioning the propriety of the order made by the vestry.

The case of *Hajee Essa Hajee Fudla v. Charles* (4) was a suit filed in this Court against the Municipal Commissioner of Bombay for acting under the powers vested in him by section 200 of the Bombay Municipal Act, 1872. That section, which corresponded with section 354 of the present Act, enacted :

"If any house be deemed by the Commissioner to be dangerous he shall immediately if it appears to him necessary cause a fence to be put up and cause notice to be given to pull down, secure or repair, etc."

The Court came to the conclusion that the plaintiffs' house was in a dangerous condition, but it was argued the notice was bad since the Commissioner should have exercised a judgment of his own instead of relying on a report of a subordinate. Jardine, J., in an unreported judgment held that the Municipal Act did not deprive any person injured by an improper exercise of authority under section 200 of the ordinary remedy by suit. The Commissioner had to appear and plead his authority and it might be had to justify his act. The Commissioner should examine the circumstances of the particular case in order to see whether the defence was made out. The Commissioner was entitled to act under section 200 on the report of an Inspector of Buildings and did not act indiscreetly in relying on the Inspector's statement about plaintiff's building, *although it was easy to imagine cases of greater complexity when an officer entrusted with those great powers [352] would, if he used proper discretion, take other and more experienced advice, or make further inquiry or hear the owner of the property more fully, unless the emergency admitted of no delay whatever.*

The remarks of the learned Judge which I have italicized above can well be applied to this case. In the first place the words 'hear the owner more fully' imply that the owner had a right to be heard in any case. Even then the owner should have in cases of greater complexity a further opportunity of being heard, and a failure by the Commissioner to hear him would be a failure to exercise proper discretion.

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(1) *The King v. The Chancellor, &c. of Cambridge*, 1 Stra. 557.

(2) (1890) 24 Q. B. D. 703 at p. 709.

(3) (1863) 14 C. B. N. S. 180.

(4) O. C. J. Suit No. 225 of 1887 (Unreported).



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There was no doubt, however, in that case that the Inspector's report was correct, the plaintiff had had a previous notice to pull down ten months before he had been heard, the Municipal authorities had been willing to allow him to adopt preventive measures, and it was only when those had failed that a second notice was served.

Mr. Kirkpatrick further relied on section 471 of the Municipal Act 1888 which provides for the penalties to be executed against anyone who fails to comply with any requisition lawfully made under the sections therein referred to, as showing that a person on whom such a requisition is made is entitled to prove that requisition was not made lawfully, i. e., in accordance with the conditions prescribed by the legislature and that therefore the notice could not be conclusive. Mr. Jardine, on the other hand, wished to confine the word 'lawfully' to procedure in drawing up and issuing the notice. Nothing regarding procedure appears in section 354 and the notice to enter under section 488 stands on a different footing. I think that Mr. Kirkpatrick's argument is correct, and that a person proceeded against under section 471 would be entitled to show that the provisions of the Act had not been complied with, otherwise the word 'lawfully' is without meaning and unnecessary. I do not think anything that I have said is calculated to hamper the action of the Commissioner under section 354. The legislature has not given him absolute powers, and whether the danger is imminent or not it is impossible to dispute the justice of allowing an owner to be [353] heard on the question as to what steps should be taken to secure the safety of the public. In cases where the danger is certified as imminent, there would be little chance of his getting an injunction, but in a case like the present if he can get an injunction he may succeed in saving his property, otherwise he can only assert his claim to damages.

The actual condition of the plaintiffs' house at the date of the notice is then a question of fact which must be decided. In dealing with this it is necessary to distinguish between the evidence of examination made before and after suit filed, namely, the 25th February. After the 11th December 1907 no one examined it on behalf of the defendant till the 27th February. Between the 6th January and 25th February Mr. Kanga and Mr. Chambers examined it on plaintiffs' behalf. It is admitted that the whole of the upper floor leans over from the south to north. Nearly all the posts have been plumbed by both parties and the results obtained by the plaintiffs and defendants' Engineers respectively appear in Exhibit A 13 in parallel columns. I have no hesitation in placing more reliance on the results obtained by Messrs. Chambers, Stevens and Kanga for the plaintiffs. There have been too many indications throughout the case of the inclination of Mr. Vaidya and Mr. Katrak to exaggerate, to enable me to place implicit reliance on their calculations. In plumbing, nothing can be easier than to miscalculate half an inch or so, and it is certain that most of the wood in the building was put in undressed so that accurate plumbing would be in some cases impossible. Mr. Chambers refers to some of these in Exhibit A 13. Mr. Vaidya and Mr. Katrak have not allowed for this. Then it appeared that the plan to be annexed to Mr. Hall's affidavit of the 16th March (Exhibit 9) was prepared by Mr. Vaidya and passed by Mr. Katrak. Defendant strenuously opposed the granting of the *interim* injunction and Mr. Vaidya knew the plan was wanted to support the defendant's case in Court. It is always difficult to come to a satisfactory conclusion on questions of fact when all the evi-



dence is on affidavits, but a drawing carries far more conviction than pages of affidavit, and the section appearing on the plan must have been intended to give the Court a correct idea of the dangerous [354] condition of the building. The ground plan by itself could not give that idea. If the injunction had not been granted, the house would have been pulled down and the relief sought by the suit would have become unobtainable. The plaintiff's case thus hanging in the balance, the Executive Engineer, whose opinion would necessarily carry very great weight with the Court, advising the pulling down of the first floor, there is shown to the Court a section of the building which can only be described as most misleading. Yet in Exhibit 6 dated the 6th March Mr. Vaidya affirms that the plan was correct and the figures therein showing the extent of the lean over were correct. In Exhibit 2 of the same date Mr. Katrak swears he has satisfied himself of the correctness of the plan. Mr. Hall also says in his affidavit on the 16th March he believes the plan to be correct. Whether or not it was intentionally prepared in order to mislead the Court, there was certainly culpable negligence. No reasonable man comparing the correct and false sections could possibly come to any other conclusion. Nor is it clear why the plan was annexed to Mr. Hall's affidavit instead of to the affidavit of Mr. Vaidya who prepared it, unless it was considered that it would thereby carry more weight. The verandah post is said to be  $4\frac{1}{2}$ " out of plumb  $1\frac{1}{2}$ " more than any other post on that line and 2" more than the posts to the east and west of it. Mr. Chambers plumbd it 3" out and remarked in A 13 :—"This post is roughly squared out of a bent piece of timber of the shape in which it grew and therefore it is almost impossible to plumb it accurately." This is confirmed by reference to two of the photographs annexed to Exhibit 3. The post is clearly visible, and appears to incline outwards more from the top of the railing than from the floor level. The scale of the section is very small, 8' to an inch, and the lean over is much exaggerated. How much it is difficult to say, but Mr. Chambers and Mr. Stevens in Exhibit A 12, para 4, say that the posts said to be leaning about 3" towards the north are plotted as if they were 6" towards that side. The answer to this in Exhibit 3, para 4, is somewhat ingenuous though practically admitting the exaggeration :—

In answer to para 4 of the joint affidavit of Messrs. Chambers and Stevens we refer to the plan itself (plan A) which in every case clearly [355] shows in figures the actual extent of "lean over" of the posts and wall, when plumbd, and the section shows the height in which such "lean over" occurs so that even if the slope is not plotted with strict accuracy no one who understands a plan can possibly be misled by plan A as to facts.

The centre post on the ground floor is omitted and also the post on the first floor between the south wall and the centre post. Apart from omissions and exaggeration it is not a fair average section. The attempts made by Mr. Vaidya and Mr. Katrak in their affidavit of the 5th May (Exhibit 3) to justify that section only aggravated the offence, especially as correct sections appeared in the plan annexed to the same affidavit. It was suggested the post on the ground floor was omitted because it was only necessary to show the condition of the upper floor but the plaintiffs were required to remove the joists which, it was alleged, had sagged and those would rest on the beams. Obviously these beams would afford more support to the joists if there were centre posts on the ground floor. They say the post is left out on the upper floor because it had not been plumbd—a very insufficient reason. Again, the plan showed one post, Gf, leaning over 10". I am satisfied that though there was a slight lean over to the

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north the lean over of 10" was in the same direction as the ridge of the roof in order to meet a joint in the ridge which did not correspond with the posts in the partition. Afterwards it was discovered that this post was fixed in the ground and came through the floor. Mr. Hall then admitted it was a source of strength and not a sign of danger. Lastly, the allegation that in one room there was a separation between the south wall and the floor proved to be absolutely without foundation.

I have dealt with the matter at considerable length, first, because on the strength of those affidavits of the 16th March the Court was asked to decline to take the responsibility of ordering the building to remain standing, and thereby in effect to dismiss the suit, and secondly, because to swear a plan as correct which as a matter of fact is incorrect in a very material way seems perilously near to giving false evidence. In any event it must have a bearing on the evidence of Mr. Vaidya and Mr. Katrak given in Court, and the attitude adopted by the Executive [356] Engineer's Department throughout the case. But all discussion regarding the lean over, whether it was original, or began subsequent to the completion of the building, or was caused by the thrust of the roof, and whether it was due to the lean over that the building should be considered, in a dangerous condition, became unnecessary when Mr. Hall admitted that the building as it existed might continue to exist for years in spite of the lean over if the timbers were sound. The main question therefore is whether the timber was reasonably sound, that is to say, so sound that there could be no danger of its being likely to give way and so carry the whole of the upper floor with it. On the 29th November 1907 when Mr. Katrak first visited the building he came to no conclusion about its condition, he only instructed Mr. Vaidya to examine it. It is certainly remarkable that Mr. Katrak had entirely forgotten this visit until reminded of it by Mr. Vaidya after his examination by Mr. Jardine had been closed. In para 2 of his affidavit (Exhibit 2) Mr. Katrak says nothing about this visit and in para 2 of his affidavit (Exhibit 6) Mr. Vaidya says he has read para. 2 of Mr. Katrak's affidavit and it was correct. Mr. Vaidya visited the house on the 6th and 9th December owing to Mr. Katrak's instructions and made very full notes of his inspection (Exhibit 5) and yet nothing is said in the affidavit about these visits nor were those notes disclosed. Mr. Vaidya said his remarks on A 2 were a summary of his notes. As regards the condition of the timber he says in those notes (Exhibit 5)—"*ground floor*—rotten joists are marked on spot as also the portion of beams. *First floor*—the rotten rafters are marked on spot and are unsound." This is summarized in A 2 as follows—"The joists of flooring are rotten in places as also the rafters."

No doubt in Exhibit 5 there is a rough ground plan with some post marked as decayed, but nothing is said about them in the remarks, so their condition could not have been considered as affecting the stability of the structure.

Mr. Katrak's remarks are as follows:—"Many rafters are rotten. The joists of flooring of the room of the first floor [357] have sagged". In the evidence before me, there is nothing to show the joists are rotten. Mr. Katrak said he noticed decay in a few places, but nothing sufficient to cause a remark to be recorded, so he only said they had sagged. The notice to pull down was issued therefore because the walls had become out of plumb, many rafters were rotten and the joists had sagged. I may remark here it is difficult to imagine how



Mr. Katrak came to record in A2 the south wall was 3 or 4 inches out of plumb in 4 feet height when the wall was 5' 6" high.

It has not been suggested that Mr. Katrak ever considered whether the building could not be repaired. For the above reasons he practically condemned the whole structure, as the ground floor was useless without the joists and flooring and nothing could be done in the way of reconstruction without the leave of the defendant. It is clear that this need not have been given and that defendant might have acquired the whole property under section 298. If therefore plaintiff had complied with the notice they would have lost the whole of their building and would only have been paid the value of the land. The rents they were getting from the building were extremely profitable and there would be a great difference between the value of the property as a rent bearing concern and the value of the land vacant as estimated by Mr. Hall in his memo to the Commissioner. Before the suit was filed Mr. Chambers, Mr. Stevens and Mr. Kanga examined the building. They reported generally that the building in their opinion was in a sound condition. It must be remembered that they had before them only the notice of the 6th January and they could not know for what particular reasons the notice had been issued. With regard to the evidence given of examinations made of the building in general and the timber in particular after suit filed it is necessary to remember that has only an indirect bearing on the question whether the notice of the 6th January was properly issued. Such evidence of defects proved to exist at the date of the notice is only relevant so far as it proves that the grounds for which Mr. Katrak condemned the building were correct; evidence of defects discovered since the suit was filed and not [358] patent to Mr. Katrak when he issued the notice is irrelevant to the question whether Mr. Katrak exercised a proper discretion. On the 16th March 1907 Mr. Hall, Mr. Katrak and Mr. Vaidya made affidavits (Exhibits 9, 2 and 6) for the purpose of opposing the plaintiffs' application for injunction which I have already referred to. Mr. Hall says in para 1 of his affidavit "Much of the wood work of the said building is in a very decayed condition." Mr. Katrak says in para 2 of his affidavit "Many rafters and some of the posts and post plates were rotten." Mr. Vaidya in his affidavit merely says para. 2 of Mr. Katrak's affidavit is correct. On the 1st May Mr. Chambers and Mr. Stevens reply to these affidavits. They point out the misleading nature of the section in defendant's plan and refer to a correct section on their plan annexed. In para. 8 they say—"there is nothing to show that the posts supporting the roof are leaning over to a considerable extent or that the south wall leans over considerably towards the north or that the wood work of the said building is in a decayed condition." Then in para 11 they give a general opinion that the building is sound and not in a dangerous condition. This affidavit embodies practically the whole of Exhibit A 9 which is a report made by the plaintiffs' three Engineers on the 4th April. In para. 10 they say: "The wood-work on the whole is sound and some of it is quite new." Messrs. Katrak and Vaidya reply to this in their affidavit of the 5th May (Exhibit 3). In para 3 they say regarding the posts, post plates and purlins, "we examined them carefully on the 15th April and found two of the post plates and two of the purlins in the gallery on the north, two of the post plates on the south wall and six of the purlins on the row of posts the subject of sub-clause (d) to be in a decayed condition." In para 8 (3) they say—"Finally we say as regards the wood-work seven of

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the posts are decayed, twelve of the purlins and post plates are decayed and upwards of eighty of the rafters are decayed." Four photos of the building taken from various positions are annexed to the affidavit.

Mr. Hall in his affidavit of the 5th May (Exhibit 10) says in para. 2 that the danger due to the absence of ties between [859] the posts in the south wall and those in the gallery to the north was very greatly aggravated by the fact that some of the posts on which the roof rested and many of the post plates were in a decayed condition. At the hearing Mr. Chambers said in cross-examination:—"I found no decayed wood anywhere. I tried to find if there was any decayed timber as I was told the timber was rotten. If the posts and post plates were decayed that would be a source of danger; green timber has been put in, the bark has gone but the heart is sound. That was what I referred to when I said the timber was on the whole sound." On the 18th March Mr. Stevens was examined. He had visited the house the previous day and had found the post plate in the south west room had been considerably eaten by white ants. But he thought that did not affect the stability of the building. The centre of the post plate was sound. In cross-examination he admitted that he had noticed that post plate was ant-eaten on the 25th February but did not refer to it until he came into the witness box because the defendant had made no remarks about this post plate at any time during the proceedings. Further on he said—"I found no decay anywhere except in the post plate eaten by white ants and in one rafter."

Mr. Kanga was not questioned in detail about the condition of the wood. Though Mr. Katrak was examined at considerable length about the condition of the wood-work in order to reply to the evidence of plaintiffs' witness, I need only refer to the evidence of Mr. Hall who visited the premises on the 19th June with defendant's Solicitor, Mr. Crawford, with the express purpose of taking careful notes of the condition of the woodwork. These notes are Exhibit 11; and Exhibit 12 is a plan showing the timber referred to there. It is clear that the 7 posts and 12 purlins and post plates referred to in para. 3 of the affidavit of Messrs. Katrak and Vaidya (Exhibit 3) as decayed do not all appear in Exhibit 12. Only two posts Bc and Fc are marked as unsound and 8 post plates.

It would have been better if the Court had first been consulted so that directions might have been given regarding the desirability of the plaintiffs having notice of Mr. Hall's visit. [360] As a matter of fact they had no notice and it was therefore necessary for Mr. Chambers to inspect the building again and to give evidence in rebuttal. The notes made by Mr. Chambers appear parallel with Mr. Hall's notes in Exhibit A22. Mr. Chambers admitted he found defects on the last visit which he had not noticed on previous visits. One rafter in the verandah 5th from the east end he found absolutely rotten and had it cut away. Part of three rafters condemned by Mr. Hall had been cut off and brought into Court. These were marked A23, A24 and A25. From these Exhibits it was easy to determine where Mr. Hall and Mr. Chambers were at issue. All wood which showed signs of decay or of having been eaten by weevils or white ants was condemned by Mr. Hall as decayed or rotten without reference to the extent of the decay or the work required to be done by each particular piece condemned. Mr. Chambers admitted in most cases that the pieces referred to in Exhibit 11 are decayed to a certain extent, but in most cases he considers there is sufficient strength left in the wood to do what is required and in the case of the worst rafters, if they went



theroof would still exist without them. In considering what work was required of the rafters it must be remembered that they are from 7" to 8" centre with a bearing of about 4" only. Exhibits A23 and A25 apparently had been a little eaten away on the surface by weevils but apart from that I am satisfied they were perfectly sound. A24 was considerably decayed but still quite capable of bearing all the work that was required of it. I think therefore there was no danger to be apprehended from the condition of the rafters. As regards Bc and Fc the only two posts which Mr. Hall condemned, Mr. Chambers and Mr. Stevens said that Bc was tested by a chisel and was not decayed, the outer skin of Fc, had gone, otherwise that post was sound. If all the posts were sound, there could not be any danger of a general collapse. Mr. Chambers admitted two post plates should be replaced, namely C. D. on line A and the one in the S. W. corner. A new post plate would cost Rs. 8. Mr. Stevens said he would only replace the S. W. post plate. The objections to the other six post plates condemned by Mr. Hall were I think hypercritical.

[361] It was also stated by defendant's witnesses that the joints of the post plates at post Gb had shifted and the joint at post Ha had opened showing that a movement was going on. Mr. Chambers in Exhibit A22 explains that what was considered by Mr. Hall to be a shifting and opening was due to the post plates being of unequal width. He did not think the joints had moved and I think his opinion must be accepted as correct.

The building is undoubtedly an old one and it could not be expected that the woodwork had not suffered from various causes. The question is had it suffered to such extent as to cause the first floor to be in such a dangerous condition when the notice was served so that plaintiffs should be compelled to pull it down. No doubt I must take into consideration that Mr. Chambers and Mr. Stevens would naturally be biassed in favour of the plaintiffs, but if they thought the building was in a dangerous condition (and from their experience they must be able to form a very reliable opinion on its condition) I am quite sure no bias would hold them from saying so. On the other hand, Messrs. Katrak and Vaidya depended mainly on the lean over when they reported the building was in a dangerous condition, and since the defendant decided to contest the suit, that report had to be supported. Evidence of every possible defect that the minutest examination could bring to light has been brought before the Court to show that the opinion formed by Mr. Katrak was correct, but I remain quite unconvinced on the evidence that on the 6th January 1908 the plaintiffs' building was in a ruinous and dangerous condition and likely to fall. Further, I fail to understand how Mr. Katrak with his experience came to the conclusion that the house was a fit subject for a notice under section 354. However, he did come to that conclusion, but I am quite satisfied that he never exercised a proper discretion in considering what form the notice should take. Fifty to hundred rupees would have covered the cost of replacing all the woodwork condemned by Mr. Hall and there was no reason whatever for issuing a notice which if executed would have caused a loss to the plaintiffs of several thousands of rupees. That can only be characterized as rank injustice. But besides contending that [362] Mr. Katrak did not exercise a proper discretion, the plaintiffs have suggested that he and therefore the defendant was actuated by improper motives. Neither Mr. Sheppard nor Mr. Hall had

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in their minds when they signed the notice the particular structure to which it referred, but as they have adopted the decision of Mr. Katrak, the notice must stand or fall by the conduct of Mr. Katrak. It is difficult to imagine that Mr. Katrak was not perfectly well aware that plaintiffs' house was nearly all within the regular line of the street, and it is not an unreasonable inference for the plaintiffs to suggest that Mr. Katrak thought he had found a good opportunity for getting rid of a building which stood in the way of a desirable street improvement. The fact that the plaintiffs' request for a further examination in the presence of their Engineers was ignored lends further strength to their suggestion. Reading Exhibit A3 it should have occurred to Mr. Katrak that the request was a reasonable one and he ought to have advised the Executive Engineer to pay some attention to it. Mr. Sheppard said in cross-examination the plaintiffs had an opportunity of showing him there was no cause for the notice, but he had to admit in answer to the Court that his reply (Exhibit A5) gave no such opportunity to the plaintiffs.

Further, it was suggested by the plaintiffs that the projecting beams of Harichand's house were intended to support a verandah which could only be added when plaintiffs' house had been removed and that Messrs. Vaidya and Katrak were acting in collusion with Harichand in order to enable him to build his verandah. A very reasonable explanation of the projections was forthcoming, namely, that the scaffolding had to start from the plinth of the building owing to the narrowness of the street and it was necessary to have projections to which the scaffolding could be attached. The plan showing the projection of beams at the terrace to the east where no verandah could have been required supports this explanation. On the other hand, no doubt some of the projections could have been used to support a verandah and it was a curious coincidence that they should have only recently been cut away, but all this remains conjecture and nothing more. It would require very [363] strong evidence to satisfy me that the defendant had made up his mind several months before the notice to acquire the plaintiff's property, and that Mr. Katrak had in consequence expressly permitted Harichand to project the beams over the street for the purpose of a verandah. There are no doubt many facts in the case which strongly support the plaintiffs' suggestion of *mala fides*. At the same time the facts from which the inference of *mala fides* is sought to be drawn must be so irresistible as to admit of no other conclusion. I cannot therefore find the charge of *mala fides* proved.

A very heavy responsibility is laid upon the Court in dealing with a case of this nature but I am thankful to say that the grant of the *interim* injunction has been justified by events.

There will be a decree for the plaintiffs restraining the defendant from pulling down or attempting to pull down or trespassing upon the premises referred to in the plaint or in any way taking action under the notices of the 6th January 1908 or 19th February 1908.

The defendant must pay the plaintiffs' costs. The plaintiffs to be entitled to have the costs of one Engineer taxed as between attorney and client, the other Engineers will be entitled to a fee for preparing themselves for giving evidence and the usual charges.

Attorneys for the plaintiffs: Messrs. Bhaishankar, Kanga and Girdharlal.

Attorneys for the defendant: Messrs. Crawford, Brown & Co.



33 B. 364 (=10 Bom. L. R. 1230=3 I. C. 441).

[364] ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

KEDARMAL BHARAMAL, *Appellant and Plaintiff* v. SURAJMALGOVINDRAM, *Respondent and Defendant*.\*

[11th September, 1908.]

*Pakki Adat agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.*1908  
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K. a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On the agency account being taken a sum of money was found to be due from S. to K. On K. suing for this sum S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

*Held*, in the case of *Pakki adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

*Per Chandavarkar, J.*—A *pakki adatya*'s liability ceases when hard cash has come into the hands of his constituent.

[Ref. 76 I. C. 353.]

THE plaintiff was a merchant and a constituent in Bombay. The defendant was the plaintiff's agent at Akola on *pakki adat* system. Under instructions and directions from the plaintiff the defendant transacted at Akola certain *sodas* (contracts) for the forward sale of *jowari* for the Vaida of Falgun Sud 15th, Samvat 1959 (13th March 1903). The defendant also did business for the plaintiff in cotton, cotton seeds and hundies. In the case of cotton, ready cotton was purchased at Akola, and forwarded to the plaintiff in Bombay.

The defendant remitted cash to Ujjain from Akola on the plaintiff's account for which he subsequently drew hundies on the plaintiff at Bombay which hundies the plaintiff accepted and paid in Bombay.

At the foot of the agency account there was a profit payable to the plaintiff who filed this suit for the recovery thereof and for the agency account. As the defendant resided out of [365] Bombay the leave of the Court was obtained under clause 12 of the Letters Patent. The defendant contended in his written statement that this Court had no jurisdiction to entertain this suit as no part of the cause of action had arisen in Bombay.

After filing his written statement the defendant took out a Chamber summons, dated 31st March 1905, calling upon the plaintiff to show cause why the leave granted to him under clause 12 of the Letters Patent to institute this suit in this Court should not be revoked and in the alternative why the questions as to whether the monies, if any, due to the plaintiff were payable in Bombay and whether this Court had jurisdiction to try this suit should not be tried as preliminary issues. Affidavits were made on the summons, each party contending that according to the custom of the trade the monies were payable at his place.

Tyabji, J., who heard the summons dismissed the same following his previous decision in *Motilal v. Surajmal* (1).

The defendant appealed against this decision and the appeal Court ordered the following preliminary issue to be tried:—

\* Suit No. 57 of 1905, Appeal No. 1490.  
(1) (1904) 80 Bom. 167.



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"Whether the monies, if any, due to the plaintiff are payable in Bombay."

Batty, J., before whom evidence on this preliminary issue was heard decided that the plaintiff had not proved the custom, that the place of payment was the place where the constituent resided, and that therefore the cause of action did not arise within the jurisdiction of this High Court.

The plaintiff appealed.

*Bahadurji* (with Jardine) for appellants.

We say that the onus is on defendant to establish that the monies were payable at Akola and this onus he has failed to discharge.

Batty, J., held that this onus was on us.

We say the Adatya's duty was to remit and pay in Bombay or if we directed elsewhere then to such place as we might direct. [366] That is according to the pakki adat system: see *Bhagwandas v. Kanji* (1).

Payments made by Adatyas to constituents are made in three ways: by (1) hundis, (2) currency notes, (3) making credit entries in Bombay. The witnesses also agree that the constituent has to bear all the charges including the cost of remittance. If exchange is above par it is debited to the principal if below par it is credited to the principal. See *Hiralal Motiram's* evidence as to exchange. Interest ceases to run against the Adatya on posting remittance, the reason being that he then ceases to have the use of the money. In case the hundi is lost in transmission the Adatya sends another a Pett Hundi. If the drawee fails then the Adatya recovers from the drawer and credits the constituent with principal and interest. Batty, J. seems to have thought that the above circumstances are against us and to have argued why should the principal bear the charges if the monies were payable in Bombay. Our answer is that that is the system upon which the business is carried on. The important point is that the Adatya as soon as he recovers the money holds the money as agent and as agent would be entitled to all his charges under sections 217 and 218 of the Indian Contract Act. The money is payable in Bombay and the Adatya is bound to pay elsewhere, if so desired. We have given evidence of this and the defendant has given no evidence to the contrary. From incidental charges it appears that the money was to be paid in Bombay. Defendant cannot show that the money was to be paid at Akola. See *Rein v. Stein* (2), *Bell & Co. v. Antwerp, London and Brazil Line* (3); *Motilal v. Surajmal* (4).

*Robertson* with *Weldon* for the respondent.

We contend that the evidence shows that both parties intended that the contract should be carried out where the Adatya was. There is no obligation to pay in Bombay. They are entitled to order us to remit the money, because it is theirs, to Bombay, and we should be obliged to carry out those orders taking due precautions for safety but could they call upon us to go to Bombay and pay [367] cash there? The Akola merchants nearly all agree that the money is payable at Akola. We belong to Akola therefore how could we have understood that payment was to be made in Bombay: *Comber v. Leyland* (5); *The Eider* (6); *Fry and Co. v. Raggio* (7).

(1) (1905) 30 Bom. 205.

(2) [1892] 1 Q. B. 753.

(3) [1891] 1 Q. B. 103.

(4) (1904) 30 Bom. 167.

(5) [1898] A. C. 524.

(6) [1893] P. 119.

(7) (1891-92) 40 W. R. 120.



We cannot admit that payment was to be without application indeed we say that application was necessary. Akola currency would suggest that the contracts were to be performed at Akola. In *Hare v. Henty* (1) the authorities are collected about a debtor's duty to seek out his creditors.

*Strangman* in reply referred to *Charles Duval & Co., Limited v. Gans* (2).

CHANDAVARKAR, J.—The question in this case is whether the custom set up by the plaintiff is proved. The learned Judge in the Court below has held the custom not proved upon the ground that, according to the witnesses both for the plaintiff and the defendant, what is proved is that the constituent should be paid the money due to him by his *pakka adatia* at the place where he so desires. The learned Judge has also held that as the plaintiff had not given any directions on that point, no part of the cause of action arose within the jurisdiction of this Court and therefore the suit did not lie.

Now, it is to be observed at the outset that the learned Judge has to some extent misapprehended most of the evidence on the custom set up by the plaintiff. The version he has given of some of the evidence is plainly different from what the witnesses have actually said. The effect of the evidence of the witnesses both of the plaintiff and the defendant is summarized by Batty, J., as follows:—"The result of the evidence seems to be (1) that, as plaintiff admits, no place of payment was fixed by the term of the contract: (2) that the place of payment was fixed by custom: (3) that while plaintiff asserts that, according to custom, the constituent's place of business was the place of payment, most of his witnesses admit that where correspondence is silent on the point, payment must be made either where the constituent is or [368] at any other place to which he may direct remittance to be sent: and that this is not a matter of courtesy or favour but a rule of business: (4) that the constituent always has to bear the loss or to take the benefit of exchange: (5) the Adatya's liability for interest ceases with the despatch of the hundi."

That is the way Mr. Justice Batty reads the evidence of most of the witnesses for the plaintiff.

A careful perusal of the plaintiff's witnesses has satisfied me that it is not an accurate description of what they have said. The net result of that evidence correctly read is that primarily the place of payment is the place where the constituent resides, which in the present case is Bombay, but that the payment should be made in any other place, if the constituent has chosen to give directions to that effect.

[After discussing the evidence given by different witnesses, his Lordship continued].

Upon the whole, then, I have arrived at the conclusion that the weight of the evidence is in support of the custom set up by the plaintiff. Batty J. would, I think, have come to the same conclusion if he had not misapprehended the evidence of several of the witnesses.

But it was argued that an inference to the contrary must be drawn from certain circumstances, namely, the *hundyaman* system and loss of interest on hundis in transit. I do not think that it is a necessary inference from those circumstances that they are inconsistent with the custom set up by the plaintiff. It must be remembered that the transaction we have to deal with is one between a principal and his agent. Where the latter

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(1) (1861) 30 L. J. C. P. 302, at p. 303.

(2) [1904] 2 K. B. 685.



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has to remit to the former moneys which he has collected for the principal he is certainly entitled to charge all the expenses he has to incur in collecting and sending. The evidence shows that *hundyan* is charged on that account as part of the contract. It is but reasonable that if the custom is that an up-country agent should pay to his principal in Bombay moneys collected by the former on the latter's account, the agent ought to debit the principal with charges incurred in remitting the moneys to Bombay; and that the principal should lose interest [369] during transit. That is also the conclusion come to by Batty, J., at the page 114 where he remarks:—"The evidence in this case shows that he undertakes to send such profits not as a debt due from himself but as proceeds realized by him on the constituent's charges, and custom recognises that he is entitled to such charges as an agent as under section 217 of the Contract Act for expenses properly incurred by him in conducting such business." If then these are the terms of the contract, we do not see how they affect the material question as regards the custom set up by the plaintiff. The learned Advocate General has however sought to bring this case within the principle of *Comber v. Leyland* (1). He has argued that what the evidence establishes is that the up-country *pakka adatya* has to remit the money to his constituent in Bombay and when he has remitted the money by means of a hundi, then his obligation is at an end. No doubt some of the witnesses have spoken of remittance but they were not asked whether they understood payment and remittance as synonymous expressions. It is merely speculating to suppose that they so understood, especially when we find that most of the witnesses have distinctly stated that the up-country *adatya*'s liability ceases, not when he has simply remitted the money but when the money in cash is received by the constituent. One of the witnesses examined by the defendant, viz., Ramanand, says (page 66) that the constituent will not give credit to the *Adatya* merely because the latter has sent a hundi for moneys due; credit will be given after the constituent has cashed and received actual payment. The effect of the evidence is to prove that the *pakka adatya*'s liability ceases when hard cash has come into the hands of his constituent. That circumstance distinguishes the present case from *Comber's*.

For these reasons, I think, the decree of the Court below must be reversed and as the learned Judge in that Court disposed of the suit on a preliminary point, we must remand it for trial on the merits. Plaintiff must bear the costs of the previous hearing of the appeal and have the costs of the present appeal heard before us and the costs of the issues tried in the Court below.

[370] BATCHELOR, J.—I agree with my learned colleague in the order he has proposed but in deference to the arguments we have heard I think it is desirable to state my views as briefly as possible.

The only question before us is whether the money payable under this contract is payable in Bombay so that the cause of action may be said to have arisen in part within the jurisdiction.

Now it seems to me that this case is one which depends entirely upon its own evidence. What does the evidence show? Does it show that the money is payable in Bombay or does it show only that the money is payable where the principal, the creditor, elects to be paid? In my opinion it shows that the money is payable in Bombay with a discretion to the principal to select some other place for payment if he chooses to do so.

(1) [1898] A. C. 524.



[His Lordship discussed the evidence of several witnesses and continued]:—

Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges, if it stood alone, would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to section 217 of the Contract Act. But however that may be, in my opinion, the best answer to the argument is this, that the evidence must be considered as a whole and, so considered, it shows that by the ordinary mercantile usage attached to this form of contract, the contract embodies both stipulations, first, that the money should be payable in Bombay, and secondly, that the Agent should be entitled to deduct these charges. I can see no reason why these two stipulations should not co-exist in the same contract if the parties are minded to combine them. And on the evidence in this case I find that that is precisely what the plaintiff and the defendant elected to do. That in my opinion is the contract which they made. Some assistance to the respondent was sought to be obtained from the use of the phrase [371] "Akola chalan," but the word 'chalan' means no more than currency and the Akola currency is admittedly the British currency. That being so, it seems to me that the only distinction sought to be introduced was the distinction between the British currency of Akola and the currency of the neighbouring Native State which borders upon Akola. It may be desirable just to notice the case of *Raman Chettiyar v. Gopalachari* (1), though it has not been cited to us. That case is distinguishable inasmuch as there the only fact in the plaintiff's favour was that he resided at Kumbakonam, and there was no evidence that the debt was payable at Kumbakonam.

For these reasons I agree in the order proposed by my learned colleague.

Attorneys for the appellant:—*Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondent:—*Messrs. Dikshit, Dhunjishah and Soonderdas.*

33 B. 371 (=11 Bom. L. R. 317=2 I. C. 492).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

RANCHHODBHAI VALLUVBHAI (Original Claimant), Appellant, v.

THE COLLECTOR OF KAIRA, Respondent.\*

[1st February, 1909.]

*Bombay Civil Courts Act (XIV of 1869), section 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure.*

Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court.

*Laxmi v. Aba* (2), followed.

[Fol : 36 Bom. 860; Ref : 69 I. C. 428=3 Lah. 420.]

\* First Appeal No. 149 of 1907.

(1) (1908) 31 Mad. 223.

(2) (1908) 32 Bom. 634; 10 Bom. L. R. 924.

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APPEAL from the decision of K. Barlee, Assistant Judge of Ahmedabad.

[372] The Collector of Kaira, acting under the powers conferred upon him by the Land Acquisition Act (I of 1894), compulsorily acquired 1 acre and 30 gunthas of lands belonging to the claimant, for the purpose of building a hostel for the students of the Nadiad High School.

The District Deputy Collector of Kaira, acting as Collector for the purposes of land acquisition, fixed the compensation at the rate of Rs. 1,600 per acre and awarded Rs. 2,938 to claimant for the land acquired.

The claimant claimed Rs. 4,000 per acre and applied to the Court of the Assistant Judge of Ahmedabad.

The Assistant Judge found the claim in excess not proved and confirmed the order passed by the lower Court.

The claimant appealed to the High Court.

G. S. Rao, for the appellant.

M. B. Chaubal, Government Pleader, for the respondent.

At the hearing, the Government Pleader raised the preliminary objection that the appeal lay to the District Court and not to the High Court.

CHANDAVARKAR, J.:—Following the ruling in *Laxmi v. Aba* (1), the reasoning of which applies to the facts of the present case, we must hold that no appeal lies to this Court from the order of the Assistant Judge, but that the appeal lies to the District Court. We, therefore, return the appeal for presentation to the District Court.

The respondent must have his costs of this appeal.

33 B. 373 (=2 I. C. 480=11 Bom. L. R. 352.)

### [373] APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

KRISHNAJI PANDURANG SATHE (*Original Defendant*), Appellant, v.  
GAJANAN BALVANT KULKARNI (*Original Plaintiff*), Respondent.\*

[12th February, 1909].

*Jurisdiction—Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immoveable property—Suit to enforce the right in British Courts.*

The plaintiff sued to recover from the defendant a certain sum of money on account of toll leviable under a grant from the Peshwas and known as the Tipnis Pansare right, on paddy exported from the territory of the Punt Suchiv to Pen, via Umber Khind in British territory. The cause of action arose admittedly in foreign territory; but it was contended the suit lay in the British Courts because the defendant resided in British jurisdiction:—

*Held*, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in performance, and such an allowance, whether secured on land or not, being according to Hindu law, *nibandha*, was immoveable property.

*The Collector of Thana v. Hari Sitaram* (2), followed.

*Held*, further, that this immoveable property was situate, in the eye of law, in a foreign state; and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied.

\* Second Appeal No. 668 of 1907.

(1) (1903) 32 Bom. 634; 10 Bom. L. R. 924. (2) (1883) 6 Bom. 546.



*Keshav v. Vinayak* (1), applied.

The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immoveables situated out of the jurisdiction.

SECOND appeal from the decision of F. X. DeSouza, District Judge at Thana, confirming the decree passed by S. G. Kharkar, Subordinate Judge at Pen.

Suit to recover a sum of money from the defendant.

The plaintiff was the holder of a right, known as the Tipnis Pansare right, which consisted in levying a certain fee or rate [374] on all imports into and exports from the Songhad Taluka, which now forms part of the territory of Punt Suchiv of Bhor. The right in question was to levy two annas on every khandy of paddy carried from the territory of Punt Suchiv to Pen via UMBER Khind. The right was conferred on the plaintiff by the Peshwas.

The plaintiff filed this suit to recover the sum due to him in exercise of this right from the defendant.

The defendant pleaded among other things want of jurisdiction.

The Subordinate Judge held that the suit was bad for want of jurisdiction. He said as follows :—

“ *Keshav v. Vinayak* (1) shows that suits as to rights in respect of immovable property arising in States must be filed in the Courts of the States themselves. A *varshashan* allowance was in dispute in the above suit. Hence, in the present case the right to levy fees on carts passing by a particular road is also similar to the above right of *varshashan* allowance. Hence, the present suit must be filed in the Court of Pali and not in this Court.”

This finding was on appeal reversed by the lower appellate Court, and the case was remanded for trial on merits. The learned Judge remarked :—

“ The ruling in *Keshav v. Vinayak* (1) does not apply in the case. The *varshashan* referred to therein was a charge on the revenue of a village which is clearly different from the claim in the present case where it is a fee on carts taken from one place to another. In the case referred to, the *varshashan* was to be taken from the Nizam's territory at Aurangabad. There is no such thing in this case.”

In trying the case upon its merits the Subordinate Judge found the plaintiff's claim proved. His decree was, on appeal, confirmed by the lower appellate Court.

The defendant appealed to the High Court.

*P. P. Khare*, for the appellant :—The question involved in this case is one of *nibandha*, which is immovable property ; and, therefore, the suit ought to have been instituted in the territories of the Native State where the right is to be exercised. See *Keshav v. Vinayak* (1) and Dicey's Conflict of Laws, Introduction.

[375] *P. B. Shingne*, for the respondent :—The suit is one for recovering an amount of money due in respect of a right. We do not sue to recover immovable property, such a suit is governed by section 17 of the Civil Procedure Code of 1882.

We sue for money, and the defendant raises a question of title. In such a case the question of jurisdiction has to be decided by reference to the plaint and not by looking at the stand taken by the defendant.

CHANDAVARKAR, J. :—The action in this case was brought by the respondent to recover a certain sum of money from the appellant on

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I. C. 489=11  
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I. C. 647=11  
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account of toll leviable on paddy exported from the territory of the Punt Suchiv to Pen, via Umber Khind in British territory. The respondent alleged in his plaint, and it is found proved by both the Courts below, that under a grant from the Peshwas, who were the rulers at that time of the territory now owned by the Punt Suchiv, the respondent has acquired the right in that territory to levy a certain rate or cess on all imports into and exports from it. It goes by the name of the Tipnis Pansare right.

It is admitted before me that the cause of action arose in foreign territory but it is contended that the suit lies in our Courts because the defendant resides in British jurisdiction. What the respondent claims, however, is an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being, according to Hindu law, *nibandha*, has been held to be immovable property: *The Collector of Thana v. Hari Sitaram* (1). This immovable property is situate, in the eye of law, in a foreign State, because, on the facts found, the right to levy the toll which the respondent claims is found to arise in the territory of the Punt Suchiv. To this state of facts the principle of the decision of this Court in *Keshav v. Vinayak* (2) applies. It was held there that a Court in British India has no jurisdiction to try a suit for the determination of a right to or interest in immovable property situated outside British India, where the right is denied. In the present case [376] the respondent's claim has been contested by the appellant, and, though the suit is for a money claim, it is in reality a claim to immovable property situate outside British territory.

Our Courts, no doubt, have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction but that is "upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction." See the notes to *Penn v. Lord Baltimore* (3). There is no contract or equity here. On the other hand, what the respondent claims and what is found on the evidence is that the ruling power of a foreign State has assigned to the respondent the right of that power to levy toll on certain articles in that territory. "The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State." *Sydney Municipal Council v. Bull* (4).

For these reasons the decree of the Court below must be reversed and the claim rejected with costs throughout on the respondent.

*Decree reversed.*

(1) (1882) 6 Bom. 546 at p. 559.

(2) (1897) 23 Bom. 22.

(3) 1 Wh. & Tu. L. Cas. p. 768 (7th

edn).

(4) [1909] 1 K. B. 7 at p. 12.



33 B. 376 (=2 I. C. 515=11 Bom. L. R. 342.)

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

CHUNILAL HARICHAND GUJAR (*Original Plaintiff*), Appellant,  
 v. VINAYAK ANANDRAO (*Original Defendant*), Respondent.\*  
 [15th March, 1909.]

*Dekkhan Agriculturists Relief Act (XVII of 1879); 'sec. 2—'Agriculturist'—Interpretation—'Earns his livelihood'—Sources of income.*

In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Court [377] must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of his livelihood and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture.

*Dwarkanjirav Baburav v. Balkrishna Bhalchandra* (1) explained.

APPEAL from order passed by S. S. Wagle, First Class Subordinate Judge, A. P., at Thana, reversing the decree passed by B. D. Subnis, Subordinate Judge at Kalyan.

Proceedings in execution.

The plaintiff held a decree against the defendant. He applied to execute the decree: and in the proceedings that followed the defendant pleaded that he was an agriculturist.

The Subordinate Judge took evidence upon the point and came to the conclusion that the defendant was not an agriculturist, on the following grounds:—

It is unquestionable that defendant derives his income from agricultural sources. He was examined by the Court—and also as a witness on his own side. (Exhibits 21 to 25). He has put in assessment receipts (Exhibits 27 to 36), and examined witnesses exhibits 38 to 40. He has also put in some leases but they were not proved. The whole of the evidence on record shows that the defendant's income from agriculture amounts to Rs. 300 at the most after paying Government assessment and the expenses of cultivation; defendant himself in his deposition (Exhibit 21) not only practically admits this but that deposition further shows that his income from this source is even less. He on the other hand states that he has a ten annas share in the revenues of the Inam village of Atgaon. He has also purchased a one-anna share from another Inamdar of the same village. The revenues of the village amount to about Rs. 1,000 (Exhibits 21, 25 and 38) and the defendant admits that his income from this source amounts to Rs. 300 a year (Exhibit 21) and that he got Rs. 700 last year on account of ground-rent. His deposition (Exhibit 25) makes it clear that he derives a part of his annual income from the village ground-rent and though the amount of it is not certain yet calculating on the basis of the rent received last year, *viz.*, Rs. 700 it may safely be presumed that it amounts to at least half the amount annually on an average. Then again defendant is forced to admit that he has got tenants at Shahapur—paying about Rs. 80 annually as rent. He no doubt says that he does not recover more than Rs. 25 or 30 out of it but this statement is not borne out by any reliable evidence on the record. Even assuming that what the applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources, I find nothing in them to support the applicant's contention that his income [378] from agriculture exceeds that from other sources. I therefore hold that he is not an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act. I therefore find the first issue in the negative. The more delicate question as to whether any relief can be granted to the applicant when the execution proceedings are once at an end does not consequently arise; I therefore pass the following order inas-

\* Appeal No. 44 of 1908, from order.

(1) (1894) 19 Bom. 255.

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much as defendant applicant being held not to be an agriculturist is not entitled to reliefs prayed for.

This decree was on appeal reversed by the lower appellate Court, on the following grounds :—

It appears to me that the learned Subordinate Judge has approached the consideration of this case from an erroneous point of view. He says "Even assuming that what applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources I find nothing in them to support the applicant's contention that his income from agriculture exceeds that from other sources. I therefore hold that he is not an agriculturist." This view cannot be supported. It is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources. All that is necessary is to show that his income from agriculture is sufficient to enable him to earn his livelihood wholly or principally. He may have other sources of income and that income may be sufficient for his maintenance. But that fact will not affect the construction of the definition. *Dwarkojirav v. Balkrishna* (1). What we have to see is therefore not whether the judgment-debtor's income from agriculture exceeds his income from other sources, but whether the income from agriculture is sufficient for his maintenance. It is not disputed that the judgment-debtor owns lands about 40 or 45 acres situated at Adgaum, Shahapur and Nandgaum which are all adjoining villages. He cultivates some land (about 20 bighas) privately and has let the rest to tenants. He says that his income from these lands is about Rs. 500 to 600. He has called witnesses Nos 38, 39 and 40. From their evidence I hold that the income from lands is about Rs. 350 to 400 a year clear of Government assessment and costs of cultivation. To this is to be added the income from grass Rs. 40 or Rs. 50. For grass may very well be classed as agricultural produce. The judgment-debtor stated that this income was sufficient for his maintenance. The decree-holder has not produced any evidence nor shown by the cross-examination of the judgment-debtor that the agricultural income is not sufficient for the maintenance of the judgment-debtor. Ordinarily this income would be sufficient to maintain a man and there is nothing to show that the judgment-debtor's style of living is other than ordinary. No doubt in the lower Court no inquiry was directed as to the amount required for the judgment-debtor's maintenance. But when the judgment-debtor stated his agricultural income and alleged in his application that he maintained himself principally by [379] agriculture it was for the decree-holder to show that agricultural income is not sufficient to maintain the judgment-debtor. The decree-holder however called no evidence. I, therefore, hold that the agricultural income is sufficient to maintain the judgment-debtor and that he is an agriculturist.

The plaintiff appealed to the High Court.

*M. B. Chaubal*, (Government Pleader), for the appellant.

*B. V. Vidwans*, for the respondent.

CHANDAVARKAR, J.—The learned Judge in the appeal Court below has misunderstood the judgment of this Court in *Dwarkojirav Baburav v. Balkrishna Bhalchandra* (1) in construing the word "agriculturist" as defined in the Dekkhan Agriculturists' Relief Act. He says that "it is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources." That is not what was held in *Dwarkojirav Baburav v. Balkrishna Bhalchandra* (1). In that case, as the facts show, when the suit was instituted the income from non-agricultural sources had become less than that from agriculture; and the Court held that that circumstance brought the plaintiff within the definition. The judgment begins by pointing out that the expression "earns his livelihood" can only mean obtains the means of maintaining himself. In ascertaining whether a man who has two or more sources of income, of which the income from agriculture is one, occupies the status of agriculturist as defined in the Act, the Court must take into account all

(1) (1894) 19 Bom. 255.



those sources and ascertain whether the income from agriculture is larger or smaller than the rest. All the sources must be taken to be means of his livelihood, and, if the income from agriculture exceed the other incomes, he must be held to be earning his livelihood principally by agriculture. That is the interpretation which has been hitherto placed by this Court in all the cases in which this point has arisen, following *Dwarkojirav Baburav v. Balkrishna Bhalchandra*(1). We reverse the decree and remand the appeal for rehearing on the merits. Costs to abide the result.

*Decree reversed.*

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33 B. 380 (=1 I. C. 343=11 Bom. L. R. 221=9 Cr. L. R. 291.)

[380] CRIMINAL REFERENCE.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. DE SYLVA.\*

[3rd February, 1909.]

*The Bombay Abkari Act (Bombay Act V of 1878), sections 3 (10), 9, 43†—Cocaine—Import by sea into the Bombay Harbour—"Import," meaning of—Sea Customs Act (VIII of 1878), section 19.*

Section 9 of the Bombay Abkari Act (Bombay Act V of 1878) does not prohibit importing cocaine generally; it merely prohibits its importation unless duty has been paid.

The intention and requirement of the section in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded.

The mere entry into the Bombay harbour of a ship conveying dutiable goods or merely tying it up against the dock wall is not importing goods in contravention of the obligation to pay duty.

The term "import" as used in the Bombay Abkari Act, 1879, includes the conveying into any part of the Presidency of Bombay by sea.

\* Criminal Reference No. 129 of 1908.

† The Bombay Abkari Act (Bombay Act V of 1878), sections 3 (10), 9, 43 run as follows:—

3 (10). "Import" and "export" include respectively the conveying into, or out of, any part of the Presidency of Bombay, from, or to, any other part of India.

9. No liquor, hemp or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(a) it is liable to the payment of duty under the Indian Tariff Act 1894, or any other law for the time being in force relating to the duties of customs on goods imported into British India, and the duty prescribed by such law has been paid thereon; or

(b) such import is permitted under the power next hereinafter conferred.

43 (1) Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act—

(a) imports or exports liquor, hemp or any intoxicating drug into or out of any part of the Presidency of Bombay or

shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

(1) (1894) 19 Bom. 255.



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[381] This was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was charged with an offence punishable under section 43 of the Bombay Abkari Act (Bombay Act V of 1879), inasmuch as a parcel of cocaine weighing ten pounds bearing his name and address was detected in a ship anchored in the Bombay Harbour.

The Chief Presidency Magistrate who tried the case submitted the following questions for determination by the High Court.

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43 Bombay Act V of 1878, if the ship containing such cocaine—

(a) enters Bombay Harbour ;

(b) is tied up against the Bombay Dock Wall.

2. Whether the Bombay Harbour is a part of the Bombay Presidency within the meaning of section 43, Bombay Act V of 1878.

3. Whether a person who has committed the act referred to in question (1) has a *locus penitentiae* while the cocaine remains on board the ship and no attempt has been made to land it.

*Strangman*, Advocate-General, instructed by *Nicholson*, Government Solicitor, for the Crown.—The provisions of section 43 of Act V of 1878 must be read with section 9 of the same Act. Various notifications have been issued under the Sea Customs Act (VIII of 1878) prohibiting the importation of cocaine except by certain chemists and agents mentioned in the notifications. "Import" means to bring or carry from a place abroad. The word does not involve landing. Importing into Bombay Presidency is bringing into Bombay harbour whether the goods brought are landed or not. The accused committed the offence as soon as the parcel of cocaine came into the Bombay harbour.

Bombay harbour is a part of the Bombay Presidency : see *Ilbert's Government of India*, pp. 19, 20; *Encyclopædia of the Laws of England*, Vol. XII, p. 131. The whole of the harbour forms part of British India : see *Reg v. Elmstone* (1), *Reg v. Kastya Ram* (2).

[382] *Lowndes*, instructed by *Godinho*, for the accused.—If importation is complete the moment a ship comes within the limits of the Bombay harbour everyone on board the ship who has dutiable goods commits an offence under section 9 of the Abkari Act. There can really be no importation till the person bringing dutiable goods has had an opportunity of paying duty : see *Queen-Empress v. Ascensao* (3). Goods are only imported when they are landed and delivered to the importer : see *Canada Sugar Refining Company v. Reg* (4).

A person may bring dutiable goods, but on finding that the duty is very heavy may never land them. In such a case he can never be said to have imported the goods because they are brought into the harbour in a ship. If importation is not complete till a person has had an opportunity to pay duties, then the question whether that person had a license for a particular kind of goods or not is immaterial. He may sell the goods to a license-holder on board the ship or he may throw them away finding the duties to be exorbitant.

The Government Notification of 15th April 1908 does not prohibit importation of cocaine. It merely restricts its importation to certain persons. But other persons may apply for a license and import it.

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 65.  
p. 104.

(2) (1871) 8 Bom. H. C. R. Cr. C. 68 at

(3) (1890) *Ratanlal's Unrep. Cr. C.* 508.

(4) [1898] A. C. 735.



Section 3 (10) of Act V of 1878 is to be read subject to section 9.

Bombay Presidency has been defined in the Bombay General Clauses Act (Bom. Act I of 1904), section 3 (7). The word 'territory' means land only. The ship bringing the cocaine was not within the territory because it was in territorial waters. The territorial limit of every State extends to three miles from the shore. The State has jurisdiction over it. But this is quite different from the 'territory' included in the expression Bombay Presidency. The Bombay Abkari Act distinctly speaks of importation within the territory of Bombay Presidency. There is nothing to show that the Bombay Government administers the portion between the shore and the imaginary harbour line. Ilbert speaks of the Port of Bombay and not of the Harbour. There is no Act to [383] show that Bombay harbour is under the administration of the Government of Bombay. The passage in the Encyclopædia says that territory includes harbour, ports, etc., but there is no authority referred to in support of this statement. The remarks on p. 99 in *Reg. v. Elmstone* (1) are merely *obiter dicta*.

Regulation II of 1827 divided Bombay Presidency into Zillas. The Regulation does not speak of the sea. It excludes the sea.

*Strangman* in reply.—The Bombay harbour is within the Ordinary Original Civil Jurisdiction of the Bombay High Court; see *Queen v. Essub Ibrahim* (2). The Bombay harbour is within the Ordinary Criminal Jurisdiction of the Bombay High Court. The Ordinary Original Civil Jurisdiction and Criminal Jurisdiction are both the same: see clauses 11 and 21 of the Letters Patent. The Government of Bombay has administered the port and harbour of Bombay, as in Bombay Act I of 1873 there are provisions dealing with the harbour. The harbour therefore forms part of the Bombay Presidency. In *Queen-Empress v. Ascensao* (3) the accused was fined before he had opportunity to pay duty. But in the present case the importation of cocaine is restricted under notifications issued under section 19 of the Sea Customs Act. In the former case the importation of wine was neither prohibited nor restricted. In this case no payment of duties would have entitled the accused to import the parcel. If harbour is included in the Bombay Presidency then the bringing in of cocaine into the Bombay harbour is importing into the Bombay Presidency. The liability to pay duty arises as soon as a ship arrives within the limits of the harbour, though the duty is, for the sake of convenience, levied after the goods are landed.

The Indian Tariff Act (XVI of 1875) imposes the duty. The Sea Customs Act shows how it is to be collected. The latter Act uses the words "leviable" and "payable". The duty is leviable as soon the goods came: see sections 3 (d), 11, 15, 17, 20, 20 (c), 24, 25, 27, 29, 30, 32, 33, 41, 46, 53, 54, 55, 57, 80, 81, 82, 83, 85, 88, 128, 129, 131, 142, 168, 194, 196. Section 128 is [384] an important one. Section 194 allows a Custom Officer to open any package and examine goods on board a ship.

Section 9 of the Abkari Act does not restrict the meaning of import in section 43. It should be read in the light of the Sea Custom Act which came into force before the Abkari Act. Import has a general meaning in sections 3 (10) and 43 and cannot have a restricted meaning in section 9.

*Lowndes*.—Harbour may be part of the Bombay Presidency but the three-mile territorial limit is not. The Abkari Act speaks of the Indian

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CRIMINAL  
REFERENCE.

33 B. 380=1  
I. C. 343=11  
Bom. L. R.  
221=9 Cr. L.  
J. 291.

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 104.

(2) (1845) Perry's O. C. 577,

(3) (1890) Ratanlal's Unrep. Cr. C. 503,



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CRIMINAL  
REFERENCE.

38 B. 380=1  
I. C. 343=11  
Bom. L. R.  
221=9 Cr. L.  
J. 291.

Tariff Act but not of the Sea Customs Act. The Legislature specially refers to one and not to the other. The Abkari Act is not therefore subject to the provisions of the Sea Customs Act.

The Privy Council has held in *Canada Sugar Refining Company v. Reg.* (1) that the words 'levy' and collect only mean 'payable'. The word 'levied' means 'paid,' and not 'become payable.' As the Abkari Act provides for bonded warehouses, the offence of importation is not complete until goods are landed and there was an opportunity to pay duty.

The Government Notification simply restricts the importation of cocaine until permission is obtained. It does not say that permission should be obtained even before the article is brought into the harbour. If a man is in a foreign country, for instance, it is not possible to get a permit, and if he brings cocaine in a ship and then applies to the proper authorities for license, it would be absurd to hold that he has committed an offence.

HEATON, J.:—The questions which we are asked to answer are these:—

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43, Bombay Act V of 1878, if the ship containing such cocaine.

(a) enters Bombay harbour,

(b) is tied up against the Bombay Dock wall.

[385] 2. Whether the Bombay harbour is a part of the Bombay Presidency within the meaning of section 43 of Bombay Act V of 1878.

Whether a person who has committed the act referred to in question (1) has a *locus penitentie* while the cocaine remains on board the ship and no attempt has been made to land it.

The first question involves a consideration of the meaning of section 43 of Bombay Act V of 1878. That section makes penal the import of cocaine "in contravention of this Act or of any rule or order made under this Act." It does not appear that anything has been done in contravention of any rule or order made under the Act. No rule or order thereunder exists, so far as we are informed, prohibiting or restricting the import of cocaine. There may have been a contravention of an order made under section 19 of the Sea Customs Act. With that, however, we are not concerned. In the absence of any rule or order relating to the import of cocaine and made under Bombay Act V of 1878, all we have to do is to determine whether the bare provisions of the Act have been disobeyed. It is said they have, and section 9 of the Act is referred to. The Act may or may not give power to make a rule or order prohibiting or restricting the import of cocaine, but section 9 does not, it seems to me, prohibit importing that drug generally; it merely prohibits its importation unless duty has been paid, because cocaine is a thing liable to the payment of duty under the Indian Tariff Act. Having only the words of the Act itself, having no rule or order made under that Act, that is the only conclusion at which I can arrive. The intention and requirement of section 9 in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded. So the import with which we are dealing is not an import within the meaning of section 43 unless it is an import

(1) [1898] A. C. 735.



in contravention of the Act, that is, in the particular case put to us, in contravention of the obligation to pay duty. Ordinarily, we are told duty is required to be paid on shore usually after the ship conveying the dutiable goods has come to rest in the harbour or dock. If this be so, the mere entry into [386] the harbour or tying up against the dock wall is not importing goods in contravention of the obligation to pay duty. Further discussion of the point is useless because the facts have not been found by the Magistrate.

So far I have assumed that on the facts stated there is an import and have only considered whether such import is in contravention of the Bombay Abkari Act. There is not, in my opinion any doubt that the facts stated do amount to an import. That word is stated in the Act to include the conveying into any part of the Presidency of Bombay from any other part of India, and therefore by implication and having regard to the common meaning of the word, must include the conveying into any part of the Presidency of Bombay by sea. The Bombay Presidency is defined in the Bombay General Clauses Act 1904 to mean "the territories within British India for the time being under the administration of the Governor of Bombay in Council."

It does not seem to be really doubted that the Bombay harbour is under the administration of the Governor of Bombay in council but were doubt on this point to arise, it could be set at rest by ascertaining as a question of fact whether the harbour in whole or in part is or is not under the administration of the Governor of Bombay in Council.

The facts have not been fully stated to us. They may show that there has been such an evasion of opportunity to pay duty as to make the import punishable. That, however, is for the Magistrate to decide. He has referred abstract questions to us and not questions arising out of facts fully ascertained and stated.

In my opinion it is impossible to answer the third question in a general form, and in any set of facts, the answer would be so dependent on the facts as to be a matter which the Magistrate should decide for himself.

The other questions referred do not it seems to me admit of more precise answers than those here given.

CHANDAVARKAR, J.:—I concur.

33 B. 387 (=2 I. C. 419=11 Bom. L. R. 389.)

[387] APPELLATE CIVIL.

Before Mr. Justice Chandavakar.

TRIMBAK GOPAL PARICHARAK AND OTHERS (*Original Defendants* 6, 7, 10, 8, 11), *Appellants* v. KRISHNARAO PANDURANG AND OTHERS (*Original Plaintiffs and Defendants* 1, 4, 12), *Respondents*.  
KRISHNARAO PANDURANG AND OTHERS (*Original Plaintiffs*), *Appellants*, v. VISHVANATH GOPAL AND OTHERS (*Original Defendants*), *Respondents*.\*

[9th February, 1909.]

*Civil Procedure Code (Act V of 1908), section 9—Civil Court—Jurisdiction—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.*

\* Cross Appeals Nos. 454 and 589 of 1907.

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CRIMINAL  
REFERENCE.

33 B. 380=1  
I. C. 343=11  
Bom. L. R.  
221=9 Cr. L.  
J. 291.



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88 B. 387=2  
L. C. 419=11  
Bom. L. R.  
889.

The plaintiffs, as members of the committee of management of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers, owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office.

*Held*, that the suit was a civil nature.

An action would lie against the plaintiffs by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered.

[388] SECOND APPEALS from the decision of V. M. Bodas, First Class Subordinate Judge, A. P., at Sholapur, confirming the decree passed by T. R. Kotwal, Subordinate Judge at Pandharpur.

Suit for declaration and injunction.

The plaintiffs were the committee of management of a temple at Pandarpur and as such were in receipt from Government of a certain allowance to meet the cost of certain religious ceremonies which came to be known as the *Sarkari puja*.

The defendants were the representatives of the families known as Badves and Shevadharies. The right to perform all the worship of the deity in the temple appertained to the former and it was their hereditary right. The other, the Shevadharies, performed a subordinate part in the worship and their right also was hereditary.

On the 4th July 1902, these two classes of temple officers quarrelled among themselves the result of which was that the *Sarkari puja* and all other ceremonies in honour of the deity were left unperformed that day and for ten consecutive days.

The plaintiffs therefore sued for a declaration that the defendants were not entitled to leave unperformed the usual worship of the deity, and that they were entitled to get the *puja* performed by the defendants, or if the latter refused, by other fit persons; and for an injunction against the defendants restraining them from obstructing the plaintiffs in getting the worship performed.

The plaintiffs' claim was decreed by the Court of first instance. And, on appeal, it was upheld by the lower appellate Court, on the following grounds:—

“The conduct on the part of the Badves and the Sevadharies certainly gives the plaintiffs a cause of action to sue for the relief which they have now claimed, because what happened in July 1902 may happen again at any time; and the only question, so far as I can see, is, whether having regard to the provisions of section 11 of the



Code of Civil Procedure, 1882, the suit can be maintained. I agree with the lower Court in holding that it can be. It is to be remembered that the present allowance from Government is the continuation of the old grant which the former Governments had made especially for defraying the expenses of particular *pujas* and other services to the deity. From the first, the money has been applied rigidly to those purposes and to no other. [389] Not only that but till the annexation of the Satara Raj the application of the money had actually been made by the officers of Government themselves. In sanctioning the continuance of the allowance, the present Government has also specifically mentioned the several *pujas* and services to which the money should be applied by the committee of management appointed by them. It is admitted and proved that the Badves and Sevadharies have no right to stop the morning and other *pujas* and the plaintiffs' right to have them done through the Sarkari Badves that is, a descendant of Bhimaji or his representative. All this goes to show that the present is a suit not to vindicate plaintiffs' right to a mere dignity or merely for a declaration of their right to have certain religious ceremonies performed, but for something more which is one of a civil nature."

The parties appealed to the High Court.

G. S. Rao for the Shevadhari defendants:—This suit is not of a civil nature. It is brought to enforce religious duties; and is therefore not cognizable by a Civil Court. See *Vasudev v. Vamnaji* (1); *Ramrao v. Rustomkhan* (2); *Waman Jagannath Joshi v. Balaji Kusaji Patil* (3); *Vanamamalai Bhashyakar v. Krishnaswami Thathachariar* (4); *Subbaraya Mudaliar v. Vedantachariar* (5); *Kooni Meera Sahib v. Mahomed Meera Sahib* (6); *Krishnasami Ayyangar v. Samaram Singrachariar* (7).

Chamier (with S. S. Patkar) for the Badve defendants was heard in support of Mr. Rao's contentions.

D. A. Khare, with P. D. Bhide, for the plaintiffs:—The suit is not of a religious but of a civil nature. It is brought to vindicate the natural rights of each private individual to enter a temple and perform the worship. In this the plaintiffs in common with other private individuals were obstructed and they have brought this suit to vindicate their civil rights.

CHANDAVARKAR, J.—It is contended for the appellants, on the authority of this Court's decision in *Vasudev v. Vamnaji* (1), that a Civil Court has no jurisdiction to try a suit of the present character because its prayer is for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there [390] is no contest as to any right to property or to any office. Carefully analysed, the suit is not of that nature. The plaintiffs are members of the Committee of Management of the Temple of *Shri Vithoba* and *Shri Rakhmabai* at Pandharpur. They hold the office under a *sanad* from Government and receive annually a certain sum of money for defraying the expenses of certain kinds of religious worship in the Temple known as *Sirkari Puja*. The obligation is attached to that office to get that worship performed by the hereditary officers or servants attached to the Temple. The plaintiffs complain that those officers, owing to quarrels among themselves, have failed to perform the worship with the result that the duties owing to the idol are neglected and the funds in the hands of the plaintiffs undistributed for the purposes for which the plaintiffs hold those funds in trust. Accordingly, they ask for a declaration of their right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the Temple concerned failing to perform it; and they ask for

(1) (1880) 5 Bom. 80.  
 (2) (1901) 26 Bom. 198.  
 (3) (1888) 14 Bom. 167.  
 (4) (1905) 16 M. L. J. 150.

(5) (1904) 28 Mad. 23.  
 (6) (1906) 30 Mad. 15.  
 (7) (1906) 30 Mad. 158.

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33 B. 387=2  
I. C. 419=11  
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an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared.

The facts above stated, which are found proved by both the Courts below, distinguish the present case from that in *Vasudev v. Vamnaji* (1). The latter was a case of bare religious worship. Here the plaintiffs are trustees of a public charitable trust holding moneys in their hands for disposal in a certain manner for certain defined purposes. They hold the funds on behalf of the public for the benefit of the deity of the Temple, who, in Hindu Law, is considered as a sacred entity, or ideal personality possessing proprietary rights : see *Thackersey Dewraj v. Hurbhum Noursey* (2). The deity of the Temple being, according to that law, a juridical person as "the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a [391] responsibility for its due application to the purpose of the foundation. . . . They are answerable as trustees . . . and a remedy may be sought against them for mal-administration by a suit open to any one interested:" *Manohar Ganesh v. Lakhmiram Govindram* (3). It would be so in the case of non-administration also. An action would lie against them by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gives them a corresponding right to disburse the funds after getting the religious worship, for which those funds are intended, properly performed. Such a right is not the less of a civil nature though the funds are to be appropriated to religious ceremonies. The Court is not called upon to enter into the adjudication of any rites or ceremonies as such. What it has to decide is the right of the trustees to fulfil the trust unhindered.

The suit was brought against two sets of defendants—one consisting of the *Badves* and the other consisting of the *Shevadharies*, of the Temple. The lower Courts have given to the plaintiffs a decree as against both the classes of defendants. But it is urged in this second appeal that the decree is erroneous in law so far as it affects those *Shevadharies* who are not Pujaris, because these had nothing to do with the dispute between the *Badves* and the other *Shevadharies* which led to the stoppage of the worship and compelled the plaintiffs to file the suit. This objection does not appear to have been raised in the lower appellate Court. That Court has found that the plaintiffs had to sue because of the conduct of the *Badves* and the *Shevadharies*. That finding of fact included all classes of *Shevadharies*. Even assuming that the *Shevadhari* defendants, who are not Pujaris, had done nothing before suit to give the plaintiffs a cause of action against them, the denial of the plaintiffs' right by them in their written statements is sufficient in law to cure that defect and entitle the plaintiffs to the declaration claimed as against them under section 42 of the Specific Relief Act.

The decree of the lower Court declares the right of the plaintiffs to get the worship performed by "their *Badves* appointed [392] perpetually, viz., the descendants of Bhimaji." For the appellants it is complained that this term of the decree ignores the rights which they have according to the decrees passed by this Court in litigation between them and the

(1) (1880) 5 Bom. 80.

(2) (1884) 8 Bom. 482.

(3) (1887) 12 Bom. 247 at p. 265.



*Badves*. I do not think that the declaration was intended by the lower Courts to have any such result. But to prevent all ambiguity or misconstruction, I would add the words, "with due regard to the judicially declared rights of the other *Badves* and the *Shevadhari*s", after the words above quoted. As to the Second appeal preferred by Mr. Chamier's clients (S. A. 488 of 1907) I do not think that there is any conflict or inconsistency between the decree passed by the Subordinate Judge Mr. Kotval, and that passed by the Subordinate Judge Mr. Karkare, both of which have been confirmed by the lower appeal Court.

The lower Court's decree is imperfect in that it does not give to the plaintiffs the particular relief for which the suit was brought. They asked for a declaration that in the event of the *Badves* and the *Shevadhari*s refusing or failing to perform the *Sirkari Pujas*, they (the plaintiffs) were entitled to get the *pujas* performed by a suitable person or persons of their choice. This declaration must be added to the decree.

The result is that the lower Court's decree must be modified by adding the words and the declarations above mentioned. As to costs, the appellants in Second Appeal No. 454 of 1907 must pay the costs of the respondents (separate sets for plaintiffs and the respondent defendants). In Second Appeals 588 and 589, the appellants must have their costs from the respondents. In Second Appeal 488 of 1907 each party should bear his own costs.

*Decree varied.*

33 B. 393 (=3 I. C. 511=10 Bom. L. R. 498.)

[393] APPELLATE CIVIL.

*Before Mr. Justice Chandavarakar and Mr. Justice Knight.*

RAJENDRALAL MANEKLAL (ORIGINAL PLAINTIFF), Appellant, v.  
THE SURAT CITY MUNICIPALITY (Original Defendant),  
Respondent.\*

[11th February, 1909.]

*Negligence—Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance.*

The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch, which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town. They constructed a dam in the adjoining creek, but allowed the sluices at the dam to be choked up with weeds, sedges and silt. The consequence was that the storm water which had collected in the creek passed on to the plaintiff's land and did damage.

*Held*, that there was misfeasance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby.

*Borough of Bathurst v. Macpherson* (1), followed.

APPEAL from the decision of Jehangirji E. Modi, First Class Subordinate Judge at Surat.

The facts of this case are set forth in the judgment at length.

*Baptista* with N. M. Samarth, for the appellant.

\* First Appeal No. 124 of 1909.

(1) (1879) 4 App. Cas. 256.

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33 B. 387=2  
I. C. 419=11  
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CIVIL.33 B. 393=3  
I. C. 511=11  
Bom. L. R.  
498.*The Government Pleader*, for the respondent.

KNIGHT, J.:—The facts of this case are set forth in the able and elaborate judgment of the learned First Class Subordinate Judge. Briefly, the plaintiff sues to recover damages from the Surat Municipality on account of injury done by storm water to certain garden land of his known as the Gopitalao, alleging that it was owing to the negligence of the Municipality that the water first broke into his garden, and that having broken in, it did not drain off.

[394] The negligence alleged is of three kinds : firstly, improper and inadequate construction of the sluice gate known as the Macca dam ; secondly, defendant's refusal or omission to drain the water off the garden by means of a disused culvert that once connected it with the main ditch ; and thirdly, defendant's failure to keep the ditch cleared from obstruction and the sluice gate in proper working order.

Now, the first of these allegations is demonstrated to be unsustainable by the plaintiff's own expert witness, as the learned Subordinate Judge has shown. Mr. Maneklal, Engineer (Exhibit 23) deposes that "if the sluice gates had been kept open, the Gopitalao would not have suffered any damage from the overflow of the waters." Evidently, therefore, plaintiff cannot assert that the damage was caused to his property by faulty construction of the original works.

The second, we think, discloses no good cause of action against the Municipality. It seems that at one time the Gopitalao was used as an overflow reservoir from the Macca ditch itself, and, in order to subserve this end, was connected with it by a culvert designed, not to drain the water from the Gopitalao, but to draw it off from the ditch. This arrangement was abandoned, many years ago, in 1875, when the culvert was finally closed. It is probable perhaps that if it had been opened after the irruption of the heavy flood which has given rise to this suit, much of the damage caused to the garden that now occupies the bed of the Gopitalao might have been averted. But we are not satisfied upon the evidence that it was reasonably possible to re-open it at the time. The plan put in indicates that it had become deeply embedded in silt or rubbish on the ditch side, while on the Gopitalao side it was many feet under water. Under any circumstances, it was just as easy for the plaintiff to open it as for the Municipality ; and, although the latter declined to undertake the job when the plaintiff suggested that they should do so, it is not pretended that they offered any objection or hindrance to his doing it himself.

We are now left with the third allegation of negligence, viz., that the Municipality allowed the ditch to become choked by silt and rubbish, and that the sluice gates were not in proper [395] working order. This demands more serious treatment than the other two, and we think that it has not received adequate consideration in Mr. Modi's otherwise excellent judgment.

To commence with, this item of negligence was explicitly asserted in the plaint. "The defendant Corporation has, instead of preserving the ditch in its original condition, filled up the greater portion of it with the rubbish of the town;" and again, "this rush (of water) was owing to the defendant having filled up the ditch as above and the consequent incapacity of the ditch to contain the rain water;" and, "the sluices in the dam had not been kept in the condition in which they ought to have been kept, . . . the openings having been kept closed."



All this is definite enough. The allegation re-appears in the first material issue framed by the Subordinate Judge who commenced the trial, Mr. Chimanlal :—" Whether the rain water on July 16th, 1902, rushed into the Gopitalao, knocking down its western gate, on account of the defendant's negligence in not keeping its ditch on the north in proper order, and in not adopting measures, etc., etc." It is noticeable that this is practically the only allegation of fact embodied in the issues, which make no explicit reference to the other two items of negligence. Judging from the pleadings and the issues, the ordinary reader would conclude that plaintiff complained of little or nothing beyond the failure of the Municipality to maintain the drainage arrangements in proper order, and that what Mr. Modi terms the main charge of negligence, to which he has devoted the bulk of his judgment, was more in the nature of formal or subsidiary pleading. No doubt, the course adopted by the learned counsel engaged for the plaintiff, who even in the argument which he addressed to us seemed to have failed to grasp the strong point of his client's case, was primarily answerable for this; though it is difficult to understand how after his own expert witness' admission in examination-in-chief (quoted above) he can have thought it worth while to prosecute the so-called main charge of negligence further. The result, however, was important, for it not only diverted the attention of the Court from the real matter in dispute to others which hardly [396] needed discussion, but, as we shall shortly shew, led everyone concerned to ignore the most important piece of evidence on the record.

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In his detailed report (Exhibit 25) Mr. Maneklal, Engineer, after reciting a number of positive facts that he had observed, wrote : " From these facts it can easily be admitted that the old channel has been filled up with enormous quantities of silt which the defendants appear never either to have noticed or taken care to remove." The channel here means the ditch, as the context shews, and not, as plaintiff's counsel supposed, the abandoned culvert. There is certainly room for misunderstanding, inasmuch as the preceding portion of the paragraph is mainly occupied with the culvert ; but the passage immediately succeeding—" This channel runs with almost a uniform slope till it reaches Macca dam "—places the meaning beyond doubt. The stream, Mr. Maneklal continues, cuts a number of narrow passages all along through the silt. " There are no regular side slopes, and the bed seems to have been in some places on or about the same level as the surrounding ground." The picture delineated is clear and intelligible, and we must express our regret that the misapprehension to which we have referred caused these important assertions to pass almost unnoticed in the oral examination of the witness.

They received however very substantial corroboration. Mr. White, the Executive Engineer of Surat, writing in 1876, observed : " The lower sluices of the Macca dam . . . are very much silted up, about 5 feet of silt having accumulated on the up stream side of the dam." If that was the state of affairs in 1876 (we are not sure as to the precise year, but the argument would be as strong even if it were 1896), it can easily be conjectured what the condition of the ditch must have been in 1902. For here we may observe that the defendant Municipality have not asserted, much less attempted to prove, that they ever spent one farthing, or employed one single coolie, in keeping the ditch clear.

With this the plaintiff can claim to have laid a very solid foundation for his charge of negligence against the Municipality in the detail indicated.



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Placing wholly on one side the rest of [397] his oral evidence, we now come to the very important evidence to which we referred above; a document buried completely out of sight under the silt of irrelevant discussion, and exhumed, not by the efforts of the Counsel for the plaintiff, but by our own unaided researches.

This document is to be found below Exhibit 39, which is an application made by the plaintiff to the Municipality on July 28, 1902, only twelve days after the flood, and while the water was still standing in his garden. He begged the Managing Committee to inquire into the damage that was being done to his property; and the application was forwarded with an endorsement over the Municipal Secretary's signature to the following effect:—

"With reference to the above, the undersigned begs to state that on the day mentioned by Mr. Maneklal (*i. e.*, July 17th, the day after the flood, but perhaps the day of the flood itself is intended) it was found by the Municipal Overseer that the openings of the sluice under the Macca bridge were choked up with weeds, sedges and silt and were rendered unworkable; and as fears were entertained of a rising in the Tapti, it was imperatively necessary to keep (*i. e.*, put) the sluices in working order. The Municipal Overseer had therefore sent a party to clear off the sluices, as is usually done on such occasions."

This is dated 29th July 1902.

Now how the writer of this endorsement could have the impudence to stand in the witness box and swear that "he knew that the sluices used to be kept open," and that he merely sent and made inquiries in order to make certain, we find it difficult to understand. Still more marvellous is it that he should have been allowed to leave the witness box without being confronted with this endorsement and asked to reconcile it with his evidence. Exhibits 34, 37, 38 and 40 were shown to him, it appears, but the vitally important Exhibit 39 was wholly overlooked.

In the light of that endorsement however it is an easy task to appraise at its true value both the evidence of the Secretary and that of the Fire Brigade Superintendent (Exhibit 67) who supports him. The latter gentleman would have us believe that "the strict rule is that the sluices are always to be kept open. [398] All the sluices in the city are cleaned and oiled in the beginning of June." He being the head of the Department charged with the duty of seeing this done, it is natural enough that he should pretend that he punctually discharged the duty during the year in question. It is significant however that the private diary which he produced in Court showed that the sluices were greased on July 31st, but contained no such entry prior to that date ("but there is no entry in May and June; for that was done at the usual time punctually"); and that other entries show that on August 29th some silt was cleared away, and on the 7th September the sluices were again greased. That is to say, the book indicates that a great deal of attention was paid to the dam *after* the flood, and none at all before. It is also to be noted that this witness proves that the Secretary visited the dam during the flood; so that the contents of the endorsement cannot be cast aside as mere hearsay.

We may now return to the "interested" evidence of plaintiff's uncle Maneklal (Exhibit 30), armed with the means of gauging its probability. He tells us that he visited the dam on the afternoon of the flood, and found the Overseer there, with the Fire Brigade Superintendent and half a dozen coolies, busily engaged in trying to open the sluices. The Overseer



told him that the gates had long been closed, and that it was therefore difficult to open them; and he came away. This of course the Overseer and other Municipal employes deny; but it accords too closely with the statements made in the endorsement not to command our credence. The Overseer, it may be noted, admits that the rubbish and silt brought down by the water were removed by the Municipality after the 16th of July (Exhibit 60); and the Fire Brigade Superintendent assures us that violent rain such as that which produced this flood would not deposit any silt near the dam. It must therefore follow that the silt removed was the result of prior accumulations.

Emphasizing once more the omission of the defendant Municipality to prove, or even to assert, that they had ever made the smallest provision for keeping the ditch clear prior to the flood, we may here quit the evidence. The conclusions to which it points are manifest. The carrying capacity of the ditch had [399] been greatly reduced by the gradual accumulation of silt and rubbish in its bed, and the Municipality had done nothing to maintain it in proper order. The sluices at the dam "were choked up with weeds, sedges and silt and were rendered unworkable" in the Secretary's own words; and the water therefore collected in a channel of reduced capacity, and, unable to discharge itself through the sluices, burst into plaintiff's garden. In other words, the material allegations in the plaint are fully borne out by the evidence. It now remains to determine the legal consequence of this finding.

It is argued for the respondent Municipality, on the authority of the ruling of this Court in *Achratlal v. The Ahmedabad Municipality* (1), that the facts held proved above amount to no more than non-feasance, for which the respondent is not liable in damages at the instance of any private individual. In that case it was held that there being no duty cast upon the Municipality by the District Municipal Act to repair roads vested in it, no person injured by the non-repair of such a road could sue it for damages, because the omission of the Municipality to repair was non-feasance. But, as has been pointed out by the House of Lords in *Mayor &c. of Shoreditch v. Bull* (2), "the distinction between non-feasance and mis-feasance might be carried too far," and "in some cases non-feasance might be equivalent to mis-feasance." And of the latter *Borough of Bathurst v. Macpherson* (3), affords an illustration. The facts of that case were as follows:—The Borough of Bathurst had constructed a barrel drain under or in proximity to the highway. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the highway, with the result that he sustained personal injuries. The Privy Council held upon these facts that the Municipality having constructed the barrel drain was bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. That decision is explained in these terms by the Privy Council in *Municipal Council of Sydney v. Bourke* (4):—

[400] "The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and

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(1) (1904) 28 Bom. 340: 6 Bom. L. R. 75.

(2) (1904) 20 T. L. R. 254.

(3) (1879) 4 App. Cas. 256.

(4) [1895] A. C. 433 at p. 441.



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indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become foundrous."

Similarly here, the respondent Municipality constructed the dam in the Macoa creek, and by not keeping the ditch properly clean but by allowing it to fill with silt and permitting the dam to be choked with weeds and sedges, turned their works by their negligence into a nuisance so as to throw the water collected on their property—the said creek—into appellant's land. That is a clear act of mis-feasance and falls within the principle of law illustrated in *Borough of Bathurst v. Macpherson* (1). The respondent's act is similar to that of a man who brings water on to his own land and dams it up so that if it breaks away it must be a danger to his neighbour and must do him injury; there the man is liable, though he does nothing to let the water out, but it bursts away without any subsequent act of his. (See the judgment of Brett M. R. in *Whalley v. Lancashire and Yorkshire Railway Company*. (2))

On the question of damages both parties through their respective pleaders agree before us to abide by the decision of the Collector of Surat acting as arbitrator in the matter. The Collector to give his award and send it to this Court within two months—the time to be extended if necessary. Liberty to apply.

[Note—Subsequently an application for a review of this judgment was refused.—Ed.]

33 B. 401 (=11 Bom. L. R. 406=2 I. C. 431).

[401] APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BHAURAO alias RAMCHANDRA JIWAJI PITRE (*Original Plaintiff*),  
Appellant, v. RADHABAI kom LAXUMAN JIWAJI PITRE AND OTHERS  
(*Original Defendants*), Respondents.\*  
[9th March, 1909.]

*Arbitration—Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.*

When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.

An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests.

*Muhammad Newas Khan v. Alam Khan* (3), and *Laldas v. Bai Lala* (4), followed.

[Ref. 35 B. 153.]

APPEAL from the decision of V. V. Phadke, First Class Subordinate Judge at Belgaum.

\* First appeal No. 51 of 1908.

(1) (1879) 4 App. Cas. 256.

(2) (1884) 13 Q. B. D. 131 at p. 137.

(3) (1891) 18 Cal. 414.

(4) (1908) 11 Bom. L. R. 20.



Laxman and Bhaurao (plaintiff) were two brothers who lived together. Disputes arose between them and they referred their disputes to arbitration. The arbitrators delivered the award which effected a partition between the two brothers.

Bhaurao next applied to the Court for a decree in the terms of the award. Laxmanrao opposed his application. But before it could be adjudicated upon by the Court, Laxmanrao died. Bhaurao then withdrew his application.

Bhaurao filed the present suit wherein he claimed possession of the whole property, alleging that no decree having been taken upon the award, the brothers were not divided in interest, and that the whole property survived to him.

[402] His claim was resisted by the widow of Laxmanrao.

The Subordinate Judge rejected the plaintiff's suit for reasons which he expressed as follows :—

" Whether an award can be said to effect separation as soon as it is passed is a question untouched by any decision, and so far as I am aware there is no Bombay ruling covering the point. In two cases the Madras High Court has decided (I. L. R. 19 Mad. 290 ; I. L. R. 20 Mad. 490) that an award is a final judgment, that partition is to be deemed as effected on the date of the award and that an award bars any fresh suit for partition. It appears that in the case in Vol. 19 all the parties had objected to the award and still the Court held that the parties must be held to be bound by it. The above authorities govern the present case and I have no hesitation in following them. The award being thus binding on the parties the plaintiff must bring a suit to enforce it. He cannot pretend to ignore it and claim the entire property in contravention of the terms of the award as if he has become the sole owner of the entire property by the death of his brother.

The plaintiff appealed to the High Court.

*M. B. Chaubal* and *S. S. Patkar*, for the appellant :—The cases of *Krishna Panda v. Balaram Panda* (1) and *Subbaraya Chetti v. Sadasiva Chetti* (2) cited by the lower Court do not apply to the present case because when the parties referred the matter to the arbitrators each maintained that he was the owner of the whole property—they did not concede that the property was joint. The question which the arbitrators had to decide was whether the property was the self-acquired property of any of the parties to the suit or was joint property and could not go further and decide that the property should be partitioned. The arbitrators had no jurisdiction to go beyond the reference and to bring about a disruption of the joint property without the consent of the parties. Secondly, the award was only an inchoate partition. When the application for filing the award was numbered as a suit, Laxman, the younger brother, thought he would survive the appellant and raised various objections to the award including the objection that the award was not a legal award. But Laxman died and the application was withdrawn by the appellant. Till the award was filed, there could not be said to be a final decree. It has been held that so long as a decree for [403] partition remains under appeal, it does not effect severance : *Sakharam Mahadev Dange v. Hari Krishna Dange* (3). We say that the award was at most an inchoate partition and did not effect severance : *Babaji Parshram v. Kashibai* (4).

*G. S. Rao*, for respondent :—The point as to want of jurisdiction in the arbitrators to effect partition as being beyond the reference was not raised in the Court below. On the second point award is equivalent to a judgment : *Laldas v. Bai Lala* (5).

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(1) (1896) 19 Mad. 290.

(2) (1897) 20 Mad. 490.

(3) (1881) 6 Bom. 113.

(4) (1879) 4 Bom. 157.

(5) (1908) 11 Bom. L. R. 20.



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CHANDAVARKAR, J.:—The first point raised on appeal is that the decision of the arbitrators with regard to the partition which they directed to be made by the award was *ultra vires*, because there was no submission upon that point to their judgment and that, therefore, the award so far as the direction as to partition was concerned was invalid and not binding upon the parties. It is no doubt open to the appellant to urge and show that the award is not binding upon him for want of jurisdiction in the arbitrators. But the question of jurisdiction turns in the case on a question of fact, *viz.*, did the submission or reference to arbitration include the question of partition or was it confined only to the dispute whether the property was joint or self-acquired? The former like the latter question depended upon evidence. But the pleadings in the Court below show that that question was not only not raised there but was virtually waived. On the basis that the award was valid what was urged in the Court below was that the award did not effect a partition by metes and bounds or create a severance of interests between the two brothers, and dissolve the co-parcenary between them, but that it merely resulted in an inchoate partition, which could not legally take effect until the award passed into a decree.

It was urged that the award, so long as it did not pass into a decree, could not effect severance of interests between the brothers. But that is not the law. *Muhammad Newaz Khan v. Alam Khan* (1) and *Laldas v. Bai Lala* (2) are authorities [404] for the proposition that an award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. And where it directs partition to be effected, it dissolves the joint family, and from the moment of its date severs their joint interests. On these grounds we confirm the decree with costs.

*Decree confirmed.*

33 B. 404=(11 Bom. L. R., 641=3 I. C. 745.)

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

ANANDI *alias* SHITABAI *kom* RAM PAI (Original Plaintiff),  
Appellant *v.* HARI SUBA PAI AND OTHERS (Original Defendants),  
Respondents.\*

[18th March, 1909.]

*Hindu law—Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.*

Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed, in preference to the adoptive father, to a son taken in adoption.

[Ref. 48 Cal. 944.]

SECOND appeal from the decision of C. C. Boyd, District Judge of Kanara, confirming the decree passed by K. R. Natu, Subordinate Judge at Kumta.

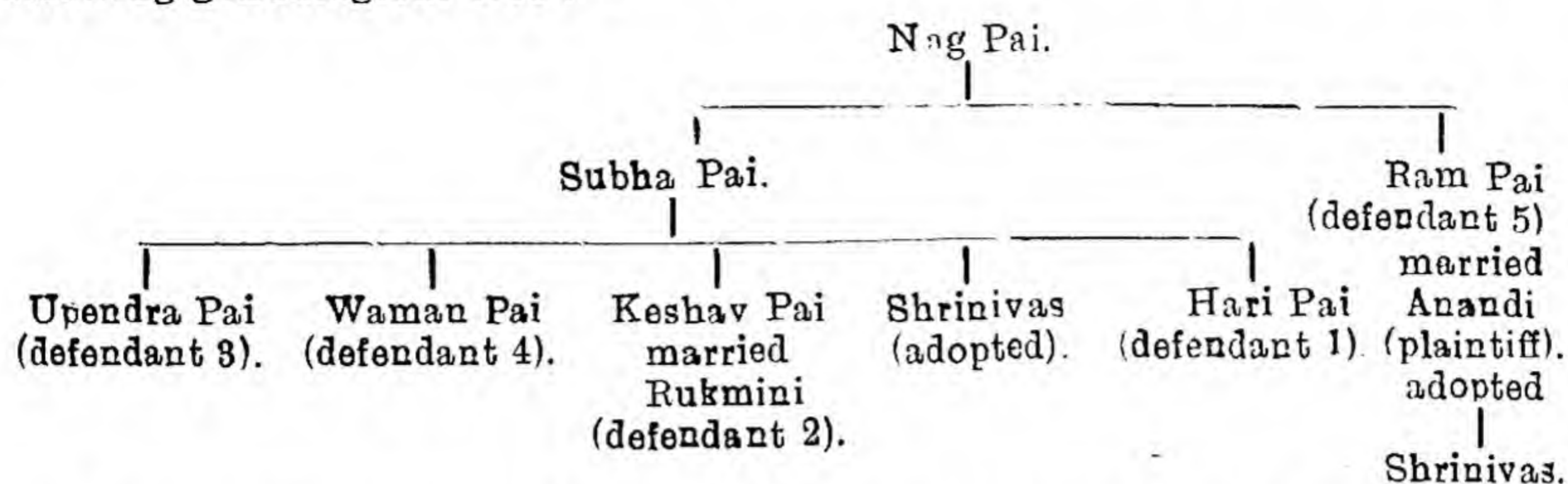
\* Second Appeal No. 800 of 1907.

(1) (1891) 18 Cal. 414.

(2) (1903) 11 Bom. L. R. 20.



The relationship between the parties to this suit appears from the following genealogical tree :—



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The parties shown in the above genealogical tree were living together as a joint family. A partition took place between [405] them on the 10th August 1888. At this partition Ram Pai (defendant 5) obtained one-half share and the five sons of Subha Pai obtained the other half.

Both Ram Pai and his wife Anandi adopted Subha Pai's son Shrinivas as their son. But subsequently to the adoption, a son, Parshottam, was born to them. They therefore allotted to Shrinivas one-fourth of the moiety of the estate which had on partition come to the hands of Ram Pai. Thus Shrinivas obtained 1/8th share of the entire estate.

Shrinivas died a bachelor on the 29th July 1892.

On the 25th July 1904, Anandi filed this suit to recover Shrinivas' 1/8th share in the family property.

The defendants (sons of Subha Pai) and Ram Pai resisted her claim.

The Subordinate Judge dismissed the suit on the ground that Anandi as the adoptive mother of Shrinivas was not entitled to succeed in preference to the adoptive father. His reasons were as follows :—

"Although under Mitakshara which prevails here a mother by birth would be a preferable heir to father by birth, still whether an adoptive mother would have a preference to an adoptive father has not, so far as I know, been yet decided by any of the High Courts. No such decision has been pointed out to me. The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators, a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share, in the composition of the sons, while the Mitakshara prefers her on the ground of greater propinquity (Mayne, section 521). Paragraph 167 of Mayne discusses the question of the preference amongst the several widows of deceased's adoptive father. But no authority is cited as to whether an adoptive mother would have a preference to an adoptive father. In the present case the adoption of Shrinivas was made by deceased, defendant 5. According to the Mitakshara, it has been decided in Bombay that a step-mother cannot be introduced as an heir under the word *mata* (mother) but that she is a more distant heir as the wife of *gotraja sapinda* and therefore herself a *gotraja sapinda* according to the doctrines of this Presidency (*vide* I. L. R. 19 Bom. 707). Just as therefore a step-mother cannot have a preference to a father by birth, so I think an adoptive mother cannot have a preference to an adoptive father."

[406] On appeal this decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant:—We submit that the adoptive mother is entitled to succeed to the estate of the son taken in adoption in preference to the adoptive father. She has the preferential right to succeed if the son is natural born. The grounds to her preference are (1) that *Mata* comes first in the compound *Matapitharau*; (2) that the mother is not necessarily common to all sons but the father is; and (3) that she is nearer by propinquity. On the texts, the adoptive mother is entitled to preference; and even according to decided cases an adopted son occupies the same



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position as a natural son except in a few instances which are defined both in the Dattaka Chandrika and Dattaka Mimansa. See *Kali Komul Mozoomdar v. Uma Shunkur Moitra* (1). An adopted son is heir to the *stridhan* of his adoptive mother: *Teencowree Chatterjee v. Dinonath Banerjee* (2). He has the rights of succession as a natural son: *Surjokant Nundi v. Mohesh Chunder Dutt* (3); *Sham Kuar v. Gaya Din* (4); Mayne's Hindu Law, page 214, section 164; page 217 sections 166, 167 (7th Edn.).

S. V. Palekar, for the respondent:—In the case of a natural son, the mother enjoys preference because she has conceived and nurtured him. This reason does not apply to an adopted son. It is competent to a bachelor to adopt: *Gopal Anant v. Narayan Ganesh* (5) and in that event the father would be the heir. Thus, the father has the preferential right: and he has been accorded it by other commentators.

CHANDAVARKAR, J.—The sole question argued in this second appeal is whether, under the Hindu Law, governed by the Mitakshara School, the adoptive father or the adoptive mother is the preferential heir to an adopted son. According to the Mitakshara, when a son dies, leaving his parents as his heirs, the mother succeeds to the son's estate before the father. Both the Courts below have, however, held in the present case that [407] the rule in question applies only to the estate of a natural-born but not to that of an adopted son dying.

The learned Subordinate Judge says:—

"The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share in the composition of the son, while the Mitakshara prefers her on the ground of propinquity."

Vijnaneshwara puts the preference of the mother to the father on two grounds, which, as West J. has rightly observed in his judgment in *Lallubhai v. Mankuvarbai* (6) are of an artificial character. They are (1) that the word *pitarau* (parents), which occurs in Yajnyavalkya's text specifying the heirs in the case of obstructed succession, is the abbreviation of two words forming a conjunctive compound, *matapitarau* (parents), in which the word *mata* (mother) comes before the word *pitru* (father); and (2) that the mother's propinquity is greater than the father's. (The Mitakshara, Section III, sections 2 and 3, Stokes's Hindu Law Books, pp. 441 and 442).

No doubt propinquity does enter into the reasoning of Vijnaneshwara but it does not on that account follow that he intended to deny the same propinquity to an adopted son which he allows to the natural-born son. The fallacy of the Subordinate Judge's reasoning lies in the fact that he gives the go-bye altogether to the legal fiction on which the whole doctrine of adoption in Hindu Law is founded. As observed in West and Buhler, "the effect of adoption is to sever the boy adopted entirely from his family of birth. His proper residence is with his adoptive parents. He exchanges 'the gotra' of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place." (West and Buhler's Digest of Hindu Law, 3rd Edition, pp. 934 and 935). The [408] fiction has the effect of bringing

(1) (1883) T. R. 10, I. A. 198.

(2) (1885) 8 W. R. (Civ. Rul.) 49.

(3) (1882) 9 Cal. 70.

(4) (1876) 1 All. 255.

(5) (1888) 12 Bom. 329.

(6) (1876) 2 Bom. 368 at p. 439.



about the ties of blood-relationship between the boy and his adoptive parents. If that is so, the remark of the Mitakshara (Stokes's Hindu Law Books, pp. 442 and 443) that "the father is a common parent to other sons, but the mother is not so; and, since her propinquity is consequently greatest, it is fit, that she should take the estate in the first instance, conformably with the text, 'To the nearest Sapinda the inheritance next belongs'", must apply in virtue of the legal and Shastric fiction as much to an adopted as to a natural born son.

The text of Yajnyavalkya in which the heirs in the case of an obstructed succession are specified applies to succession to an adopted son as much as to succession to a natural-born son. Besides, Vijnaneshwara points out in another connection that there is a blood-tie between an adopted son and the family and collateral kinsmen of his adoptive father. Dealing with the twelve kinds of sons recognised by the old but now obsolete Hindu Law, he refers to a text of Manu, according to which the first six, among whom are the natural-born and the adopted son, are heirs and kinsmen, and the other six are not heirs but only kinsmen. Vijnaneshwara then explains the text as follows:—"That must be expounded as signifying, that the first six may take the heritage of their father's collateral kinsmen (Sapindas and Samanodakas) if there be no nearer heir; but not so the last six. However, consanguinity and the performance of the duty of offering libations of water and so forth, on account of relationship near and remote, belong to both alike." (The Mitakshara, Chapter I, Section XI, placitum 31, Stokes's Hindu Law Books, page 422.) This explanation he supports by another text of Manu relating to an adopted son: "A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate; but of him, who has given away his son, the obsequies fail." Stokes's Hindu Law Books. (Page 422, placitum 32). It is true that in these citations from the Mitakshara the reference is only to the father, not to the mother. But that does not mean that the mother is excluded. Vijnaneshwara is one of those who held strongly to the principle of the Shastras that the [409] husband and wife form one body. He refers to the principle and its limitations in the Chapter on debts (1). In the Chapter of Penance he says that the husband and wife form one body by reason of their joint rights in matters of religious merit (2), secular affairs, and pleasures.

As West, J., points out in *Lallubhai Bapubhai v. Mankuvarbai* (3) Vijnaneshwara "really accepted the proposition 'that of him whose wife subsists one-half the body survives' as a basis for actual practice."

The learned District Judge, accepting the view of the Subordinate Judge, has refused to follow what he calls "the letter of the law" of the Mitakshara on the ground that "the fiction of the physical reality of an adoption is not always maintained." But the cases in which it is not maintained are specified and not left to conjecture or inference. Those again, are cases which form exceptions to the general rule which is the result of the legal fiction. And it is a rule of construction (Mimansa) according to Hindu Law, that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to unduly encroach upon the general rule. See this rule of construction explained in *Gangu v. Chandrabhagabai* (4). The legal fiction, on which

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(1) The Mitakshara: Moghe's 3rd Edition, pages 142 and 143.

(2) The Mitakshara: Moghe's 3rd Edition, page 373, of the Mitakshara.

(3) (1876) 2 Bom. 388 at p. 440.

(4) (1907) 32 Bom. 275 at p. 283; 10 Bom. L. R. 149.



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the theory of adoption is founded, invests an adopted son with the *status* of a natural-born son, except in cases excluded from the operation of the fiction either expressly or by necessary and clear implication. The District Judge further observes:—"The mother appears to be preferred on account of the merit which she possesses in reference to her son, from having conceived and nurtured him in her womb. Clearly this ground is absent in the case of an adoptive mother." This last sentence begs the whole question. The ground is absent only if we drop the whole theory of adoption, based on a legal fiction according to Hindu Law. The same remark applies to the reasoning that [410] because the adoption was made by the adoptive father and the adoptive mother had nothing to do with it, therefore, the adoption was for the benefit of the former only and the latter was "no more than the wife of the man who made the adoption." It is now more or less an exploded theory that a Hindu who has no son born to him adopts merely for his spiritual benefit and that secular objects either do not enter into the act or that they enter incidentally. Whatever the spiritual theory which originally gave rise to adoption in Hindu society, its motives and effects are at least as secular as they are spiritual; and an adoption is made as much, if not more, for the purpose of having an heir and continuing the family as for spiritual ends. These latter can, according to the Hindu Shastras, be attained by other means than those of adoption (1). But there is no secular way of continuing a family except by adoption where there is no son born. Assuming that a Hindu adopts a son for his spiritual benefit, what warrant is there in either Hindu Law or Shastras for the inference that the spiritual benefit secured to the Hindu by his act of adoption does not ensure for the benefit of his wife also. As we have pointed out above, for religious purposes and merit, the wife is identified completely with the husband and they form "one body." And this is in accordance with the Dattaka Mimamsa:—In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband." (Dattaka Mimamsa, Section I, Section 22: Stokes's Hindu Law Books, page 536). Accordingly, a Full Bench of the Allahabad High Court has held in *Sham Kaur v. Gaya Din* (2) that under the Dattaka Mimamsa and the Mitakshara, an adopted son succeeds to property to which his adoptive mother succeeded as heiress to her father.

[411] For these reasons the decree appealed from must be reversed and the point on which the District Court has decided the appeal being substantially of a preliminary character, the case must be remanded to that Court for disposal according to law. Costs of this second appeal must be paid by the respondents. Other costs to abide the result.

*Decree reversed,*

(1) 1. As Manu says, "many thousands of Brahmins having avoided sensuality from their early youth, and having left no issue in their families, have ascended nevertheless to heaven" [Manu V, 159—161, Bhattacharya's Hindu Law, 2nd Edn., page 15. See also West and Buhler's Hindu Law, 3rd Edn., page 905, Note (a). Manu's text is cited with approval by Vijnaneshwara in the Mitakshara; Moghe's 3rd Edn., page 194].

(2) (1876), 1 All. 255.



38 B. 411 (=11 Bom. L. R. 649=3 I. C. 748.)

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

GULABCHAND PARAMCHAND (*Original Defendant 1*), Appellant  
*v.* FULBAI KOM HARICHAND RAMCHAND AND ANOTHER (*Original, Plaintiff and Defendant 5*), Respondents.\*

[23rd March, 1909.]

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*Indian Contract Act (IX of 1872), sections 2 (g) (h), 20—35, 65—Indian Trusts Act (II of 1882), section 84—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.*

By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered.

*Held*, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section.

[Fol : 1915 M. W. N. 150=28 I. C. 57; Ref : 64 I. C. 18; 74 I. C. 107.]

[412] SECOND APPEAL from the decision of R. D. Nagarkar, First Class Subordinate Judge of Poona, with Appellate Powers, confirming the decree of Dahyabhai R. Dalal, acting Subordinate Judge of Baramati.

The plaintiff sued to recover from the defendants Rs. 965-13-0 under the following circumstances :—The plaintiff had a son named Ramchand and defendant 1 had a niece named Mainabai, who was the daughter of defendant 1's brother Motichand, deceased, and his widow Gangabai, defendant 5, and sister of Devchand, defendant 4. Defendants 2 and 3 were the brothers of defendant 1. Defendant 1 being the manager of the joint family of which all the defendants were members agreed to give his niece the said Mainabai, a minor, in marriage to plaintiff's son Ramchand and the plaintiff consented to give to defendant 1 Rs. 1,800 as *Daffa* (1) money. Out of the said sum the plaintiff paid to defendant 1 Rs. 500 and Rs. 250 on the 6th and 12th October 1902, who passed to the plaintiff receipts for the same. On the 20th October 1902, the plaintiff paid Rs. 150 to one Fulchand Tarachand on behalf of defendant 1. Thus the plaintiff paid to defendant 1 Rs. 900 in all and the balance of Rs. 900 was to be paid at the time of the marriage. But the marriage did not take place as the plaintiff's son Ramchand died of plague on or about the 25th October 1904. Thus the performance of the marriage having become

\* Second Appeal No. 258 of 1908.

(1) *Daffa* money means a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage.



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impossible the plaintiff asked defendant 1 for the return of Rs. 900 and as he refused to do so, the plaintiff brought the present suit for the recovery of the amount with interest thereon, namely, Rs. 65-13-0.

Defendants contended *inter alia* that defendant 1 was not the manager of the family but as he was the eldest member he was merely called at the negotiations of the betrothal according to the custom of their caste; that only Rs. 750 were paid to defendant 1 who gave the said amount to Mainabai's brother and mother and passed receipts to the plaintiff in his name, because he was the eldest member but he had not derived any benefit [413] from the amount and was not liable for it; that the payment of the *Daffa* money being against public policy the plaintiff could not recover it; that there was no agreement to return the amount and the suit was not maintainable as the plaintiff did not celebrate the marriage during Ramchand's life-time; and that the marriage could not be solemnized because Ramchand had said he would not do it and so the defendants were not liable for the return of the amount.

The Subordinate Judge found that defendant 1 was liable for plaintiff's claim; that the plaintiff paid Rs. 750 to defendant 1 for himself and for the joint benefit of all the defendants; that the plaintiff had a right to claim back the amount from the defendants, and that the claim was opposed to public policy. He, therefore, passed a decree for the plaintiff for Rs. 750. His reasons were as follows:—

Defendant No. 1 agreed to give his niece in marriage to plaintiff's son in consideration of her giving Rs. 1,800 to him as *Daffa*. That this sum was to be paid to the bride's guardian in consideration of his giving his ward in marriage is quite clear. *Daffa* means the money taken by persons in *loci parentis* to the girl for giving her away in marriage. The plaintiffs as well as the defendants' witnesses all agree in saying so. That this money was to be paid to the person entitled to give away the girl in marriage and not to the bride or to the couple is evident from the document of betrothal (Exhibit 41) not mentioning the stipulation about the sum of Rs. 1,800. In the document of betrothal no reference is made to this sum because it goes to the person who, if not satisfied, would break off the match, and who would not like that such a monetary payment to him should appear in this document which will be read by many members of his caste. The reason is that acceptance of such a reward is looked down upon with contempt by the community. It is forbidden by Hindu Law and it is nothing but the selling price of the girl. The view that this was given by way of reward to obtain the guardian's assent to the marriage and not by way of provision for or gift to the bride receives support from the plaintiff's statement in her deposition (Exhibit 42) that "defendant No. 1 said that he was the person entitled to give away the girl in marriage and therefore the money was given to him. I do not know who was to get the money, but I gave it to Gulabchand (defendant No. 1)." If the money was to go to the bride the plaintiff would have stated that the bride was to get the money instead of saying, that she did not know who (i. e., which of the defendants) was to get the money. No attempt or suggestion has been made by the plaintiff to show that this was a gift intended for the bride. Though men know that it is disgraceful to accept money for giving away their girls in [414] marriage they do not know that such acceptance is regarded by law as unlawful and it is on this account, that witnesses or parties interested in concealing the true nature of this monetary payment have not made any attempt to do it. Now turning to the question whether such an agreement which entitles a guardian to be paid money in consideration of his giving his girl in marriage is legal or unlawful as being against public policy, it is obvious that such an agreement is derogatory to the happiness and welfare of the child as it acts as an incentive to the guardian to have regard to considerations other than the child's happiness in marrying her into another's family. The child is given away to the highest bidder without having the least regard for her welfare. She is actually sold to the highest bidder without caring to know whether the child's life is likely to be miserable or not. Hindu law forbids and treats with contempt such contracts. The law is quite settled on this point, it regards such agreements as against public policy, *vide* I. L. R. 22 Bom. 658.



Now I turn to the important issue whether plaintiff has a right to claim back the amount. The defendants attempt to take advantage of the unlawfulness of the agreement by way of a defence to the plaintiff's claim. It is to be observed that in the present case the marriage being not solemnized the illegal purpose has not been carried out. Not only that, but the defendants assert that the boy Ramchand refused to carry it out and they have tried to substantiate their statement by proving a letter written by the boy to the defendant No. 1 (Exhibit 66). Had the illegal purpose been carried out, the money paid could not have been recovered back; nor could an action by the defendants have lain to recover the amount promised to them in consideration of their giving their girl in marriage. Thus the present case is quite distinguishable from cases where the illegal purpose has been carried out. It may also be observed that the plaintiff would not have been willing to make such a payment if the defendants had offered to give their ward in marriage to her son without demanding such money. But the greedy guardians who want to make the marriage of their ward a source of gain to themselves would not give her to the plaintiff's son unless she promises to pay.

The payment takes place under circumstances practically amounting to coercion and the plaintiff has no alternative but to submit to the terms dictated by them. The Calcutta High Court has in *Ram Chand Sen v. Audaito Sen*, (I L. R. 10 Cal. 1054) allowed such a claim, and Tyabji, J., has while referring to the Calcutta case at page 665 of I. L. R. 22 Bom. expressed his opinion that payment of money made to a father can be recovered if already paid when the marriage is not performed. In this case also it is manifest justice that defendants should not be allowed to retain the money, the justice of the claim being entirely with the plaintiff.

On appeal by defendant 1 and cross-appeal by the plaintiff the decree was confirmed. The following is an extract from the appellate Court's judgment:—

[415] On 5th October 1902 (Exhibit 41), there was executed by the defendant No. 1 a document of betrothal, under which it was agreed that the niece of defendant No. 1, who is also the daughter of the defendant No. 5, should be given in marriage to the plaintiff's son, since deceased. The plaintiff agreed to pay the defendant No. 1 Rs. 1,800 besides as *Daffa*. This is practically a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage. The *Daffa* amount is not mentioned in the document of betrothal. The lower Court came to the conclusion that the agreement to pay *Daffa* was opposed to public policy. This finding was not challenged by the appellant's pleader in either appeal; but the case was argued on other points without disputing this finding. I agree with the lower Court on the evidence that the agreement in the present case is opposed to public policy.

The next question is whether the plaintiff is entitled to recover such *Daffa* money as she might be proved to have paid to the defendant No. 1 on the ground that the illegal purpose of the agreement was not carried out owing to the death of the boy the bridegroom elect, before the celebration of the marriage. I think the lower Court correctly decided the point in the affirmative following the Calcutta ruling in *Ram Chand Sen v. Audaito Sen* (1) of which Tyabji, J., has expressed his approval at p. 665 *et sequens* in I. L. R. 22 Bombay. In the Calcutta case the guardian of the girl had married her to another boy in breach of the agreement with the plaintiff thereby committing a sort of fraud on the plaintiff. This feature is absent in the present case; but still the principle of the ruling applies and the equity is in the plaintiff's favour as remarked by the lower Court.

Defendant 1 preferred a second appeal and the plaintiff presented cross-objections.

*D. A. Khare* for the appellant (defendant 1):—We contend that the agreement between the parties was in the nature of a marriage brokerage and was therefore void as opposed to public policy. The plaintiff, therefore, cannot recover the sum paid under such an agreement: see section 65 of the Indian Contract Act. That section provides for the restitution of any advantage received under a contract or agreement in two cases only. The first case is where "an agreement is discovered to be void," and the other "where a contract becomes void." In the present case the contract

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(1) (1884) 10 Cal. 1054.



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was void from the beginning. Therefore, the case does not fall under the section which applies to agreements [416] which are not void at the outset on account of some illegality known to the parties. We rely on *Dayabhai v. Lakhmichand* (1).

*M. V. Bhat* for the respondent (plaintiff) was not called upon.

BATCHELOR, J.:—By an agreement made between the parties to this suit the plaintiff promised to pay the sum of Rs. 1,800 to the first defendant as consideration for the first defendant's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had, before her son's death, paid to the first defendant a sum which the lower Courts have ascertained to be Rs. 750. The question is whether having regard to the character of the agreement between the parties, the plaintiff is entitled to recover this sum from the first defendant. Both the Courts below have decreed the claim, and the first defendant now appeals from that decree.

The only ground upon which the decree is attacked has reference to the character of the agreement between the parties. It is contended that that agreement, being an agreement by way of marriage-brokerage, is void as opposed to public policy, and therefore, under section 65 of the Contract Act, no sum paid under it can be recovered.

In *Dholidas v. Fulchand* (2) it was held by a Division Bench of this Court that such an agreement as that now in question is void as opposed to public policy under section 23 of the Contract Act, and this decision is binding upon us. That being so, it is urged by the Honourable Mr. Khare that the only principle of law on which in India money paid under a void agreement can be recovered is contained in section 65 of the Contract Act, and that the language of this section shuts out such a claim as this.

The section provides for the restitution of any advantage received under a contract or agreement in two cases, of which the first is the case where "an agreement is discovered to be void." It urged that the agreement before us was never discovered to be void, but was void *ab initio*. That, however, [417] is we think, precisely the case contemplated by the section, where the word "agreement," used in sharp antithesis to the word "contract" in the second branch of the sentence, clearly denotes an agreement which, being void *ab initio*, never reached the stage of contract. In this respect section 65 merely preserves the distinction between agreement and contract which is maintained throughout the Act—e.g., sections 10, and 20 to 30—in compliance with the interpretation of clauses (g) and (h) of section 2. It will be observed, moreover, that the section speaks generally of an agreement discovered to be void without express reference to the cause or origin of the void character, so that such an agreement as this, void by reason of a principle of law, would not on that account fall outside the scope of the section. It is true also that there seems the less justification for any attempt to circumscribe the wide language of the Act seeing that the section purports on its face to substitute one broad, general principle for the numerous and somewhat technical rules, with their qualifications, which obtain in English Law on the subject. So far, then, the matter seems to be free from complexity.

But apart from the observations in *Dayabhai v. Lakhmichand* (1) which scarcely seem to have been necessary to the decision arrived at, the

(1) (1885) 9 Bom. 358.

(2) (1897) 22 Bom. 658.



use of the word "discovered" introduces certain difficulties in the application of the section to an agreement which is void under section 23 by reason of an unlawful consideration or object; and we are therefore of opinion that this appeal should be decided on a somewhat different ground.

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It will be observed that what section 65 provides for is a suit to recover any advantage received by the defendant under the agreement or to obtain compensation therefor. But what the plaintiff in this suit seeks is the recovery of a definite sum of money paid to the defendant. In the recent case of *P. R. and Co. v. Bhagvandas* (1) we have held that a suit for a debt or liquidated money demand can still be maintained, as it could formerly have been maintained under the *indebitatus* counts, and we think that the present suit should be regarded as a suit for money had and received. Such suits were held to lie wherever the defendant was "obliged by the ties of natural justice and equity to refund the money": per Lord Mansfield in *Moses v. Macferlan* (2). The rule was, no doubt, subsequently restricted in its operation, but in such a case as this, where no material part of the illegal purpose has been carried into effect, the payment has always been held to be recoverable; See *Kearley v. Thomson* (3), *Herman v. Jeuchner* (4), *Wilson v. Strugnell* (5) and *Taylor v. Bowers* (6).

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The principle of law applied in this view of the case is recognised and illustrated in section 84 of the Trusts Act, and has been adopted by the Courts in India in numerous cases. Reference may, for instance, be made to *Mulji Thakersey v. Gomti* (7), where not only the ornaments and clothes, but also the Rs. 700 *upariyaman* paid to the father of the intended bride were held to be recoverable; and to *Dholidas'* case (8), where Tyabji, J., expressed the opinion that payments under such an agreement as this may be recovered if the marriage has not taken place. This was also the view followed by a Division Bench in Calcutta in *Jogeswar Chakrabatti v. Panch Kauri Chakrabatti* (9), which was approved in *Ram Chand Sen v. Audaito Sen* (10), where Garth, C. J., says that in such a case "it is manifest justice that the defendants should not be allowed to retain the money." We concur in this opinion and on the above grounds we affirm the decree of the lower appellate Court and dismiss this appeal with costs. The cross-objections are also dismissed with costs.

*Decree affirmed.*

ارد فریق (محکم دلائل) فی فیصلہ فی حق  
میرٹریٹ لایٹ ہیکس لیمٹڈ لاہور

(1) (1909) 11 Bom. L. R. 335.

(2) (1760) 2 Burr. 1005 at p. 1012.

(3) (1890) 24 Q. B. D. 742.

(4) (1885) 15 Q. B. D. 561.

(5) (1881) 7 Q. B. D. 548.

(6) (1876) 1 Q. B. D. 291.

(7) (1887) 11 Bom. 412.

(8) (1897) 22 Bom. 658.

(9) (1870) 5 Ben L. R. 895.

(10) (1884) 10 Cal. 1054.



33 B. 419 (=11 Bom. L. R. 512=3 I. C. 172).

## [419] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

MURLIDHAR NATHU GUJRATHI (*Original Plaintiff*), Appellant, v.  
VALLABHDAS MURLIDHAR AND OTHERS (*Original Defendants*),  
*Respondents.\**

[5th April, 1909.]

*Guardians and Wards Act (VIII of 1890), section 41—Guardian—Order of discharge by the Court—Liability of the guardian to suit.*

When a declaration is once made by the Court, under section 41 of the Guardians and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration.

[Ref. 1918 M. W. N. 440=51 I. C. 529.]

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree passed by R. B. Khamgaonkar, Subordinate Judge at Yeola.

One Khemchand (father of defendants 2 and 3) was appointed by the Court a guardian of the property of a minor named Bhagirathi (wife of plaintiff). Bhagirathi died a minor leaving her surviving an infant daughter and her husband (plaintiff). The daughter died in 1903, whereupon the plaintiff became entitled to the property as her heir.

Among the properties which came under Khemchand's administration as guardian was a sum of money deposited with the firm of Gangaram Chhabildas (managed by Vallabhdas Murlidhar, defendant 1). The firm continued crediting interest over the amount at  $4\frac{1}{2}$  per cent. upto 1893-94, after which no interest was credited. Khemchand allowed the matter to rest as it was.

In 1904, Khemchand applied to the Court for a discharge from the guardianship: it was granted in spite of the plaintiff's objection.

In 1906, the plaintiff sued the manager of the firm Gangaram Chhabildas (defendant 1) and the sons of Khemchand (who [420] died in the meanwhile) (defendants 2 and 3). The prayers were: first, to recover the balance of amount due at compound interest from the date of last crediting of interest less the amount already paid: and, secondly, to recover damages from defendants 2 and 3, as representing Khemchand, for fraud and negligence in not properly dealing with the sum.

The Court of first instance held that the first defendant did not owe anything to the estate: that Khemchand had not acted fraudulently or negligently in not recovering the debt sooner: and that his estate was therefore not liable.

On appeal this decree was confirmed by the lower appellate Court. The District Judge remarked:—

"I cannot say that Khemchand did his duty as a guardian should. Having ascertained that this money was lying at call without interest, being a very much larger sum than was needed for current expenses, he ought to have withdrawn it and deposited it with some bank, or in some good securities which would have brought in income to the estate, instead of allowing it to lie without profit for so many years. That is what a prudent man would do with his own funds, and, accordingly, that is what a guardian ought to do with his ward's money. It is not enough to say that Gangaram Chhabildas was a perfectly safe firm and the money could be nowhere so safe as lying at call there. There are other equally safe investments which would have brought in a

\* Second Appeal No. 402 of 1908.



reasonable amount of interest. The action of Khemchand was therefore negligent, but this does not give the plaintiff any right of suit against Khemchand, because Khemchand was discharged by the District Court and that is a protection to him against all suits, except on the ground of subsequently discovered fraud. Now, there is no fraud at all here; he did not allow this money to lie in the hands of Gangaram for any corrupt or fraudulent reason; he made no profit out of it to the prejudice of his ward. His act is not even *crassa negligentia*, whereby positive loss, easy to be foreseen, has occurred; he has merely incurred a negative loss. I am of opinion then that the suit must fail against Khemchand also."

The plaintiff appealed to the High Court.

S. S. Patkar for the appellant.—It is found as a fact that the action of the guardian was negligent; but the lower Court has held that the order of discharge by the District Court was a protection to him against all suits except on the ground of fraud subsequently discovered. We submit the discharge is [421] operative only so far as regards any action that may be taken under the Guardians and Wards Act, 1890, against the guardian. But it does not take away the right of the minor or his heir to proceed against the guardian by a regular suit to enforce his liability under the common law.

D. A. Khare for defendant No. 1.

G. S. Rao for defendants Nos. 2 and 3.—The discharge of the guardian protects him and a subsequent suit does not lie. Under cl. (4) of s. 41 of the Guardians and Wards Act, 1890, when the guardian has delivered property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered. There is no allegation of fraud.

Even as regards negligence the lower Court says that the guardian's act is not even *crassa negligentia*. The maxim *actio personalis moritur cum persona* applies and therefore the heirs of the guardian are not liable.

S. S. Patkar in reply.

CHANDAVARKAR, J.:—The lower Courts have rightly, in our opinion, held that the first respondent is not answerable to the claim of the appellant.

The question is as to the liability of the second and the third respondent. Their father had been a guardian appointed by the Court and, when the minor died, the Court made a declaration discharging him so far as his liabilities under the Guardians and Wards Act were concerned. Under s. 41, cl. (4), of the Guardians and Wards Act, when a guardian has delivered any property in his possession or control belonging to the ward or accounts as required by the Court, "the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered." Such a declaration has the effect of protecting the guardian from all suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration. No such fraud is found proved in the present case; but it is contended for the appellant that the declaration actually made by the [422] Court saves the guardian only from suits concerning liabilities arising under the Guardians and Wards Act, not from those arising under the common law. Assuming such a distinction to exist between the liabilities under the Act and those under the ordinary law, here the complaint is that the second respondent invested his ward's money in an imprudent manner by letting it lie as a deposit without interest with the

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38 B. 419=11  
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512=3 I. C.  
172.



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33 B. 419=11  
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first respondent. That means that the second respondent did not deal with his ward's property in the manner he was bound to deal with it by the provisions of section 27 of the Act. That section says that "a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own." A man of ordinary prudence invests his money for interest; and this is what the father of the second and third respondents failed to do in respect of his ward's money. There can be no question in this of any liability outside the Act. It arises under the Act itself. The order of the Court discharging the second respondent is therefore a complete protection to him, so far as the present claim goes.

The decree of the Court below must, therefore, be confirmed with costs, separate sets being allowed in the case of the first respondent and the second and third respondents.

*Decree confirmed.*

33 B. 423 (=11 Bom. L. R. 350=2 I. C. 480=10 Cr. L. J. 30).

[423] CRIMINAL APPELLATE.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. MAVSING BECHAR.\*

[25th February, 1909.]

*Criminal Procedure Code (Act V of 1898), section 269—Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure.*

The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors on the second charge and to write a judgment.

*Held*, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain.

[Ref. 86 I. C. 847=1917 M. W. N. 1=18 Cr. L. J. 15.]

APPEAL from convictions and sentences recorded by Dayaram Gidumal, Sessions Judge of Ahmedabad.

The facts of the case were as follows :—

The accused were tried by the Sessions Judge of Ahmedabad with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The jury returned a verdict of not guilty as regards some of the accused: the Sessions Judge accepted the verdict and acquitted them; as regards the remaining accused, the jury returned a verdict of not guilty on the charge of murder but found them [424] guilty of rioting and causing griev-

\*Criminal Appeal No. 442 of 1908.



ous hurt. The Judge accepted the verdict and sentenced the accused to various terms of imprisonment.

The accused appealed to the High Court, contending, *inter alia*, that the Sessions Judge was in error in treating the trial as though it was a trial by jury on all counts and in treating their verdict on all the counts as the verdict of a jury contrary to the provisions of section 269 of the Criminal Procedure Code, and that the irregularity involved in accepting the verdict at the last moment as a verdict of the jury and not as the opinion of assessors seriously prejudiced the accused.

*L. A. Shah*, for the accused.

*M. B. Chaubal*, Government Pleader, for the Crown.

CHANDAVARKAR, J.—The preliminary point urged in this appeal is that the trial having been as a matter of fact conducted by the Sessions Court as one with the aid of assessors, as far as the charges for the offences of which the appellants have been convicted are concerned, the learned Sessions Judge has erred in law in that he omitted to take the opinions of the jurors as assessors in the manner required by the Criminal Procedure Code and to write a judgment. It may be that, as Mr. Shah for the appellants states, throughout the trial both the Judge and the pleaders understood the trial to be one with the aid of assessors, for the purposes of the charges abovementioned. But, however that be, as a matter of fact, after the learned Judge had charged the jury he asked for their verdict on all the charges in the manner required by the provisions of the Code of Criminal Procedure relating to jury trials. At that moment the appellants' pleader might have intervened and asked the Judge to deal with the trial as to the specific charges with which we are concerned in this appeal as one by the Court with the aid of assessors and to take the opinions of the jurors as assessors in the manner provided by the Code. The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are [426] respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain. But that was not done and the Judge was allowed to deal with the whole case as one tried by a jury. Under these circumstances it is too late now for the appellants to urge successfully that the Judge's action should be corrected. We must deal with the appeal as one from the verdict of a jury, to which the Full Bench decision in *King-Emperor v. Parbhushankar*(1) applies.

HEATON, J.—I have a few words to add as to the facts of this case. The question we have to determine is a question of fact: whether the trial was by a jury or with the aid of assessors. We find that the Judge charged the jury on the case as a whole and directed them to give a verdict on each of the charges. He did not direct them to give a verdict on the charge of murder only and to give their opinions as assessors on the minor charges. This is the more apparent when we see, as the proceedings show, that the Judge had twice to question the jury in order that he might obtain from them a specific verdict on charges as to which otherwise they would not have given a verdict at all. The record also shows that the verdict of the jury was taken on each charge and that as

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33 B. 423=11  
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350=2 I. C.  
480=10 Cr.  
L. J. 30.

(1) (1901) 25 Bom. 680 ; 3 Bom. L. R. 278.



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FEB. 25.

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APPELLATE.

33 B. 423=11  
Bom. L. R.  
350=2 I. C.  
480=10 Cr.  
L. J. 80.

to no charge at all was their opinion taken as if they were assessors. Then the Judge accepted the verdict of the jury. He wrote no judgment but merely sentenced the accused (the appellants) for those offences of which the jury had found them guilty. That procedure seems to me to show conclusively that the trial was a trial by a jury.

33 B. 426 (=2 I. C. 432=11 Bom. L. R. 386).

[426] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor,  
and Mr. Justice Heaton.*

THE HITWARDHAK COTTON MILLS CO., LIMITED, APPLICANT,  
v. SORABJI DINSHAW KARAKA.\*

[26th March, 1909.]

*Indian Stamp Act (II of 1899), section 2 (5) (b).—Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.*

The transactions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill.

A question having arisen as to what was the proper stamp duty payable on the document,

*Held* that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs. 5-8-0 in all.

An agreement to lend money does not create an obligation to pay money within clause (5) (b) of section 2 of the Indian Stamp Act (II of 1899).

An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages.

REFERENCE by R. P. Barrow, Commissioner, Northern Division, under section 57 (a) of the Indian Stamp Act (II of 1899).

The terms of the reference were:—

An instrument, which the parties thereto meant to be a partition deed was drawn up on the 29th June 1907 between the Directors of the Ahmedabad Fine Spinning and Weaving Company, Limited, and the Firm of Sorabji Dinshaw Karaka and Company.

The Firm of Sorabji Dinshaw Karaka and Company entered into an agreement with the Hitwardhak Cotton Mills Company, Limited, on the 6th April 1904 by which the firm was appointed the Agents of the Company on certain conditions.

In pursuance of the said agreement the firm from time to time advanced money aggregating Rs. 4,03,035-4-2 to the Company, repayment of the sum [427] being made a first charge on the property of the Company. The instrument mentioned in the first para shows that the greater part of this money was borrowed from the Ahmedabad Fine Spinning and Weaving Company, Limited, by Mr. Sorabji Dinshaw Karaka who was also the Managing Agent thereof. By this instrument the firm transferred to the Ahmedabad Fine Spinning and Weaving Company, Limited, its interest in the first charge over the property of the Hitwardhak Cotton Mills Company, Limited, which had been acquired under the agreement of April 1904. The firm further bound itself to pay to the Ahmedabad Fine Spinning and Weaving Company, Limited, one-half of the commission from the Hitwardhak Cotton Mills Company, Limited, to which it was entitled under the aforesaid agreement. In consideration of this transfer of interest the Ahmedabad Fine Spinning and Weaving Com-

\* Civil Reference No. 6 of 1903.



pany undertook (1) to confirm the loan already advanced by the firm to that Company and (2) to advance a further loan up to Rs. 4,50,000 if required by Mr. Sorabji Dinshaw Karaka for additions to or improvements in the machinery or plant and building, &c., and (3) to advance such money as working capital as might be required by Mr. Sorabji in the working of the mill. The instrument embodying these conditions which purports to be a deed of partnership bears a stamp of Rs. 15. The Sub-Registrar of Ahmedabad before whom the document was produced for registration held that the transfer of interest secured by the firm by way of first charge over the Hitwardhak Mill and half commission came under Article 62 (c) 2 of the first Schedule of the Stamp Act of 1899 and required a stamp of Rs. 5. As regards the advance of up to Rs. 4,50,000 he considered that it fell under the definition of a bond and that the duty leviable was that chargeable on a bond under clause 15 of the Schedule. Being in some doubt however as to the correctness of his opinion he referred the question for decision to the Collector. The Collector then consulted the Government Pleader as to the amount of the duty leviable and the latter has advised that the document should be taken to be a transfer under Article 62 (c) 2 of the Schedule and an agreement as regards the three conditions—

- (1) Transfer of half commission,
- (2) Advance of Rs. 4,50,000,
- (3) Advance as working capital made.

According to his opinion the stamp duty leviable would be Rs. 6-8-0 in all.

The Collector then, holding that since the document embodies various conditions of transfer of interest secured by the firm and an undertaking on the part of Ahmedabad Fine Spinning and Weaving Company, Limited, to advance money, it should be taken as a transfer under Article 62 (c) 2 and a bond under Article 15, as regards the sum of Rs. 4,50,000, referred the question for decision to the Commissioner under section 56 of the Stamp Act.

The Inspector-General of Registration whose opinion has since been taken refers to the decision of the Full Bench of the Madras High Court in Indian Law Report 15 Madras, page 193, and agrees with the Collector except with [428] regard to that part of the instrument which contains an agreement to advance money for working capital. He considers that since the amount was not ascertainable when the deed was drawn up the duty should be 8 annas only under Article 5 (b), Schedule I, the total duty leviable being Rs. 5 + 2, 250 + annas 8, or Rs. 2,255-8-0.

The Commissioner's opinion was that the Inspector-General's view was apparently correct, but as the amount of duty involved was large and agreements of the nature referred to were not uncommon, the present reference was made under section 57 (a) of the Indian Stamp Act (II of 1899) for an authoritative decision.

M. B. Chaubal, Government Pleader, appeared for the Government.

There was no appearance for the parties.

SCOTT, C. J. :—The transactions comprised in the document which is the subject of this reference consist of a transfer of mortgage by S. D. Karaka to the Ahmedabad Fine Spinning and Weaving Company and an agreement *inter alia* that the company shall lend money at the request of S. D. Karaka for making improvements, additions and repairs to the building and machinery of the Hitawardhak Cotton Mills up to an unascertained though ascertainable amount and also such money as may be required for working the said mills.

It has been argued on behalf of the Revenue Authorities that the agreement to lend money for repairs and improvements is a bond within the meaning of the Indian Stamp Act, 1899, section 2 (5) (b).

By that clause it is provided that "bond" shall include any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another.

In our opinion an agreement to lend money does not create an obligation to pay money within the meaning of this clause. An agreement to lend money to a partnership is not capable of specific performance

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83 B. 426=2  
I. C. 432=11  
Bom. L. R.  
386.



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MAR. 26.  
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APPELLATE  
CIVIL.  
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33 B. 426=2  
I. C. 432=11  
Bom. L. R.  
386.

(see *Sichel v. Mosenthal* (1)); and it creates [429] no debt though the breach of it may give rise to a claim for damages: see *South African Territories v. Wallington* (2).

We hold that the document is only liable to duty as a transfer of mortgage and as an agreement, i.e., to Rs. 5-8-0 in all.

*Order accordingly.*

33 B. 429 (=3 I. C. 164=11 Bom. L. R. 495).

# APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

TRIMBAK MAHADEV TILAK (*original Opponent No. 3*), Applicant, v.  
NARAYAN HARI LELE AND ANOTHER (*original Petitioner and  
Opponent No. 1*), Opponents.\*

[2nd April, 1909.]

*Indian Trusts Act (II of 1882), section 34—Executor—Trustee—Advice of Court as to  
administration of property—Executor continuing as such—Administration suit.*

So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. A. Kincaid, District Judge of Poona.

The facts of the case were that on the 25th April 1900 one Vishnu Mahadev Tilak made a will appointing under it Narayan Hari Lele and Ganesh Narayan Khare executors and his brother Lakshman Mahadev Tilak *alias* Anna Tilak residuary legatee. In the will the property of the testator was valued at Rs. 7,100 and the directions as to its disposal were as follows:—

Rs. 2,000 for the marriage of the testator's daughter Varubai.

[480] Rs. 4,000 to be given to the testator's wife Yamunabai.

Rs. 2,000 ornaments.

Rs. 2,000 cash.

4,000

Rs. 500 to be given to Varubai—ornaments on her person.

Rs. 300 to be given to Sonubai.

Rs. 300 to be given to Lakshman Mahadev *alias* Anna Tilak.

7,100

The testator died on the 25th February 1903 and the said Narayan Hari Lele obtained probate of the will on the 29th July 1904. When the executor began to administer the estate, he found difficulty in giving effect to the instructions in the will. He therefore submitted the following points for advice and guidance by the District Judge:—

(1) The testator had insured his life for Rs. 3,500 and the life policy was assigned by him to his wife Yamunabai who, after her husband's

\* Application No. 72 of 1909 under Extraordinary Jurisdiction.  
(1) (1862) 30 Beav. 371. (2) [1898] A. C. 809.



death recovered the amount of the policy. This being so, whether Yamunabai should be paid Rs. 4,000 as directed in the will over and above the amount of the policy, or whether the difference in that amount and the amount of the policy, namely, Rs. 500 only.

(2) Rs. 800 only were spent on account of the marriage of Varubai, while the will directed that Rs. 2,000 should be spent for that purpose. Therefore, whether she should be paid Rs. 1,200 more.

(3) In the will the estate was valued at Rs. 7,100 while when the probate was taken the value of the property was found to be Rs. 5,104. Thus the estate being not sufficient to meet the legacies, whether the legatees should be given rateable distribution.

On the above points the Judge expressed his opinion as follows :—

(1) Yamunabai was entitled to receive Rs. 4,000 independently of the amount of the life policy which was not mentioned in the particulars of property given in the will.

[431] (2) Rs. 800 only being spent for Varubai's marriage she was not entitled to the balance of Rs. 1,200, because Rs. 2,000 were specifically granted for her marriage.

(3) If the estate had so shrunk that the legacies could not be paid, the legatees must be contented with rateable distribution.

Further the Judge opined that Trimbak Mahadeo Tilak, who claimed as the undivided heir and brother of the testator, had no *locus standi* as a residuary legatee. He was entitled only to a rateable distribution of the specific legacy of Rs. 300. All the legacies must be satisfied in full before he could claim as a residuary legatee.

Being dissatisfied with the above expression of opinion, Trimbak Mahadeo Tilak preferred an appeal and in the alternative an application for revision under the extraordinary jurisdiction, section 622 of the Civil Procedure Code, Act XIV of 1882.

K. H. Kelkar (with P. D. Bhide) appeared for the applicant Trimbak Mahadeo Tilak :—We submit that the Judge had no jurisdiction under section 34 of the Indian Trusts Act to move in the matter. This contention was raised in the lower Court. Section 34 of the Act applies to trustees and not to executors. An executor is not a trustee under the section and so he cannot ask for the opinion of the Court. The powers of an executor are given in section 90 of the Probate and Administration Act and there are similar provisions in section 269 of the Indian Succession Act. There is a distinction between the office of an executor and that of a trustee : see Snell's Equity, pp. 165 and 169 (12th Edn.). An executor can at the most be said to be a constructive trustee. But section 34 of the Indian Trusts Act does not apply to constructive trustees. The term trustee is defined in the Act. See also Walker on Executors, p. 308 (3rd Edn.), and Godefroi and Lewin on Trusts. These authorities bear out our contention that an executor is not a trustee. The ruling in *In the Goods of Nundo Lall Mullick* (1) lays down the distinction between an executor and a trustee. An executor has the widest powers of disposition and is not subject to the authority of the Court. He cannot ask the opinion of the Court on any point. The legatees can seek redress [432] by bringing a suit. In the present case the executor's opinion was in favour of the applicant. Moreover all the parties concerned were not before the Court. Therefore, the Judge had no jurisdiction to express his

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83 B. 429=3  
I. C. 164=11  
Bom. L. R.  
498.

(1) (1896) 23 Cal. 908.



1909  
APRIL 2.  
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APPELLATE  
CIVIL.

33 B. 429=3  
I. C. 164=11  
Bom. L. R.  
495.

opinion in the matter. The executor becomes a trustee after he has given full effect to the terms of the will. See *In re Mackay* (1).

There was no appearance for the opponents.

SCOTT, C. J. :—The executor of one Vishnupant Tilak applied to the District Court of Poona for its opinion under section 34 of the Indian Trusts Act with regard to the administration of the trust property of the testator.

Some of the parties interested as beneficiaries under the will were present at the time of the application, and those parties appear to have agreed that the Court should advise the executor under section 34 of the Trusts Act. An opinion was accordingly expressed by the District Judge upon the points preferred for the Court's opinion by the executor, but one at least of the beneficiaries was absent and not consenting.

One of the parties who had consented to this method of disposal of the question having found that the opinion of the Court was unfavourable to his interests preferred an appeal against that opinion, and, in the alternative, has asked this Court to entertain his objection as made under the revisional jurisdiction of the Court conferred upon it by section 622 of Civil Procedure Code, 1882.

We think that assuming that an opinion was expressed which fell within the powers of the Court under section 34, there is no appeal from such an opinion. We hold, however, that the case presented to the District Judge was not a case falling under section 34; for, the executor who asked for the opinion of the Court had not become a trustee with regard to any of the property in his hands on behalf of the legatees. His difficulty was to decide how much of the property in his hands he should allocate for the benefit of each of the persons named as legatees, and it is in consequence of his inability to decide that that he [483] came to the Court. It is no doubt true that an executor, when he has assented to a legacy and set aside funds to meet it, becomes a trustee, but, as observed by Mr. Justice Kekewich in *In re Mackay* (1), the exact moment of passage from the character of executor to that of trustee is difficult to define.

The Applicant in this case had not in our opinion become a trustee so as to incur all the liabilities of a trustee. He was still an executor and could as an executor have pleaded limitation against the claims of beneficiaries, and so long as he occupied that position he could not claim the advantages provided for trustees by section 34 of the Indian Trusts Act. His remedy, if he felt any doubt as to the manner in which he should administer the estate come to his hands, was to file an administration suit.

We hold that the opinion of the District Judge was given without jurisdiction, and we therefore direct that the proceedings be set aside.

*Proceedings set aside.*

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(1) [1906] 1 Ch. 25 at p. 31.



33 B. 433 (=11 Bom. L. R. 708=3 I. C. 765.)

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

CHUNILAL PRANSHANKAR (original Defendant No. 2), Appellant, v.  
SURAJRAM HARIBHAI AND OTHERS (original Plaintiffs and  
Defendant No. 1), Respondents.\*

BHOGILAL VALABHRAM (original Defendant No. 1), Appellant, v.  
SURAJRAM HARIBHAI AND ANOTHER (original Plaintiffs),  
Respondents.†

[5th April, 1909.]

*Hindu Law—Marriage—Asura form—Brahma form—Construction of texts.*

Under Hindu Law, where the paternal or maternal relation of a girl, who is given in marriage, receives money consideration for it, the substance of the [434] transaction makes it not a gift but a sale of the girl. The money received is what is called the "bride-price": that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her.

It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

[Ref. 53 I. C. 423=1920 M. W. N. 158.]

SECOND appeals from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the decree passed by Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The material facts are set out in the judgment.

*Gokuldas K. Parekh* for the defendants:—The finding of the lower Courts that the form of marriage in which Bai Mani was given away was *Asura* is erroneous. The form of a marriage under Hindu Law is determined by the preliminaries adopted in it. Where, therefore, the preliminaries adopted appertain in fact to the *Brahma* form of marriage, the marriage is to be taken as performed in the *Brahma* form, no matter whether the money was paid to the relations of the bride.

In verse 31, chapter 3 of the *Manava Dharma Shashtra*, where the essentials of the *Asura* form of marriage are defined, the word *ज्ञातिभ्यः* (*jnatibhyah*) means the paternal kindred. In verse 63 of the *Acharya Kanda* of *Yajnyavalkya* which enumerates the relatives who are competent to give away a girl in marriage, no mention is made of maternal relations.

In this case, the maternal uncle was appointed guardian of the person of the minor girl by the District Court and was authorised to give the girl in marriage. He was in the position of a stranger or neighbour. If he abused his powers and took money secretly for giving the girl in marriage, that would not affect the form of marriage.

*Lallubhai A. Shah* for the respondents:—According to *Yajnyavalkya* the test to determine whether a marriage was in the *Asura* form or not is the payment of money—आसुरो द्रविणा दानात् (*Asuro dravina danat*). In his *Sanskara Mayukha*, Nilkantha [435] describes the *Asura* form thus: धनेनोपतोष्यापेयच्छेत्—(*dhanenopatoshyopayachet*) i. e., where one marries after satisfying by means of (paying) money.

\* Second Appeal No. 252 of 1908.

† Second Appeal No. 892 of 1908.

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APRIL 5.APPELLATE  
CIVIL.33 B. 433=11  
Bom. L. R.  
708=3 I. C.  
765.



1909  
APRIL 5.  
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APPELLATE  
CIVIL.  
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33 B. 438=11  
Bom. L. R.  
708=3 I. C.  
765.

The word ज्ञातिभ्यः (*jnatibhyah*) in Manu's verse 31 means no doubt paternal relations. But it is illustrative and not exhaustive. Similarly the text of Yajnyavalkya which enumerates the relatives who are competent to give a girl away in marriage is not exhaustive. See also *Mulchand v. Bhudhia* (1).

As money was taken by the maternal uncle for giving the girl in marriage, the marriage assumed the Asura form. The ceremonies gone through may have been pertinent to the Brahma form: that did not change the character of marriage. The test is the payment of money. See *Vijiarangam v. Lakshman* (2); and *Venkatacharyulu v. Rangacharyulu* (3).

CHANDAVARKAR, J.—The facts, upon which the question of law in the two second appeals turn, are shortly these :—

The property in dispute originally belonged to one Dowlatrai Becharlal. He made a will on the 9th of October 1889, and died ten days later, leaving him surviving two daughters, Ladkore and Mani. Mani being a minor, the District Court of Ahmedabad appointed her maternal grandmother Raliata and her maternal uncle Chunilal guardians of her person, and the Nazir of the Court guardian of her property, under the Guardians and Wards Act. By the order of appointment the guardians of the person of the minor were enjoined not to give the girl in marriage without the Court's permission. Subsequently Chunilal applied to the Court for permission to betrothe the girl to one Harprasad. The permission was granted, but some disagreement having arisen between Chunilal and Harprasad's grandfather, the former applied to the Court for revocation of the order granting the permission. The Court declined to revoke the order; nevertheless Chunilal gave the girl in marriage to another boy. This was in violation of the Court's order. [436] Some time after that, Mani lost her husband, and she herself died childless on the 22nd of November 1905.

The respondents Nos. 1 and 2 in Second Appeal No. 252 brought the suit claiming in their plaint the property in dispute, which Mani had left at her death, as reversionary heirs of her father Dowlatrai. They alleged that under Dowlatrai's will the property had come to Mani but with only a life interest in it; and that on her death it descended to them as Dowlatrai's heirs.

At the trial of the suit the said respondents prayed for amendment of the plaint to the effect that Mani had taken an absolute estate in the property under her father's will and that on her death they were entitled to it as her heirs. The amendment was allowed and evidence led accordingly.

Both the Courts below have found upon the evidence that Chunilal gave the girl in marriage by receiving money consideration for the gift. Upon that fact they have held that the marriage was in the Asura form. The result of that finding being that on Mani's death her stridhan, in default of her issue, must go to her nearest relations on her father's, not her husband's side, the Courts have given the respondents a decree, holding that they are entitled to the property as Mani's heirs.

The first point of law urged in this Second Appeal (No. 252) from that decree is that the amendment of the plaint ought not to have been allowed, since it transformed the nature of the suit into one of a character inconsistent with that originally brought. At first the respondents claimed

(1) (1897) 22 Bom. 812.

(O. C. J.).

(2) (1871) 8 Bom. H. O.R. 244 at p. 256

(3) (1890) 14 Mad. 316 at p. 319.



the property as Dowlatrai's heirs; subsequently they abandoned that position and claimed as heirs to his daughter Mani. There is no inconsistency if we have regard to the substance of the claim. The respondents claimed the property on the strength of Dowlatrai's will. The Court was asked to construe it and to give the respondents a decree for the property. It was competent for them to abandon their first construction and substitute for it another as the basis of their title.

It is next contended that the finding of the Courts below that the marriage of Mani was in *Asura* form is erroneous in law, be-  
[437] cause there is no evidence that her maternal uncle, who gave her in marriage as her guardian, received money as consideration for it. The question is one of fact and its determination must depend on the evidence of surrounding circumstances and probabilities, if direct evidence of payment of money is not forthcoming.

Then it is urged that, assuming that money was received by Chunilal as consideration for the gift of the girl in marriage, that fact will not give the marriage an *Asura* form under the Hindu Law, if the marriage itself was solemnised according to the rites prescribed for the *Brahma* form; and that the Court must presume in the first instance in every case that the marriage was in the latter form.

The *prima facie* presumption no doubt is that every marriage under the Hindu Law is according to the *Brahma* form; but it can be rebutted by evidence. And here, according to the findings of the Courts below, it has been rebutted.

Where the person who gives a girl in marriage receives money consideration for it, the substance of the transaction makes it, according to Hindu Law, not a gift but a sale of the girl. The money received is what is called bride-price; and that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The Hindu law-givers one and all condemn such benefit and the *Shastras*, regarding it as an ineradicable sin, prescribe no penance for the sale of a bride (see the Agni Puran cited in Shudra Kamalakar, page 108).

Whenever, therefore, it is proved, the Courts must hold the marriage to have been in the *Asura* form, however much it might be disguised by the adoption of the rites of the *Brahma* form. That adoption cannot take away the taint of the lower form.

Under the Hindu law, certain forms are common to both the *Brahma* and the *Asura* form of marriage. Unless those forms are gone through, the relation of husband and wife is not [438] brought about in either case and there can be no marriage tie. Those forms consist in the invocation before the sacred fire and the seven steps (*Saptapadi*) taken before that fire by the bride-groom and the bride jointly. As said in the Madana Parijata (page 157, Bibliotheca Indica Series), "it should not be doubted whether the relation of husband and wife is produced in the *Asura* and other forms of marriage by reason of the absence of the *saptapadi* or seven steps ceremony therein. Even in those forms of marriage the observance of that ceremony is prescribed by way of command after acceptance." Those steps taken, the marriage tie becomes indissoluble. (The Hindu Law of Marriage and Stridhan by Sir Gooroodass Banerjee, 2nd Edition, page 89; Madhavacharya's Parashara Samhita, Bombay Oriental Series, Vol. 1, part II, pages 88 and 89).

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But what distinguishes the one form from the other is that, in a *Brahma* marriage it is a gift of the girl pure and simple; in the *Asura*, it is the sale of the bride for pecuniary consideration. If the sale exists, its effects cannot be undone by the form of a gift being gone through.

It is contended by Mr. Gokuldas for the appellant that the true test of the *Asura* form of marriage is the taking of the bride-price by none but the father of the girl, or, in default of him, by any of her paternal kindred giving her in marriage. In support of this argument the following Smriti of Manu (1) is relied upon:—

“When (the bridegroom) receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called the *Asura* rite.”

The original in this text for “kinsmen” is *jñati*, which, Mr. Gokuldas argues, means “paternal kindred.” That no doubt is the meaning, according to certain scholiasts (2). So also in his gloss on the third verse of Yajnyavalkya in the Chapter on “Impurity,” where the word *jñati* occurs, Vijñaneshwara in [439] the Mitakshara (3) explains the word as meaning *samana gotraja sapindas* and *samanodakas*.

But the question is whether this text of Manu uses the word *jñati* as exhaustive, confining the right to receive the bride-price to paternal relations in the absence of the father, or as illustrative, extending it to all who have the right to give the girl in marriage.

The answer to that question must depend upon whether the duty of giving a girl in marriage devolves in the first instance upon her father, and in default of him, on any of her paternal relations only, or extends to all relations, paternal or maternal.

A text of Yajnyavalkya (4) mentions the paternal relations as being charged with the duty. But Narada (5) and Vishnu (6) include the maternal relations also. The former specifically mentions the girl's maternal uncle. Nilakantha in his Sanskara Mayukha quotes as authorities both the text of Yajnyavalkya and of Narada. Madhavaacharya in his Commentary on Parashara Samhita quotes as authority the text of Narada.

No doubt Vijñaneshwara in the Mitakshara quotes only Yajnyavalkya's text and makes no reference either to Narada's or Vishnu's. But no importance attaches to that circumstance. The Mitakshara purports to be a commentary on Yajnyavalkya, and Vijñaneshwara (7) himself enunciates the principle that where all Smritis are of equal importance, and where there is conflict between two or more Smriti writers, we are free to choose any we like. Nilakantha in the Vyavahara Mayukha cites Yajnyavalkya's text that where there is a conflict between two or more Smritis that one should be accepted which is conformable to equity (8).

The rule of the Hindu Shastras that a girl must be given in marriage as far as possible and that she cannot give herself [440] unless there is no relation to give her is founded upon the theory that women have no independence. Her father, or, in his absence, any

(1) Sacred Books of the East, Vol. XXV, page 81, Section 81.

(2) See the St. Petersburg Sanskrit Dictionary under the word *Jñati*.

(3) Moghe's Third Edition, page 274.

(4) Mandlik's Hindu Law, page 169, Sections 63 and 64.

(5) Sacred Books of the East, Vol. XXXIII, part I, page 169.

(6) Sacred Books of the East, Vol. VII, page 109.

(7) विरोधे तु विकल्प : Moghe's Edition (3rd) of the Mitakshara, page 3.

(8) Mandlik's Hindu Law, page 5, lines 17 to 20.



relation who, as guardian standing in the father's place, has supported and protected her during her virginhood, is charged with the duty. This is pointed out in the Mitakshara (1), where it is said :—"The gift is enjoined only in the case of a virgin who has been protected by her father and others." The word "others" being construed *ejusdem generis* with the word "father"—a construction of which several illustrations are to be found in the writings of the Nibandhakaras or Commentators on Hindu Law—the passage means that, where there is no father, the duty of giving a girl in a marriage devolves on a relation of hers who stands in his place as her legal guardian and as such protected her.

If, then, the Smritis of Narada and of Vishnu are as authoritative as the Smriti of Yajnyavalkya, the maternal relations of a girl are among the kindred whose duty it is to give her in marriage. And the text of Manu, on which Mr. Gokuldas strongly relies, must be construed as being descriptive, not enumerative, according to the canon of interpretation in Hindu Law, known as *nyaya samyatwa* or *samana nyayatwa*, that a rule, which in terms applies to one individual, who is a member of a class composed of many persons, all possessing the same property or attribute, must be held to apply not only to that individual but also to all the other members of the same class in matters relating to that property, because all of them stand in respect of it on the same footing (2).

An instance of the application of this rule of interpretation is to be found in the portions of the Mitakshara and of the Vyavahara Mayukha which deal with partition. There Vijñaneshwara and Nilakantha respectively refer to a text of Manu, which says that if at a partition in a joint family, consisting of two or more brothers, the elder or eldest deceive the younger [441] brother or brothers by concealing any part of the joint wealth, he (the elder or eldest) shall be punished by the king and deprived of his share. Vijñaneshwara explains that though Manu mentions only the elder brother, the text applies to the younger equally, if the latter be guilty of similar fraud. Nilakantha too says the same.

If, then the maternal relations of a girl are like the paternal relations in the category of those charged with the duty of giving her in marriage, what Manu says in the text relied upon by Mr. Gokuldas about the paternal relations must apply to the maternal relations also on the rule of interpretation just mentioned. The receipt of bride-price is no doubt condemned by Manu as a sin : but he allows as lawful a marriage in which such receipt enters as consideration for the sale of the girl ; and it is difficult to understand why the marriage should be *Asura*, if the girl happens to be given by one of her paternal relations by receiving a gratuity, whereas it should not be that if the party giving her and receiving the gratuity happens to be one of her maternal relations.

In the present case Chunilal (defendant No. 2), who gave Mani in marriage, was her maternal uncle ; and a maternal uncle is mentioned among the guardians competent to give a girl in marriage. Besides, by reason of that relationship he was at the time of the marriage the legal guardian of her person duly appointed by a Court of Law. He supplied to her the place of her father. It is true that his power to give her in

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(1) Moghe's Third Edition, page 265. पित्रादिरक्षितायाः कन्याया एव दानापेदेशात्,

(2) बहुनापेकधर्माणामेकस्थपि यदुच्यते । सर्वेषामेव तत्कार्यमेकरूपाहि ते स्मृता :

The Mitakshara, Moghe's 3rd Edition, page 397. The rule is quoted there as Ushanas's. In the Vira Mitrodaya it is quoted as Baudhyayana's page 25 : Shastri Gholap C. Sarkar's Edition.



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marriage was subject to the condition of the Court's consent; and he infringed it. But that circumstance cannot affect the question as to the form of marriage, if he was, according to law, her relation and guardian, and as such was competent to receive the bride-price and give the marriage the *Asura* form.

We are not to be understood as deciding that the conclusion above stated would apply to the marriage of a girl who has been sold in marriage by a person who was neither her paternal nor maternal relation. According to the Shastras, the giving of a girl in marriage is a pious act, and even a person who is in no way related to her may so give her, if she has no relations, or, if there being relations, they are unwilling to discharge that duty. [442] In Madan Ratna Skandha quoted in the Nirnaya Sindhu (page 245, Jnana Sagar Edition) it is said that "it is proper (for a man) to give in marriage according to the (prescribed) religious rites the unmarried daughter of another person, even if she is not of the same *gotra* as himself, after making her his own (daughter) and by (presenting) her (with ornaments) of gold." Such a case, when it arises, will have to be determined on its own merits.

Lastly, it remains to notice Mr. Gokuldas's argument that Mani's marriage should not be held to have been in the *Asura* form, because there is no evidence and no finding that Mani received any money for herself as bride from the bride-groom before marriage, whereas the text of Manu, which defines that form, requires that payment of money as consideration for the gift of the girl in marriage shall be not only to her relations (*jnati*) giving her but it must be also to the girl. But, as Nilakantha points out in his Sanskara Mayukha (1) on the authority of another text of Manu the taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her; and it is the taint which determines the form.

On these grounds the decree of the Court below must be confirmed with costs.

*Decree confirmed.*

(1) एवंचात्मार्य धनग्रहणे कन्यार्थेतुन दोषः [Sanskara Mayukha : Amrapurkar's Edition, Page 45.]



33 B. 443 (=11 Bom. L. R. 665=3 I. C. 753.)

## [443] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

PURSHOTTAM HARGOVAN PAREKH (*Original Plaintiff, Applicant*),  
*Appellant, v. HARBHAMJI AMARSANGJI THAKAR AND OTHERS*  
 (*Original Defendants, Opponents*), Respondents.\*

[14th April, 1909.]

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*Gujrat Talukdars' Act (Bombay Act VI of 1888, as amended by Act II of 1905) section 31—Decree—Execution against Talukdar's Estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882,) sections 320, 323.*

In execution of a money decree against a talukdar several villages belonging to him were attached: and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of talukdari lands) to be dealt with under sections 320-325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of section 31 of the *Gujrat Talukdars' Act*, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had [444] done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhast preferred by the decree-holder should be disposed of.

*Per Chandavarkar, J.*—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it.

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumentur rite et sollemniter esse acta donec probetur in contrarium*. In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

\* First Appeal No. 97 of 1908.

† *Gujarat Talukdars' Act* (Bombay Act VI of 1888), section 31 runs as follows:—  
 The section originally stood thus:—

"No incumbrance on a talukdar's estate, or on any portion thereof, made by the talukdhar after this Act comes into force, shall be valid as to any time beyond such talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer, or of some other officer appointed by the Governor in Council in this behalf."

To this were added the following words by the *Gujrat Talukdars' Amendment Act*, 1905 (Bombay Act II of 1905):—

"And after the death of a talukdar no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a talukdar's estate, or any portion thereof, in execution of any decree obtained against such talukdar or his legal representative, except a decree obtained in respect of an incumbrance made with such consent as aforesaid, or made before this Act comes into force, shall be instituted or continued except with the like consent."



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Section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

[Ref : 34 Bom. 142.]

APPEAL from the decision of Chimanlal Lallubhai, First Class Sub-ordinate Judge at Ahmedabad.

Proceedings in execution.

The plaintiff obtained a money decree for Rs. 5,007 against the original defendants (represented by the heirs the respondents) on the 26th September 1891.

In execution of this decree, several villages belonging to the respondents were attached; and the Court sent the darkhast to the Collector to be dealt with under sections 320—325 of the Civil Procedure Code (Act XIV of 1882). The Collector transferred this decree to the Talukdari Settlement Officer, who was competent to deal with it for the purpose of execution of decrees against or in respect of talukdari lands.

[445] The Talukdari Settlement Officer next framed a scheme whereby it was arranged that the plaintiff should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and that the other villages should be released from attachment. The plaintiff assented to the scheme and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter, informing him of the scheme and asking him to put the plaintiff in possession of the village. The Talukdari Settlement Officer also recorded an order to that effect and sent it to the Court which passed the decree.

In 1905, section 31 of the Gujrat Talukdar's Act (Bombay Act VI of 1888) was amended. The scheme was made by the Talukdari Settlement Officer and the village was delivered to the plaintiff after the death of the original judgment-debtor and after the section was amended but in ignorance of the amendment.

Subsequently, on the 12th November 1907, the Talukdari Settlement Officer reported to the Collector of Ahmedabad that the plaintiff's darkhast could not be proceeded with under section 31 of Bombay Act VI of 1883 as amended by Bombay Act II of 1905. This was sent by the Collector to the Civil Court.

The Court asked the Talukdari Settlement Officer, on the plaintiff's application, to show cause why the actions taken by him from time to time should not be construed into his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888).

The Talukdari Settlement Officer replied as follows :—

"The consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for the continuance of the execution proceedings as stated by the plaintiff, and the preparation of a scheme under section 323 of the Civil Procedure Code does not imply the grant of such consent which can only be given in writing. The steps shown by the plaintiff in his petition as taken by this office in connection with the execution proceedings are under the Civil Procedure Code. There has been no action taken by this office which would show that such a previous written consent as contemplated by section 31 of the amended Talukdari Act was ever given or intended to be given."

[446] The Court agreed with the contentions of the Talukdari Settlement Officer and ordered the darkhast to be disposed of on the following grounds :—



It is urged that the Talukdari Settlement Officer should be held to have given consent for the continuance of the execution proceedings as required by section 31 of the amended Talukdari Act. Under section 320 of the Civil Procedure Code, the execution of the decrees is transferred to the Collector and not to the Talukdari Settlement Officer, and the Collector executes them or gets them executed, through his subordinates, and so the Talukdari Settlement Officer is not wrong in saying that he adopted the steps above said under the Civil Procedure Code in execution of the decree and not under the amended Talukdari Act. It is clear from section 31 of the Act that the consent should be in writing and should not be presumed from the conduct of the Talukdari Settlement Officer, or from certain steps adopted by him in executing the decree. No consideration is required for such consent, and the Talukdari Settlement Officer cannot be said to have given consent merely because the applicant withdrew two darkhasts under the kabulayat made by him to the Talukdari Settlement Officer. The Talukdari Settlement Officer states that the consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for continuance of the execution proceedings, and there is nothing to show that the Talukdari Settlement Officer gave express consent for continuance of the execution proceeding.

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The plaintiff appealed to the High Court.

*T. R. Desai* for the appellant contended that the Talukdari Settlement Officer had given his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888). The framing of the scheme, the putting of the plaintiff into possession of one of the villages attached, and the communication thereof to the Civil Court are acts which clearly show that the consent of the Talukdari Settlement Officer was given to the arrangement in every sense of the term. The consent might indeed have been given in ignorance of the amendment in section 31; but ignorance of law is no excuse.

*L. A. Shah* for the respondent No. 1.—There is no consent here of the Talukdari Settlement Officer as required by section 31 of the Gujrat Talukdars' Act, 1888. The consent should be express, made previously and in writing. All that the Talukdari Settlement Officer has done has been done by him in his capacity as Collector under sections 320—324 of the Civil Procedure Code, 1882. The scheme framed was under section 323 of the Code.

[447] The provisions of section 31 of the Gujrat Talukdars' Act, 1888, should be strictly construed in favour of the judgment-debtor. When an officer holds two capacities as in this case, and he has to do an act to validate a proceeding, that act, before it can be construed to have a certain effect, must be shown to have been done with intent to procure that effect.

*M. N. Mehta*, for respondents Nos. 2—5.

*T. R. Desai* in reply.

CHANDAVARKAR, J. :—The appellant, having obtained a money decree against a Talukdar, who is now deceased and is represented by the respondents, presented a *darkhast* for its execution. Several villages, belonging to the Talukdar, were attached and the Court sent the *darkhast* to the Collector to be dealt with under sections 320 to 325 of the Code of Civil Procedure of 1882, then in force. The Collector in his turn transferred the *darkhast* to the Talukdari Settlement Officer, the reason for that being that the latter combined in himself, according to a rule having the force of law, the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of *talukdari* lands. That Officer, acting under the sections in question, framed a scheme, whereby it was arranged that the appellant should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and



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that the other villages should be released from attachment. The appellant assented to the scheme, and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter (Exhibit 54), informing him of the scheme and asking him to put the appellant in possession of the village. At the same time the Talukdari Settlement Officer recorded an order and sent it to the Court which had passed the money decree. That order (see Exhibit 22) is as follows:—

"The Kabulayat, given by the plaintiff to accept in Palachut the income of Karsanpura for 7 years in satisfaction of his Darkhast No. 614—1899 and 552—1899 is put in the case; order is given to the Deputy Manager to carry it out accordingly. This darkhast is to be entered in the list of Japti Vahivat (management of attached estates) under section 323, Civil Procedure Code, and order is given to send its account every year and therefore this darkhast is taken out of the list of cases under inquiry and entered in the list of attached estates."

[448] The scheme was made, the order was passed and delivery of possession of the village was given to the appellant after the judgment-debtor had died and after the amendment of section 31 of the Talukdars' Act had come into force.

[His Lordship then read section 31 of the Talukdars' Act and continued:—]

It appears that the Talukdari Settlement Officer was not aware of the latter portion of section 31 when he settled the scheme, passed his order, and put the appellant in possession of the village. Accordingly, the Court was requested to dispose of the *darkhast* by holding that the appellant could not retain possession of the village under the scheme.

The lower Court has allowed the Talukdari Settlement Officer's objection to the *darkhast* on the ground that there was no previous consent in writing of his such as is required by the last part of section 31 of the Talukdari Act.

The Talukdari Settlement Officer's contention in the Court below was that he had never given any such consent as the section required, because all he had said and done had been not under that section but under section 323 of the Code of Civil Procedure.

I am unable to accept this contention. All that section 31 required was his previous consent in writing. That there was such consent is clear from Exhibit 5 and the Officer's order quoted above. It may be that the Talukdari Settlement Officer was not aware of the amendment of section 31 and so had not the remotest consciousness that he was acting in conformity with it when he settled the scheme and allowed the appellant to be put in possession of the village. But if a person, holding a certain office, is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the loss a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it. As was said by Lord Ellenborough, C. J. in *Bilbie v. Lumley* (1), "Every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." As for the plea that the consent was given by the Talukdari Settlement Officer, not under

(1) (1802) 2 East 469 at p. 472.



section 31 of the Talukdars' Act but under section 323 of the Code, it is answered by the rule of law that where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia presumuntur rite et solenniter esse acta donec probetur in contrarium*. In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can indeed be rebutted by proof that certain forms required by law were not complied with. Here no form is prescribed by law. All that is urged is that the Talukdari Settlement Officer did not know of the law embodied in section 31 of the Talukdars' Act when he gave his consent to the scheme. We are, therefore, brought back to the plea of ignorance of law, which, as I have said, is no excuse.

It is to be remarked that the powers under section 323 of the Code of Civil Procedure conferred on the Collector and those conferred on the Talukdari Settlement Officer by section 31 of the Talukdari Act are both enabling or discretionary and are not necessarily of a mutually contradictory character. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both sections, if it can be so referred. It is not that in respect of one office the action was without, and in respect of the other it was with jurisdiction.

If he had the discretionary jurisdiction as to the action in both capacities, the law will refer it to both of them and then the question is reduced simply to this—had he given previous consent [450] in writing as required by section 31 of the Talukdars' Act? That section prescribes no particular form for the consent. All it requires is that there must be (1) consent, (2) that it must be previous, and (3) that it must be in writing. It is not disputed before us that these three conditions are satisfied by Exhibit 54 and Exhibit 22. As to the first of these conditions, all we have to see is that the person who gave the consent occupied at the time the office of Talukdari Settlement Officer and that he acted deliberately in the matter of the scheme and gave his sanction to it freely, because "consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side," that is, it must not be due to fraud, or undue influence. (Story's Equity Jurisprudence, 2nd edn., section 222). The Talukdari Settlement Officer is shown by the evidence to have given his sanction to the scheme after fully considering the circumstances of the case. The argument that such consideration was bestowed by him on the scheme in his capacity as Collector ignores the fact that though he held two offices it was one mind which considered the scheme before consenting to it. And that consent was embodied in writing in Exhibit 54, the letter he wrote to his Deputy, asking him to give delivery of possession to the decree-holder, and in the order, forming part of Exhibit 22, sent to the Court with the *darkhast*. Both these were put in writing before delivery of possession to the decree-holder.

On these grounds, in my opinion, the decree appealed from must be reversed and the *darkhast* should be allowed to continue. The appellant must have the costs both in this Court and the Court below from the respondent No. 1 who is to bear his own.

HEATON, J.—By Bombay Act II of 1905, section 31 of Bombay Act VI of 1888 was so amended that thereafter "no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a Talukdari estate, or any portion thereof in execution of a

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decree " could be instituted or continued without the previous written consent of the Talukdari Settlement Officer.

The decree-holder in these proceedings had several unexecuted decrees against a Talukdar of which applications for execution were pending. In the proceedings on one of these applications [451] an order was made for selling the estate of the Talukdar or a portion thereof and the proceedings were sent to the Collector under section 320, Civil Procedure Code. It fell to the Talukdari Settlement Officer, who in certain cases is the Collector for execution purposes, to deal with the matter. He entered into an arrangement with the decree-holder by which a scheme was made as permitted by section 323, Civil Procedure Code, under which the decree-holder was to have possession of one Talukdari village for seven years in discharge of his decrees. Meantime two out of four applications for execution were to be withdrawn, and the remaining two, kept pending. The negotiations had begun before the amendment of section 31 came into force; but the scheme was finally arranged, accepted and given effect to after the amendment. The question is whether the execution proceedings were continued with the previous written consent of the Talukdari Settlement Officer as required by section 31 of the Act. I think they were. The Talukdari Settlement Officer undoubtedly did consent to the continuance; that is plain from the letters he sent to the Court. It is equally plain that the consent was in writing and that it was previous to the delivery of possession to the decree-holder. The only argument of any importance against holding the previous written consent to be of the kind contemplated by section 31, is that it was not given for the purpose of section 31 and was given in ignorance of or without regard to the provisions of that section and merely in pursuance of execution proceedings which the Talukdari Settlement Officer was bound to conduct. I do not think that after the amendment of section 31 he was bound to conduct them. It was open to him to refuse to consent to their continuance and to refer them back to the Court. I also do not think the evidence establishes the contention of ignorance or that the consent was not given for the purpose of section 31. The Talukdari Settlement Officer of the time was not examined as a witness and there is no direct evidence on the matter. We are left to conjecture and I do not think the circumstances justify the conjecture urged by the respondent. Therefore I concur in the order proposed.

*Decree reversed.*

33 B. 452 (= 11 Bom. L. R. 654=3 I. C. 750.)

[452] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

BHIMACHARYA BIN VENKAPPACHARYA (Original Plaintiff),  
Appellant v. RAMACHARYA BIN BHIMACHARYA (Original  
Defendant), Respondent.\*

[14th April, 1909.]

*Hindu law—Mitakshara—Stridhan—Succession—Competition between husband and step-son.*

Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife.

[Ref. 39 Cal. 319; 38 Mad. 1144; 60 I. C. 263.]

\* Second Appeal No. 569 of 1908.



SECOND appeal from the decision of Vishvanath V. Wagh, First Class Subordinate Judge with appellate powers at Bijapur, confirming the decree passed by D. A. Idgunji, Subordinate Judge at Bagalkot.

The property in dispute belonged originally to one Kristacharya, who died on the 14th December 1902 leaving him surviving a daughter Bagawa by name. Bagawa was married to Ramacharya (defendant No. 1). Ramacharya had a son by his first wife: he was Bhimacharya (the plaintiff).

Bagawa died on the 25th December 1902. At her death, the plaintiff (her-step-son) claimed that he was entitled to succeed to the *Stridhan* of Bagawa which he inherited from Kristacharya. His claim was resisted by Ramacharya, father of plaintiff and husband of Bagawa.

The Subordinate Judge decided the suit in the defendants' favour on the following grounds :—

Assuming that the property is Bagawa's *Stridhan*, the question is whether, on her death without issue her next heir is her husband or the son of her husband by another wife.

The material texts of the *Mitakshara* are those given in chapter 2, section XI, placita 8, 9, 11.

"9. If a woman die without issue, that is leaving no progeny; in other words having no daughter nor daughter's daughter nor daughter's son, nor son, nor son's son, the woman's property as above described shall be taken by her kinsmen, namely, her husband and the rest as will be (forthwith) explained."

[453] The rights of the progeny are shown in *Manu* IX, 192 "all uterine brothers should divide the maternal estate equally and so should sisters by the same mothers." The commentary expressly states :—"The whole blood is mentioned to exclude the half-blood. But, though springing from a different mother, the daughter of a rival wife, being superior by class shall take the property of a childless woman who belongs to an inferior tribe. On a failure of the step-daughter her issue shall succeed."

Then comes a citation of *Manu*, chapter IX, 198. "Step-children are not recognized by the *Mitakshara* as entitled, except in the single case, which has now become impossible, where the woman who has left the property was the wife of an inferior class" (cf. Mayne, *Para*, section 670, 6th edition).

The step-son may come after the husband by reason of placitum 11 (*Mit.* chapter II, section XI).

And of a woman dying without issue as before stated and who had become a wife by any of the four modes denominated *Brahma*, etc.—the (whole) property as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsman (*Sapindas*) alive by funeral oblations.

It is thus clear that according to the *Mitakshara* in the case of a woman dying without issue as before stated when the marriage is in the *Brahma* form as in the present case, her property belongs to her husband "in the first place."

The *Smriti Chandrika* expressly lays down :—"He (step-son) takes the property on failure of offspring, husband, and the like." (Chapter IX, section 3, page 38) quoted by West and Buhler, page 522 (3rd edition).

These authorities would clearly show that the husband of Bagawa is the next heir to Bagawa's *Stridhan* and not the plaintiff who is Bagawa's step-son.

The plaintiff's pleaders rely on *Manu*, chapter IX, Shlokas 182, 183. The latter lays down that the son of a man by one of his wives is as a son to all his wives.

If this is so, it is argued that the plaintiff is the son of Bagawa the next however refers in express terms to progeny of the full blood as shown above. The next argument is that after the full blood at any rate, the step-son will come in by reason of Shloka 183. The *Mitakshara* provides that in default of progeny, by which progeny of the full blood is indicated, the husband succeeds "in the first place." It would be clear that Shloka 183 cannot be allowed to override this express provision. Both these Shlokas were before their Lordships of the Privy Council, in their bearing on the aspect of inheritance. They observe :—"We must suppose that all take the spiritual benefits of male issue ; but the law is clear that for the purposes of inheritance" (cf. *Annappurni Nachiar v. Forbes* (1)).

(1) (1899) 28 Mad. 1 at p. 9.

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There an adopted son died leaving property and it was held that the mother who took part in the adoption succeeded in preference to the other mother. [454] The title of a step-mother to rank as mother in matters of inheritance cannot be validly based on Shloka 158, as was laid down. The title of the step-son to come in before the husband's rights based on express provision, can hardly be substantiated by the same Shloka.

'If the son born in lawful wedlock means or includes a son of a rival wife (as is said in the Dayabhaga) he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife (see West and Buhler's Digest, page 518)' (cf. *Bai Kesserbai v. Humsraj Morarji* (1)).

Even assuming that the property is Bagawa's Stridhan I find that the plaintiff is not the next heir as Bagawa has left her husband surviving her. He does not come on the record even as the minor plaintiff's next friend and is probably unwilling to prejudice his own rights, by his appearance in a suit.....urged on behalf of his son.

On appeal, this decree was confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

*K. H. Kelker* for the appellant (plaintiff):—Under Hindu law admittedly a son is entitled to succeed to the *stridhan* of a woman in preference to her husband. We contend that a step-son also is entitled to the same preference. If the author of the Mitakshara had meant to give the husband a preference over the step-son, he would have expressly said so,

And Manu (IX, 183) has it that where one out of several co-wives gives birth to a son, all of them by that son become mothers of that son. This text shows that 'son' includes 'step-son'.

In the Mitakshara, there is a specific text which shows that if a woman dies without issue then the daughter (or failing her, her issue) born of a co-wife of a superior class takes her *stridhan* (Mitakshara, p. 211, Moghe's edition).

Mitra Misra expressly mentions step-son and places him above the husband in the line of succession. In discussing the text of Brihaspati, viz., मातुः स्वसा मातुलानी &c. (*Matuh Swasa Matulani*, &c.) he says that औरस (*aurasa*) that is, issue of the body includes a step-son. The text in question lays down the line of succession to the *stridhan* of certain females in case of the [455] failure of the heirs mentioned therein. Mitra Misra is of opinion that the step-son and his issue become heirs because they are the giver of the Pinda (funeral cake) and the liquidators of debts (Viramitrodaya, Golapchandra Sarkar's edition, translation, p. 243, text p. 98).

Smriti Chandrika (ch. ix, s. 3, Iyer's translation, p. 135) is the only text against our contention. Other authors are silent on the point.

*V. G. Ajinkya* for the respondents:—In discussing the succession to the *stridhan* of a married female, Vijnaneshwara advisedly uses the word सहोदर (*Sahodara*) (uterine), and then adds सोदरग्रहणं भिन्नोदर निवृत्त्यर्थम्. (*Saudaragrahanam bhinnodara nivratyartham*) (Mitakshara, verse 145, pp. 210, 211, Moghe's edition). This shows clearly that step-son is expressly excluded.

As to Mitra Misra, it will be seen that he begins by saying "But when there is a failure of the abovementioned heirs the childless woman's property, Vrihaspati ordains 'the mother's sister &c.'". Thus, when the above-mentioned heirs, that is to say, when the heirs which include the husband and which are mentioned in the foregoing part are exhausted, then only what he says about the text मातुः स्वसा &c. (*Matuh swasa*, &c.)

(1) (1906) 30 Bom 431 at p. 446.



is to be considered. This text again, has been discarded by the Privy Council as unintelligible in *Bai Kesserbai v. Hunsraj Morarji* (1).

And, *Smriti Chandrika* (ch. 9, s. 3) specifically assigns preference to the husband.

CHANDAVARKAR, J.—The question of Hindu Law in this Second Appeal is, when a married Hindu woman dies, leaving no issue, and the competition for heirship to her *stridhan* is between her husband and a son by another wife of the latter, who is entitled to the property—the husband or the step-son of the woman?

The case is governed by the *Mitakshara* law.

Both the Courts below have decided the question in favour of the husband; and the step-son of the deceased woman has preferred this Second Appeal.

[456] *Yajnyavalkya's* text regarding succession to the property of a woman, who dies leaving no issue, says:—"Her kinsmen take it, if she die without issue." [The *Mit.* Chap. II, Section XI, pl 8, page 460, *Stokes's Hindu Law Books*].

*Vijnaneshwara's* gloss on the text is as follows:—

"If a woman die 'without issue' that is, leaving no progeny; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son; the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest as will be (forthwith) explained:" [Do. pl. 9, page 460].

Further on, that is, in his gloss on the next text of *Yajnyavalkya*, *Vijnaneshwara* says, "in all forms of marriage, if the woman 'leave progeny,' that is, if she have issue, her property devolves on her daughters." [Do. Pl. 12 page 461.]

The original for "have issue" is *prasuta*, i.e., a woman who has children born.

"In default of daughters, or their daughters, or their sons, the sons, if any, of the woman deceased, take her *stridhan*" says *Vijnaneshwara* on the authority of the text, "the (male) issue succeeds in their default" [pl. 19, page 462].

He further supports the right of the male issue by a text of *Manu* which runs as follows:—

"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." [pl. 19].

He explains this text to mean, not that the uterine brothers and sisters that is, the daughters and sons born of the woman, take the estate as joint heirs, but that the daughters inherit first, and, in default of them, the sons.

The original for "mother" in *Manu's* text is *janani*, which means, the woman who has given birth to children and left them surviving her. That word and the word "uterine" emphasise the rule that on her death it is her own daughters, and in default of them, her own sons who are her heirs. Hence *Vijnaneshwara* adds the explanation that step-children are excluded from this category of heirs. [pl. 19, page 462].

[457] It is urged for the appellant that this exclusion means no more than that step-sons cannot inherit so long as the woman has left sons of her own to inherit her property; but that there is nothing in either *Manu's* text or *Vijnaneshwara's* gloss to prevent the step-sons coming in

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(1) (1906) 30 Bom. 431 at page 451.



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as heirs before her husband as her "sons" in the secondary sense of the word.

But the right of the step-son to come in, after he has once been expressly excluded from the primary sense of the word "sons" by Manu's text and Vijnaneshwara's explanation, must be founded on some authority discoverable in the Mitakshara. It is impossible to argue that Vijnaneshwara uses the word "sons" in his gloss in placitum 19 or the word "male issue" as including step-sons. Had he intended to include them, he would not have cited Manu's text in support of his meaning and added his gloss that it excludes step-children.

The argument for the appellant just stated comes in effect to this that Vijnaneshwara intends to use the word "sons" in its primary sense, that is, in the sense of sons born of the woman, where such sons are living at her death; but that he uses the same word in its secondary sense, meaning sons of a rival wife, if she has left no sons of her own. But we cannot ascribe to Vijnaneshwara this double interpretation of the word without charging him with the violation of a well known rule of *mimansa* or construction that "in the same passage a word occurring once cannot be taken in its primary and in its secondary sense." (1). Such construction of one and the same word occurring in a text or a rule, involving two interpretations at the same time, is condemned by the commentators on Hindu law as "illogical," as may be seen from the remarks of Nilakantha in the Vyavahara Mayukha in the chapter on "Determination of Heritage." (2).

No doubt "the more comprehensive interpretation may be adopted where it is supported by authority." (3).

[458] But for our present purposes the authority must be found either in the Mitakshara itself or, where it is silent, in the Vyavahara Mayukha. None can be found in either.

On the other hand, both what Vijnaneshwara has omitted to say and what he has gone on to point out after explaining Manu's text as excluding step-sons from the category of "sons", show plainly that he did not intend step-sons to come in as heirs of the woman before her husband.

After having given his explanation of Manu's text, he studiously omits to say that in default of sons born of the woman, her step-sons (sons of a rival wife) come in. This omission is significant, because, in dealing with the compact series of heirs in a case of what is called "obstructed succession", wherever he is in favour of the admission of the half-blood immediately after the full-blood into the class of enumerated heirs, he says so and does not leave the matter to mere inference or conjecture. [see the Mit. Ch. II, Sec. IV, plac. 6 : Stokes's Hindu Law Books, page. 445].

The omission becomes all the more significant when we have regard to what Vijnaneshwara goes on to say after having given his explanation of Manu's text. On the authority of another text of Manu he declares the right of a step-daughter of the woman to inherit before the latter's husband, provided that the step-daughter is of a caste superior to that of the woman. [The Mit. Ch. II. Sec. XI, plac. 22 : Stokes's Hindu Law Books, page 463.]

(1) The rule is : "सकृदुचरितः शब्दः सकृदेवार्थं गमयति". See Bhattacharya's Hindu Law, 2nd Edn., page 64.

(2) Mandlik's Hindu Law, page 86, lines 11 to 19.

(3) Bhattacharya's Hindu Law, 2nd Edn., page 65, citing Dayabhaga XI, v. 9.



The express inclusion of this particular class of step-children in the class of heirs taking before the husband implies the exclusion from that class of all other step-children.

It is true that this rule as to the right of a step-daughter of a superior caste is supposed by some commentators to apply also where the step-daughter and the woman happen to be of the same, that is, "equal" caste. But Vijnaneshwara's remarks and the illustrations he gives are clearly opposed to the supposition, and Nilakantha in the Vyavahara Mayukha plainly says that the authority for the supposition is "questionable". [see Mandlik's Hindu Law : Vyav. Mayu. page 96, lines 25 and 26].

[459] It follows then from all these considerations that, under the Mitakshara and the Mayukha law, where a married woman dies, leaving her husband and a son by a rival wife, the latter is entitled to inherit her property only after and in default of the former. This interpretation of the Mitakshara is confirmed by Kamalakara, the author of the Nirnaya Sindhu and the Vivada Tandava, quoted at page 580 of Bhattacharya's Hindu Law, 2nd Edition. Kamalakara says:—

"In default of the husband, the daughter, sons, and daughter's sons of the rival wife; and, in their default, the mother-in-law, the father-in-law, the husband's brother, his sons, and other next of kin of the husband (succeed), according to the text: 'The wife, and the daughters also, &c.' This is the opinion of Vijnaneshwara and Apararka."

But the learned Pleader for the appellant relies in support of his argument on certain remarks of Mitra Misra in the Viramitrodaya, which occur on page 243, plac. 14, of Mr. Golapchandra Sarkar's Edition of that work.

The remarks in question, it will be noticed, refer at the very outset to certain heirs "to a childless woman's property" enumerated in a text of Brihaspati, and Mitra Misra begins by pointing out that those heirs come in "when there is a failure of the above mentioned heirs", that is, the heirs mentioned in the preceding placita. Among these latter is the woman's husband, as placitum 13 shows.

No doubt in his gloss on Brihaspati's text, Mitra Misra says that by the term "son" used in that text is "intended the son of a co-wife" and he cites the following text of Manu in support of that:—

"If among all the wives of the same person, one be a mother of a son, then all of them become by that son mothers of male issue; this is ordained by Manu."

But it does not follow from this that Mitra Misra intended the son of a co-wife to be heir to the woman's property in preference to her husband. It is true that he says in the placitum in question that in default of the *aurasa* (born) sons of [460] the woman, their sons, and grandsons, "the son of a rival wife, his son, and grandson (become heirs in their order); by reason of their being, under the circumstances, the giver of the *pinda*, and the liquidator of debts, and by reason of the text of Manu, cited above." But he cannot have meant by that to bring in the son of a rival wife before the husband. For, he goes on to say, that "on failure of these," that is, the son of a rival wife, his son, and grandson, "the sister's son and the rest alone," that is, the secondary sons specified in Brihaspati's text, take the property "in spite of the *sapindas* such as the father-in-law." Does that mean that if there is no son of a rival wife, or his son, or grandson, the secondary sons enumerated in Brihaspati's text come in as heirs, ignoring the husband of the woman? Mitra Misra could not have meant that, because he begins his citation of Brihaspati's

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text by saying that the heirs mentioned therein come in after the husband.

Mitra Misra's remarks, therefore, must be understood as merely pointing out in a general way the heirs who fall under the category of the word 'son' in its more comprehensive sense, not as laying down the order of their succession so as to postpone the husband's right of heirship to that of a son of a rival wife. Had he intended to postpone the right in that way, and to bring in a step-son immediately on failure of a son born of the woman, his son, or grandson, he would have said so where he has discussed Manu's text in which the word 'uterine' occurs. He deals with that text much in the same way that Vijnaneshwara has dealt with it.

As to the text of Manu which Mitra Misra has cited in construing the word 'son' occurring in Brihaspati's text, and which is relied upon for the appellant as showing that a son of a co-wife of a woman becomes the latter's son also, it is to be remarked that the object of the text in question is explained by the more important of the commentators on Manu in such a way as to imply that its application is of a limited character, having no necessary reference to questions of inheritance. [See Mandlik's *Manava Dharma Shastra*: page 208.] For instance, Sarvajna Narayana, explains the text as meaning that the wife who has no son shall not resort to *nirayoga* [461] (levirate), if her co-wife has a son born of her. Culluca Bhatta and Raghavananda explain that the text is intended to prohibit adoption by the wife who has no son born of her. And the context in which this text of Manu finds its place in his *Smṛiti* supports that view. It is immediately preceded by another text which declares: "If among brothers, sprung from one (father), one have a son, Manu has declared them all to have male offspring through that son." [Sacred Books of the East: Vol. XXV, Ch. IX, 182.] Vijnaneshwara in the *Mitakshara* quotes this text and explains that it "is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle" [The Mit. Ch. I, Sec. XI, para. 36, Stokes's *Hindu Law Books*, page 424.] If this text has this limited meaning and scope, the other text relating to the son of a co-wife, must have its scope similarly narrowed, having regard to the fact that it occurs immediately after the former. And that is the view which has commended itself to their Lordships of the Privy Council as to the scope of both these texts of Manu. See *Annapurni Nachiar v. Forbes* (1) where their Lordships say:—"Reference has been made to the text of Manu (Book IX, Shloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding Shloka he declares that if among several brothers of the whole blood one have a son born, they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue: but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred."

Certain commentaries such as the *Madana Parijata* and the *Vivadar-nava Setu* no doubt assert the right of the son of a rival wife of a woman to inherit the *stridhan* of the latter before her husband; but for the reasons we have given in this judgment, their view must be held to find no support from either the *Mitakshara* or the *Vyavahara Mayukha* or the author of the *Smṛiti Chandrika*. The last says: "The issue of a rival wife

(1) (1899) L. R. 26 I. A. 246 at p. 253.



[462] takes the property of the step-mother, where the latter leaves no progeny, husband, or the like". [Smriti Chandrika, Kristnasawmy Iyer's Ed. 2nd, page 135, section 38.]

That the husband of a childless woman is entitled to inherit her *stridhan* before a son by another wife of his seems to us to follow as a necessary corollary to certain decisions of this Court. In *Kesserbai v. Valab Raoji* (1) it was held that a step-mother could not inherit her step-son's property under the term "mother" but that she could come in only as a *gotraja sapinda* on the authority of the decisions in *Lakshmibai v. Jayram Hari* (2) and *Lallubhai v. Mankuvarbai* (3). If a step-mother cannot come in as "mother" in the line of heirs to her step-son but can only come in as a *gotraja sapinda*, it follows, from the same reasoning, that the step-son cannot come in as "son" but can inherit only as a *gotraja sapinda* of his step-mother.

For these reasons the decree appealed from must be confirmed with costs.

*Decree confirmed.*

33 B. 462 (=3 I. C. 987=10 Bom. L. R. 965).

ORIGINAL CIVIL.

*Before Mr. Justice Russell.*

IN RE NAOROJI SORABJI TALATI.\*

[22nd July, 1908.]

*Indian Insolvency Act (11 and 12 Vict. c. 21), secs. 7, 26 and 36—Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai.*

The firm of T. and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M. was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907.

On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act.

[463] A Rule *nisi* was obtained on behalf of M. calling upon the opposing creditors to show cause why the above order should not be set aside.

These creditors also obtained a Rule *nisi* calling on M. to show cause why he should not deliver up to the Official Assignee goods belonging to the Insolvent firm in his possession at Shanghai.

These two Rules were heard together.

*Held* that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtor's Court at Bombay, and that Court could order M. to hand over such property to the Official Assignee in Bombay.

*Held*, further, that the Insolvent Debtor's Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.

THE firm of Talati & Co. consisting of four partners on the 29th April 1907 filed their petition in insolvency in the High Court at Bombay. At the time the petition was filed one of the partners Maneckji Pestonji

\* Nos. 197 and 200 of 1907.

(1) (1879) 4 Bom. 188 at p. 208.

(2) (1869) 6 Bom. H. C. Rep. 152 (A. C. J.) (3) (1876) 2 Bom. 388.

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Talati was at Shanghai having gone there in October 1906 to look after the affairs of the firm. Accordingly he did not join in the petition. Subsequently Maneckji Pestonji Talati swore his petition at Shanghai on 16th October 1907, and that petition was presented to Russell, J., in the Insolvency Court at Bombay on 4th December 1907. Russell, J., took time to consider his judgment which he delivered on 11th December 1907 rejecting the petition on the ground that Maneckji Pestonji Talati was not within the jurisdiction of the Court (1).

Among the creditors of the insolvents was the firm of Abhechand Goculdas who had obtained a decree against the insolvents for Rs. 16,951 on the 8th April 1907.

These creditors on the 4th March 1908 applied for and obtained an order directing Maneckji under section 36 of the Indian Insolvency Act to personally appear before the Court on the 17th June 1908 in order that he might be then and there examined touching the estate and effects and dealings of the insolvents and to produce all the books of account, papers and documents in any way relating to the insolvents' dealings and transactions.

On the same day a Rule *nisi* was obtained by the opposing creditors calling upon Maneckji to show cause why he should [464] not forthwith deliver over to the Official Assignee for the benefit of the general body of creditors the goods of the value of fifteen laos belonging to the insolvents' firm now in his possession or subject to his control or the sale-proceeds thereof.

On the 15th April 1908 a Rule *nisi* was applied for and obtained on behalf of the said Maneckji calling upon the opposing creditors to show cause why the order for examination should not be set aside.

*Setalvad* in support of the Rule *nisi*.

Under section 4 of the Insolvency Act the Court cannot summon before it a witness who resides at a distance of more than 200 miles. It is untrue that Maneckji is in possession of goods or money amounting to 15 laos. All the goods that were at Shanghai when the firm failed were in the possession of the banks who had advanced money on their security.

*R. Wadia* for the opposing creditor.

In *In re Cowasji Ookerji* (2) it was held that the Court had power to summon before it witnesses residing at longer distances than 200 miles.

*Setalvad* in reply.

In *In re Cowasji Ookerji* the insolvent had filed his schedule in Bombay and had been punished under sections 50 and 57.

RUSSELL, J.:—An important question arises on each of these rules which were argued before me on Wednesday last particularly having regard to the fact that it has been suggested that the proposed New Insolvency Act for Presidency Towns in India shall not be an Imperial Statute.

For if I am right in the conclusions I have arrived at it is highly desirable that the Insolvency Act for Presidency Towns should continue to be an Imperial Statute.

On the 4th March 1908, M. P. Talati was called on to show cause why he should not deliver to the Official Assignee of Bombay goods of the value of fifteen laos, belonging to the insolvents' firm now in his possession, or the sale-proceeds thereof, under section 26 of the Indian Insolvency Act.

(1) (1907) 10 Bom. L. R. 84.

(2) (1888) 13 Bom. 114.



[465] On the same day the same person was ordered to attend the Court for examination under section 36, and on 15th April 1908 he by his constituted attorney took out a rule calling on the opposing creditor to show cause why that order should not be set aside.

It appears that a firm comprising N. S. Talati, D. S. Talati and Hujarimal Multanchand filed their petition in this Court on the 29th April 1907 and on that day the usual vesting order was made. M. P. Talati was a partner in that firm and left Bombay for Shanghai in October 1906. Since then he has been carrying on the firm's business at Shanghai. M. P. Talati presented a petition to this Court to be declared insolvent, but it was held that this Court had no jurisdiction to entertain it: see *Re Manekji Pestonji Talati* (1).

From the power of attorney put in at the argument before me it appears that M. P. Talati is a British subject and it is stated on the opposing creditor's affidavit and not denied that there is at Shanghai "a British Consulate (*sic*—evidently intended for 'Consular') Court" which has jurisdiction in insolvency and jurisdiction over M. P. Talati. It also appears on the rule and order of the 4th March that they were served on M. P. Talati through "H. B. M.'s Supreme Court for China and Korea at Shanghai."

The first question I propose to discuss is whether this Court can order M. P. Talati to deliver over the goods of the firm to the Official Assignee of Bombay. I deal hereafter with the question whether he has any of such goods in his possession in fact.

The Act for Relief of Insolvent Debtors in India is an Imperial Statute, and it must be borne in mind that "the jurisdiction of such Bombay Court" (and for this purpose an Insolvency Court stands on the same footing) is partly local and partly imperial, "the imperial nature of the jurisdiction consists in this, that the powers of the bankruptcy courts to discharge debtors from their debts extend to all debts wherever contracted; that is to say, the discharge of a debtor by a court exercising bankruptcy jurisdiction in England will discharge a debt contracted by the [466] debtor in one of the colonies or colonial States or in India, and the provisions as to the vesting of property in the officer appointed to collect and distribute it extend all over the Empire, so that, when a man is made bankrupt by a bankruptcy court in England, property which he has in the colonies or colonial States or in India will become distributable by the English Trustee in the bankruptcy, who can enforce his title to it." Vol. II, Laws of England by Lord Halsbury, title: Bankruptcy and Insolvency, p. 6 and cases there referred to.

By section 7 of the Indian Insolvency Act all the property of the insolvent, whether within the limits of the Charter of the East India Company or without vests in the Official Assignee.

Section 26 of the Indian Insolvency Act would appear to be supplemental to section 7, for it would be certainly anomalous for one section to vest all the insolvent's property wherever situate in the Official Assignee and the Act not to contain a section empowering the Official Assignee to get hold of such property.

Now in *In re Ganeshdas Panalal* (2), it was held that the Court for the Relief of Insolvent Debtors sitting in Bombay had jurisdiction to make an order under section 26 of the Indian Insolvency Act against a person residing outside the Bombay Presidency. The order asked for

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(1) (1907) 10 Bom. L. R. 84.

(2) (1908) 32 Bom. 198, 10 Bom. L. R. 77.



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there was against a person residing at Amritsar. It will be observed that the Court expressly confined itself to the question before it, *i.e.*, whether the property was situate in British India. But it is generally clear that Mr. Inverarity who argued the case for the successful appellants also put the case on the higher ground that the Insolvent Court would make an order as to the property of the insolvent wherever situate within the *British Dominions*. His argument was :

Coming to section 26 of the Act it will appear that its wording is very general. It says, "that in case *any* person shall, after any such insolvent shall have petitioned for his discharge...be possessed of or have under his power or control any property whatsoever of such insolvent...it shall be lawful for the said Court further to order such person to deliver over such property...to the Assignee, etc." The section thus says 'any person,' and not 'a person residing within the limits of the town and island of Bombay.' Where an Act of Parliament is in general terms it applies to all countries in the British Dominion where the Imperial Parliament could legislate. See [467] *Callendar Sykes & Co. v. Colonial Secretary of Lagos and Davies*, where it is said (1891, A. C., p. 466).—"If a consideration of the scope and object of statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed." And further at p. 467: "It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it : and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony" (1).

The Court of Appeal did not express any disagreement with this argument. From this I take it that in this respect the effect of the Indian Insolvency Act is the same as the Bankruptcy Acts in England, Scotland and Ireland under which it is clear that the moveables of the Bankrupt, whether in England or elsewhere, become vested in the trustee or the representative of the creditors. In Story on the Conflict of Laws, pp. 333 and 443 (1896), I say "moveables" advisably as they are all that I am concerned with in this case. In my opinion therefore the property of the insolvents' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors Court in Bombay.

The question then arises can this Court order M. P. Talati to hand over such property to the Official Assignee in Bombay. In my opinion it can, for section 118 of the English Bankruptcy Act is a reproduction of section 74 of the Bankruptcy Act, 1869, and the Judicial Committee have held that that applies throughout the British Dominions. See *Callendar Sykes & Co. v. Colonial Secretary of Lagos and Davies* (2).

M. P. Talati is a British subject, he is subject to the Insolvent Jurisdiction of the Consular Court at Shanghai and therefore in my opinion that Court can order him if requested so to do by the Insolvent Court of Bombay to produce all the moveable property, books, papers and documents of the insolvents' firm that may be in his possession.

In England such an order would be of course—see *In re Levey's Trusts* (3)—subject to the law applicable in Shanghai; *Ex parte Rogers* (4).

[468] Although on the affidavits before me it is not possible for me to hold that he has got in his possession property of the value of fifteen lacs of rupees, still from the fact of his having presented his petition in insolvency in this Court, it is impossible to suppose that he has in his possession none of the moveables, account books, etc., of the firm in which he was a partner. I allowed the rule to be amended in this respect.

(1) (1908) 10 Bom. L. R. 77 at p. 79.

(2) (1891) A. C. 460.

(3) (1885) 30 Ch. D. 119 at p. 124.

(4) (1881) 16 Ch. D. 665 at p. 666.



The opposing creditor must therefore make an application for such a request to be sent to H. B. M's Supreme Court at Shanghai the terms of which must be submitted to me.

Now as to the order for the examination of the said M. P. Talati I am of opinion that the order can and should be made. "Every British Court with jurisdiction in bankruptcy or insolvency, is bound to act in aid of and be auxiliary to each other in bankruptcy matters; and an order of the Court seeking aid, with a request to the Court whose aid is sought, will be sufficient authority to the latter Court to enable it to exercise in regard to the matter of the request all the jurisdiction which either of the two Courts in question could exercise in regard to similar matters." Vol. II, Laws of England, Bankruptcy and Insolvency, p. 319, citing s. 118 of Bankruptcy Act, 1883, and *Callendar Sykes & Co. v. Colonial Secretary of Lagos and Davies* (1).

I see nothing to prevent a commission being issued by this Court for the examination of M. P. Talati and H. B. M's Supreme Court at Shanghai making the necessary order for his examination thereunder at the request of this Court. Of course I cannot direct M. P. Talati to come to Bombay to be examined, there being no machinery for that purpose. This request to H. B. M.'s Court at Shanghai will also be submitted to me.

The costs of and incidental to the order and rules will be reserved to be dealt with by the Judge who hears the case eventually.

Attorneys for M. P. Talati: *Messrs. Ardeskir, Hormusji, Dinshaw & Co.*

Attorneys for Abechand : *Mr. M. B. Chothia.*

33 B. 469 (=3 I. C. 990=10 Bom. L. R. 1141.)

[469] ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

UDERAM KESAJI (*Plaintiff*) v. HYDERALLY ABDUL KAYUM (*Defendant*).\*

[15th October, 1908.]

*Jurisdiction—Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court.*

The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates ; or from filing further suits relating to the same subject matter pending the hearing of the High Court suit.

*Jairamdas v. Zamonlal* (2) not followed.

[Ref : 2 Lah. L. J. 283 ;]

THE plaintiff brought a suit in the High Court on its original side on the 17th September 1908 against the defendant, praying that the lease dated the 18th October 1907 passed by the plaintiff in favour of the defendant be avoided and rescinded and praying that the defendant might be restrained by injunction from proceeding with two suits filed by him in the Court of Small Causes in Bombay and from filing further suits with reference to the same lease.

\* Suit No. 792 of 1908.

(1) (1891) A. C. 460.

(2) (1903) 27 Bom. 357.

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The said Small Cause Court suits were filed by the defendant against the plaintiff to recover from the latter the rent due under the lease up to the end of April 1908.

On the 28th September 1908 the plaintiff served a notice of motion on the defendant calling upon him to show cause why the two suits filed by him in the Small Causes Court against the plaintiff should not be stayed until the disposal of this suit.

*Jinnah* for the plaintiff in support of the notice of motion.

The High Court has power to grant the injunction asked for. See *Rash Behary Dey v. Bhowani Churn Bhose* (1) and *Mungle Chand v. Gopal Ram* (2).

[470] *Robertson* for the defendant.

The Court has no power to grant the injunction: see *Jairamdas v. Zamonlal* (3). The proper remedy of the plaintiff was to get the Small Causes Court suits removed to the High Court.

If the Court is inclined to grant the plaintiff's application the plaintiff should be put on terms by being required to deposit in Court the amount of the defendant's claim.

MACLEOD, J.:—The plaintiff has filed this suit praying for a declaration that he is entitled to avoid the lease to him by the defendant of certain premises, dated the 18th October 1907, as modified by a writing of the 6th December 1907. Before this suit was filed the defendant had filed two suits Nos. 5609 and 12,929 of 1908 in the Small Causes Court for rent due under the said lease. The plaintiff now moves for an order and injunction of this Court to restrain the defendant from proceeding with the said Small Causes Court suits and from filing further suits with reference to the said lease pending the hearing of this suit.

It cannot be denied that as the plaintiff's liability to pay rent under the lease depends on whether he will be successful in avoiding it, it is highly desirable that these suits should be stayed provided the defendant is in no way prejudiced thereby. Mr. Robertson, counsel for defendant, however, argued that the Court had no jurisdiction to grant the injunction.

By the Letters Patent of 1823 the Supreme Court was authorized and empowered to make such further and other interlocutory rules and orders as the justice of the proceeding might seem to require and it was further ordained that the Supreme Court should also be a Court of Equity.

By section 9 of 24 and 25 Vic. c. 104 it was enacted that the High Courts to be established under that Act should have and exercise all such civil jurisdiction, original and appellate, and all such power and authority for and in relation to the administration of justice as Her Majesty might by Letters Patent grant [471] and direct, and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the Legislative Powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Courts to be established in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under that Act.

The amended Letters Patent of 1865 are silent on the subject of interlocutory rules and orders but under clause 19 the law or equity to be applied in each case coming before the High Court in the exercise of the

(1) (1906) 34 Cal. 97.

(2) (1906) 34 Cal. 101.

(3) (1908) 27 Bom. 857.



ordinary original civil jurisdiction shall be the law or equity which would have been applied by the High Court if the Letters Patent had not issued. It follows, therefore, that the High Court has power to make such interlocutory rules and orders as the justice of the proceeding may require provided they are not directly prohibited by the Letters Patent or by statute.

Section 53 of the Specific Relief Act (I of 1879) is as follows :—

“Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.”

Sections 492 to 497 are the only sections of the Civil Procedure Code of 1882 dealing with temporary injunctions.

Sections 492 and 493 enact that under certain circumstances the Court may grant temporary injunctions.

I am asked to hold that the powers of the Court to grant temporary injunctions are limited to those cases in which the circumstances detailed in sections 492 and 493 exist, and I have been referred to a decision of Russell, J., in *Jairamdas v. Zamonlal* (1) as establishing that proposition.

Mr. Robertson argued that the decision was binding upon me on the doctrine of *stare decisis*.

It is necessary, therefore, to consider what was the actual point decided by the learned Judge in that case, because the doctrine does not become applicable unless the point is the same.

[472] It often happens that when a case is carefully examined it will be found that the judge has not decided what it is argued he has, or that what at first sight may appear to be a principle of general application can only apply to the particular facts of the case. The injunction was refused in that case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code, but I do not find that it was laid down as an abstract proposition that owing to the provisions of those sections the Court could not grant a temporary injunction in exercise of its inherent equitable powers to do what was justice and for the advantage of the parties.

The passage from Blackstone on the rule of *stare decisis* quoted by Davar, J., in *Jamshedji C. Tarachand v. Soonabai* (2) refers more to the days when judicial decisions were considered as enunciations of what was the common law of England. The principles to guide one in applying the rule appear in more modern form in the American and English Encyclopædia of Law, 2nd Edition, Vol. 26, from p. 158 onward.

The passages I quote are especially valuable as the position of the Courts of the various States in America as regards their respective decisions is very much the same as that of the various High Courts in India.

“*Decisions of co-ordinate Courts.* To secure uniformity of decisions a Court will, as a general rule, adhere to a principle laid down by a Court having co-ordinate jurisdiction until it is changed by the decision of a higher Court. . . The rule however is not considered absolutely binding but may be departed from in the discretion of the Court. So a Court will not follow the decisions of a co-ordinate Court where they are evidently made through mistake or are so clearly erroneous that the error is undoubted.”

“*Single decisions.* Distinction has also been drawn in the application of the doctrine of *stare decisis* where only one decision is relied upon as establishing the doctrine. For a variety of reasons a series of decisions will be

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(1) (1903) 27 Bom. 357.

(2) (1907) 33 Bom 122 at p. 147.



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given more [478] weight than a single decision. There is less likelihood of error; any previous decision or statutes overlooked in the one may be considered in subsequent cases."

"Also the opinion and decision of a Court must be read and examined as a whole in the light of the facts upon which it is based, and not applied by picking out particular parts or sentences. The facts are the foundation of the entire structure, which cannot with safety be used without reference to the facts. The decision is only an authority for what it actually decides and cannot be quoted for a proposition which may seem logically to follow from it."

The last passage is especially pertinent to the present case, as it is only by inference that it can be said that the learned Judge laid down the abstract proposition above referred to. The decision by itself amounts to this, that the injunction was refused in that particular case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code.

But the question whether the powers of the High Court are limited by the provisions of the Civil Procedure Code is dealt with exhaustively by Woodroffe and Mookerjee, JJ., in *Hukum Chand Boid v. Kamalanand Singh* (1).

At page 931 Woodroffe, J., says :—

"The Code does not as I have already had occasion to hold, *Punchanon Singh v. Kunuklota Barmoni* (2) affect the power and duty of the Court, in cases where no specific rule exists, to act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. . . . The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration, for which it alone exists. It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiæ* to consolidate. . . . These instances (and there are others) are sufficient to show, firstly that the Code is not exhaustive and, secondly, that in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties."

[474] At p. 940, Mookerjee, J., says.

"I entirely repudiate the theory that our powers are rigidly circumscribed by the provisions of the Code, and that we have no power to make a particular order, though it may be absolutely essential in the interest of justice, unless some section of the Code can be pointed out as a direct authority for it. . . . Such a theory, moreover, is entirely inconsistent with various decisions of the Judicial Committee and of the different High Courts of this country, among which I need only mention those in the cases of *Ram Kirpal v. Mussumat Rup Kuari* (3) . . . *Surenranath Banerjee v. The Chief Justice and Judges of the High Court of Bengal* (4)" &c.

Section 53 of the Specific Relief Act merely states that temporary injunctions are regulated by the Code of Civil Procedure, it does not enact that the Court shall grant only such temporary injunctions as are provided for in the Code. So that Mr. Robertson's argument could only prevail if the Code had prescribed that the Courts should only grant temporary injunctions under the particular circumstances detailed therein and no others. That this is not the effect of sections 492 to 497 has been decided in *Rash Behary Dey v. Bhowani Churn Bhose* (5) and *Mungle Chand v. Gopal Ram* (6).

(1) (1905) 33 Cal. 937.

(2) (1905) 3 O. L. J. 29.

(3) (1838) L. R. 11 I. A. 37.

(4) (1893) L. R. 10-I. A. 171.

(5) (1906) 34 Cal. 97.

(6) (1903) 34 Cal. 101.



In my opinion I am at liberty to follow those decisions.

I therefore grant the injunction asked for but as the defendant might be prejudiced in the event of the plaintiff failing in this suit I direct as suggested by counsel during the argument that plaintiff do bring into this Court within one week Rs. 1,450 the total of the amounts sued for in the Small Causes Court suits.

Costs of the motion to be costs in the cause.

Attorneys for plaintiff : *Messrs. Jehangir Mehta and Somji.*

Attorneys for defendant : *Messrs. Pestonji, Rustim and Kola.*

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33 B. 475 (=10 Bom. L. R. 1172=3 I. C. 992).

[475] ORIGINAL CIVIL.

*Before Chief Justice Scott and Mr. Justice Batchelor.*

ESMAIL EBRAHIM (*Appellant and Plaintiff*) v. HAJI JAN MAHOMED  
HAJI MAHOMED (*Respondent and Defendant*).\*

[16th November, 1908.]

*Civil Procedure Code (Act XIV of 1882), sections 102, 103, 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.*

Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

[Dist. 13 Bom. L. R. 1242=12 I. C. 903 ; Diss. 20 I. C. 67=3 P. L. J. 355 ; Ref. 62 I. C. 253.]

THESE were two appeals from the orders of Mr. Justice Russell dated the 24th day of August 1908, the first refusing the application of the plaintiff to have the suit restored to the board and the second against the decree dismissing the suit with costs.

The plaintiff filed this suit to recover certain monies from the defendant in respect of certain Hoondies drawn by the plaintiff in favour of the defendant. The suit was called on before Russell, J., on the 17th August 1908, at a time when neither of the plaintiff's Counsel could attend the Court. The defendant raised issues and then another Counsel was instructed on behalf of the plaintiff to apply for a postponement. This was refused and the suit was dismissed with costs. An application was made under section 103 of the Civil Procedure Code for the restoration of the suit but this was refused with costs.

[476] The plaintiff thereupon filed these two appeals.

*Jinnah and Setalvad* for appellant.

The suit was called on very unexpectedly on August 17th. On that day there were two long causes and one commercial cause down for trial

\* Appeals Nos. 43 and 44 of 1908 ; Suit No. 256 of 1907.



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before this suit. These earlier suits suddenly collapsed and this suit was called on at 12-15 o'clock. At that moment both the plaintiff's Counsel were engaged addressing other Courts. The plaintiff was physically present in Court. The question then arises whether where a plaintiff has instructed Attorneys and has signed a warrant in their favour authorising them to appear and conduct the case on his behalf and his Attorneys have instructed Counsel and have duly briefed them the mere fact of the plaintiff's physical presence in Court can be said to be an appearance under section 102. See *Gopala Row v. Maria Susaya Pillai* (1), Sir Arnold White's judgment. According to that case the mere fact of the party's physical appearance in Court does not mean that he appeared under section 102. The words 'appear in person' have a well defined meaning, viz., when a party appears to conduct his own case without any Attorneys or Counsel. The fact that another Counsel was instructed to apply on behalf of the plaintiff for a postponement does not mean that there was any appearance on behalf of the plaintiff. See also *Shibendra Narain Chowdhuri v. Kinoo Ram Dass* (2), *Manilal Dhanji v. Gulam Husein Vazeer* (3).

The defendant brought into Court Rs. 207-8. The Court ought to have in any event passed a decree for this amount in favour of the plaintiff under section 102 which says that if the defendant appears and the plaintiff does not appear the Court shall dismiss the suit unless the defendant admits the claim or part thereof in which case the Court shall pass a decree against the defendant upon such admission.

*Lowndes and Strangman*, Advocate-General, for the respondent.

SCOTT, C. J.—In this case the plaintiff sued the defendant for eight thousand three hundred rupees. The defendant put in a [477] written statement admitting the claim to the extent of Rs. 207 only which he brought into Court. The suit was called on on the 17th August and the plaintiff was present in Court with his Attorneys' clerk and his witnesses ready to proceed with the hearing of the suit, but the two Counsel whom he had instructed were both absent. The defendant's Counsel appeared and raised issues and another Counsel was instructed by the plaintiff's Attorneys' clerk to apply for an adjournment which, however, was not granted. The Court after waiting for some time for the plaintiff's regularly instructed Counsel to appear, on their non-appearance, dismissed the suit with costs.

It is clear that the order of dismissal cannot stand because the plaintiff was entitled to a decree for the sum of Rs. 207 brought into Court, and as it is necessary for us to pass a decree for that amount at least, we think it is open for us to reconsider the whole case.

The plaintiff has filed two appeals, the first an appeal against the order which was made under section 103 of the Civil Procedure Code and the second an appeal against the decree dismissing his suit.

In our view sections 102 and 103 of the Code do not apply because the plaintiff was present in Court. He did appear and he was ready to go on with his suit as far as his own evidence and that of his witnesses was concerned, and the Judge notwithstanding the non-appearance of the plaintiff's Counsel could under section 117 of the Code have asked the plaintiff questions relating to the suit and could have examined his witnesses or suggested that he should instruct some other Counsel to

(1) (1906) 50 Mad. 274 at p. 276.

(2) (1886) 12 Cal. 605.

(3) (1888) 13 Bom. 12.



examine the witnesses. We do not think that it can be reasonably contended that the plaintiff did not appear, and if he did not appear then there is no case for the application of sections 102 and 103.

We think, however, that having the case now before us in consequence of the Judge's error in not passing a decree for the plaintiff for the sum of Rs. 207 brought into Court, we ought in the interests of justice to set aside the decree and direct a new trial.

[478] In making this order, however, it is necessary that we should protect the defendant from loss in consequence of the expenses that he has been put to. The plaintiff must, therefore, pay the costs of the day incurred on the 17th August, the costs of the order passed on the application under section 103, the costs of and incidental to the drawing up of the decree dismissing the suit and the costs of both these appeals.

The result will be heavy costs upon the plaintiff owing to the neglect of his Counsel. In this connection it seems necessary to remind the Bar that the rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges shortly after the establishment of the High Court when several Divisional Courts sat simultaneously on the Original Side. The rule was introduced in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend till he can come in. If members of the Bar disregard their obligations in such cases the justification for the two Counsel rule will cease to exist and the rules for taxation between party and party will have to be revised by the Judges.

The payment of the costs, which we have ordered, will be a condition precedent to the hearing of the suit, the defendant undertaking to have his costs taxed and the allocatur served within three weeks.

Attorneys for the appellant: *Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondents: *Messrs. Payne & Co.*

33 B. 479 (=11 Bom. L. R. 345=2 I. C. 530).

[479] APPELLATE CIVIL.

*Before Sir Basil Scott, Chief Justice and Mr. Justice Batchelor.*

CHHAGANLAL KISHOREDAS (*Original Plaintiff*), Appellant, v.

BAI HARKHA (*original Defendant No. 2*), Respondents.\*

[23rd March, 1909.]

*Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Plea of res judicata can prevail even where its effect is to sanction what is illegal—Bhagdari and Narwadari Tenures Act (Bombay Act V of 1862), sec. 3. †*

\* Second Appeal No. 244 of 1908.

† The section runs as follows:—

3. It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhag or share in any Bhagdari or Narwadari village other than a recognized sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any home-stead, building site (gabhan) or premises, appurtenant or appendant to any such bhag or share, or recognised sub-division, appurtenant or appendant thereto, apart or separately from any such bhag or share or recognised sub-division thereof.

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33 B. 475=10  
Bom. L. R.  
1172=3 I. C.  
992.



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A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

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[Ref. 10 I. C. 329 ; 61 I. C. 162=45 Bom. 1260 (F. B.)].

33 B. 479=11  
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SECOND appeal from the decision of Chimanlal Lallubhai, First Class Subordinate Judge, with appellate powers, at Ahmedabad, confirming the decree passed by B. G. Desai, Subordinate Judge at Kaira.

Suit to recover rent.

The property, with respect to which the suit was brought, belonged to Govind and Gokul. It formed a portion of a bhag or share; any alienation, assignment, &c., of which was prohibited by the Bhagdari and Narwadari Tenures Act (Bombay Act V of 1862), sec. 3.

The lands in dispute which formed an unrecognised sub-division of a bhag, were mortgaged by Govind and Gokul to Chhaganlal Kishoredas (plaintiff) with possession on the 3rd February 1893. On the same day Govind passed a lease to the plaintiff for a term of five years. There were many other subsequent leases, the last of which was passed by Govind for a period of one year on the 10th September 1902. Even after the [480] expiry of this period, Govind remained in possession of the lands till his death which took place in June 1905. After his death, his widow Bai Harkha (defendant 2) cultivated the lands on behalf of herself and her minor son Ambalal (defendant 1).

During Govind's life-time, he was sued by the plaintiff for rent for the years 1902-03 and 1903-04 and an *ex parte* decree was passed against him.

The plaintiffs now sued the defendants to recover from them rent for the years 1904-05 and 1905-06.

Defendants contended (*inter alia*) that the land in suit was Narwa land, and that the sale or mortgage thereof in favour of any person other than a Narwadar was invalid and that it could not be dismembered, and that as the plaintiff could not get possession of the land under the Bhagdari Act he could not claim the rent thereof.

The Court of first instance held that the mortgage in favour of the plaintiff was illegal, and the lease of the land on the basis of the said mortgage was invalid and that the plaintiff could not recover damages in lieu of rent.

On appeal, the only issue raised in the lower appellate Court was: "Are the defendants-respondents estopped from denying the title of the plaintiff-appellant and are they liable for the amount claimed by the plaintiff-appellant?" This issue was found in the negative.

The plaintiff appealed to the High Court.

H. C. Coyaji (with L. A. Shah), for the appellant:—We concede that the mortgage in our favour is void under the Bhagdari Act, 1862; but the lease which has been passed to us is not on that account void. The lessee Govind paid to us rent for a number of years, and even allowed an *ex parte* decree for rent to be passed against him. Refers to *Rungo Lall v. Abdool*



*Guffoor* (1); *Venkaresh Narain Pai v. Krishnaji Arjun* (2); *Balaji v. Ramchandra* (3); *Patel Kilabhai v. Hargovan* (4); *Morton v. Woods* (5); *Seshamma Shettati* [481] *v. Chickaya Hegado* (6). The decree in the previous suit operates as *res judicata*: *Dwarka Das v. Akhay Singh* (7); *Jamadar Singh v. Serazuddin Ahmad Chaudhuri* (8).

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*Ratanlal Ranchhodas* for the respondent: — We submit that not only is the mortgage void under the Bhagdari Act, 1862; but the lease also shares the same character, it being an alienation of an unrecognized division of a bhag under section 3 of the Act.

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The decree against Govind being *ex parte* cannot operate as *res judicata*: *Modhusudun Shaha Mundul v. Brae* (9). Further, where the effect of *res judicata* is to validate what has been specifically prohibited by statute the plea should not be allowed to prevail; otherwise, it would be open to the parties to effect transactions in an indirect way, which they cannot do in face of the statute.

SCOTT, C. J.:—On the 3rd of February 1903 a possessory mortgage of certain Bhagdari land was executed by Govind Khodabhai and his brother in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for five years. Further agreements of a similar nature were subsequently executed by Govind in the plaintiff's favour the last being of the 18th September 1902 for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow the second defendant cultivated the land on behalf of herself and the first defendant her minor son. This suit has been brought by the plaintiff to recover the rent of the land for two years namely 1904-5 and 1905-6. No objection has been taken that rent accruing due in the life-time of Govind is not claimable against the defendants personally in this suit. The plaintiff comes here in special appeal having failed in both the lower Courts.

The land the subject of the mortgage and of the tenancy agreements is Bhagdari land, part of a Narwa, but not a recognised sub-division of a share or Bhag: the mortgage is therefore unlaw- [482] ful and void under section 3 of the Bhagdari Act (Bombay Act V of 1862). It is argued on behalf of the defendants that the tenancy agreements whether express or implied under which the mortgagor Govind and his heirs have remained in possession are void as being alienations tainted with the same vice as the principal transaction and that rent is therefore not recoverable. For the plaintiff it is contended that not only are these arguments unsound but also that they are no longer open to the defendants because the plaintiff's right to recover rent has been established by an *ex parte* decree against Govind obtained by the plaintiff for rent in respect of the years 1902-3 and 1903-4. It is argued that the questions now raised by the defendants might and ought to have been raised in the suit in which the decree was obtained and must be taken to have been decided against the plaintiff since they claim title merely by virtue of their heirship to Govind. It cannot be disputed that if the points now raised by the defendants are good they would have been equally good for the purposes of defence in the previous suit; they ought therefore to have been raised. It was however

(1) (1878) 4 Cal. 314.

(2) (1875) 8 Bom. 160.

(3) (1902) 27 Bom. 262.

(4) (1894) 19 Bom. 133.

(5) (1869) L. R. 4 Q. B. 298.

(6) (1902) 25 Mad. 507.

(7) (1908) 30 All. 470.

(8) (1908) 35 Cal. 979.

(9) (1889) 16 Cal. 300.



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suggested by the pleader for the defendants that a plea of estoppel by *res judicata* cannot prevail where the result of giving effect to it will be to sanction what is illegal. This however is not the law. No such limitation is contained in section 13 of the Code of 1882. If the legality of an act is a point substantially in dispute it may be a fair subject of compromise in Court like any other disputed matter and thus become *res judicata*: see *Great North-West Central Railway v. Charlebois* (1); similarly if it is abandoned or not put forward by a defendant it must, having regard to the provisions of section 13, be deemed to have been decided against him. The defences raised are therefore not now open to the defendants and the plaintiff is entitled to the rent claimed.

We reverse the decree of the lower Courts and pass a decree for the plaintiff for the amount claimed with costs throughout.

*Decree reversed.*

33 B. 483 (=11 Bom. L. R. 674=3 I. C. 757).

[483] APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Heaton.*

THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY  
(Original Opponent No. 1), Appellants, v. JALBHOY ARDESHIR  
SETT AND ANOTHER (Original Claimant and Opponent, No. 2),  
Respondents.\*

[7th April, 1909.]

*Land Acquisition Act (I of 1894), section 23—"Market value of land"—Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bombay Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references.*

The Government of Bombay, acting on behalf of the Improvement Trustees, under the City of Bombay Improvement Act (Bombay Act IV of 1898), notified for acquisition nine parcels of land in December 1898. At the date of the notification, J., the owner of the parcels, was in unencumbered possession of only one of them; and the remaining parcels were let on permanent leases as building sites. Between the dates of notification and acquisition, J. bought out the interests of the tenant in one of the parcels. The situation of the land was such that the whole plot consisting of the nine parcels was capable of forming a valuable quarry. The Collector in assessing compensation dealt with all the parcels separately; and refused compensation on a quarrying basis. As regards the seven parcels, the award was arrived at on a rental basis. In all the nine cases, references were claimed and made to the Tribunal of Appeal constituted under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898). After the Collector had made his award and before the references were heard, J. bought out the tenants' rights in the seven parcels. J. next applied to the Tribunal of appeal for consolidation of the references into one: this was allowed. The Tribunal of Appeal allowed J's claim for compensation for the whole land on a quarrying basis. On appeal, it was objected that the consolidation was wrongly allowed for J. was thereby permitted to advance a claim—namely the claim to the quarrying value—which otherwise he would not have been able to make.

*Held*, that the consolidation was rightly allowed and had not the effect which was contended for. It was not by reason of the consolidation of references that J. was enabled to put forward what might be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector.

\* First Appeal No. 80 of 1903.

(1) [1899] A. C. 114 at p. 124.



[484] Held further, that compensation should not be assessed on a quarriable basis, for the land was never a marketable quarry at the material time, and did not become so till after the Collector had made his award.

*Per Batchelor, J.* :—For the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act (I of 1894), the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

*Collector of Belgaum v. Bhimrao* (1) followed.

The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell; and then of apportioning that value among the persons interested. The "market value of the land" means the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights.

*Per Heaton, J.* :—Taking the scope of the Land Acquisition Act (I of 1894) and its words, it seems that in ascertaining compensation for land taken up neither the method of valuing each interest in it separately nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded. What is intended is a fair and reasonable estimate of the compensation to be awarded: and this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land by either of the two methods. This opinion does not conflict with what was decided in *Collector of Belgaum v. Bhimrao* (1).

[Ref. 11 C. L. J. 612=6 I. C. 457; 42 Mad. 644=36 M. L. J. 455; 24 C. W. N. 184; 31 Bom. 618; 83 I. C. 442.]

APPEAL against the decision of Tribunal of Appeal appointed under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898).

In December 1898, the Government of Bombay, acting on behalf of the Trustees for Improvement of the City of Bombay, published a notification for acquiring a piece of land belonging to one Jalbhoy. The piece consisted of nine parcels of land. The situation of the piece on the top of a cliff was such that it formed by itself a valuable quarry.

At the date of the notification Jalbhoy was in unencumbered possession of one parcel alone. The remaining parcels were let [485] out by him as building sites on permanent tenure. After the notification and before the date of the award by the Collector, Jalbhoy purchased tenants' right in one more parcel.

The Collector valued all the nine plots separately on the rental basis and awarded Rs. 11,803-14-8 as compensation to Jalbhoy for the whole piece of land.

On Jalbhoy's application, the Collector referred all the nine cases to the Tribunal of Appeal.

After the date of the Collector's award and before the references came on for hearing before the Tribunal of Appeal, Jalbhoy bought the tenants' rights in the seven remaining parcels. This made him the owner of all interests in all the nine plots of land.

Jalbhoy next urged upon the Tribunal of Appeal to consolidate all the nine cases into one, as he had become owner of all interests in the whole piece consisting of nine parcels of land. The consolidation prayed for was allowed and the cases were heard together as one appeal.

(1) (1908) 10 Bom. L. R. 657.

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Before the Tribunal of Appeal, Jalbhoy claimed compensation for the whole piece on a quarryable basis. The Tribunal allowed the claim and fixed the amount of compensation to be awarded to Jalbhoy at Rs. 42,364. The grounds of the decision were as follows:—

It was argued that the purchase of the tenants' rights long after the date of Declaration disentitled the claimant to any quarrying rights, and these rights were destroyed by his having let the land for building purposes on a permanent tenure. It was also argued that at any rate, at the date of the Declaration, the tenants were parties entitled to a part of the compensation in their own rights.

We have to consider therefore if the tenants' interest, which the claimant has purchased from the several tenants of the seven plots, falls under the purview of section 49 (2). If it does, the claimant's right to claim compensation for the quarry becomes very questionable.

The effect of a notification under the Act is to put an end to the right of the parties to interfere with the land or to add anything to its value, so as to become entitled to enhanced compensation. The valuation of the land to be acquired must be made, keeping in view the market value that a prudent purchaser would pay at the date of the Declaration. The question therefore to determine was, what was the value of the land on that date.

In the present case what we have to consider is, whether there is any interest created or enlarged by the claimant, after the date of notification, so as to [186] increase the amount of compensation to be paid for the land, under section 49 (2). It seems not. The right to quarry was in the owner of Nowroji Hall and till within the last 10 years quarrying had been carried on quite close to the plots in question. We think the right was not totally destroyed by the letting of the plots for building purposes, but was simply kept in abeyance during the occupation of the land by the tenants.

The owner of the Hall was, so as to say, possessed of the freehold. He owned the soil and had the right to quarry, but that right he could not exercise so long as his tenants occupied the land. That right would revive, and he would become repossessed of it at any time he bought out the tenants.

The claimant was the only person to appear before the Tribunal claiming full compensation for all interests. The tenants did not appear, and did not make any claim.

Under these circumstances, if this view was correct, it would follow that no new interest was created after the date of Notification, nor was any interest that previously existed enlarged after that date. The interest in the right to quarry was there; it was in abeyance for a time. The tenants, who had taken the land on lease for building purposes, had no right to quarry; they were entitled to the use of the surface-land only. When, therefore, the landlord bought out the tenants' building rights he became repossessed of what he originally had as the owner of the soil in the seven plots. As to plots 505 and 510 there was no dispute and claimant was admittedly the owner of all interests in them.

The case presents another difficulty: for, if each plot is taken separately it is so very small in size that it would not be possible to carry on quarrying operations with safety. In that case we think it fair that something extra should be allowed for the chance of acquiring the other plots so as to get a quarryable area.

Under the Land Acquisition Act, section 23, we have to ascertain the market value of the land. To do this, it has been held by my predecessor in office that it was not necessary to value the interests of the landlord and the tenant separately, but all interests should be valued together. In reference No 22 of 1905, Mr. Macleod said that it was not intended that the Collector should split up interests and value them separately and independently; as for instance to treat a landlord's interest and a tenant's interests in the same land as distinct things to be valued apart from each other.

The treatment of the different References as one Reference strengthened claimant's contention demanding compensation for his quarry rights. The question for decision is an important and difficult one, and I have consequently expressed my willingness to grant a certificate of Appeal to the High Court. We are inclined however to hold and we find that claimant has not acquired any new or enlarged interest in terms of section 49 (2) so as to increase the amount of compensation to be paid for the land.



[487] The Tribunal further worked out alternatively compensation on a rental basis : and in doing so, they remarked as follows :—

“ If the method adopted by us for the above valuation is not accepted by the High Court, the other method to follow would be to determine what a prudent purchaser would pay on valuing each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarriable area. In that event we would adopt the valuation made by the collector, but with this modification that instead of allowing 14 2/7 years' purchase as he has done, we would increase the number of years' purchase to 18 1/3.”

The Trustees appealed to the High Court.

*Lowndes and Jardine* (with Messrs. *Crauford, Brown and Company*) for the appellants :—It is not competent to the claimant to acquire a new interest in the plots after the date of the Notification issued under the Land Acquisition Act (I of 1894). The claimant Jalbhoy bought up the tenant's rights in seven plots after the date of the Collector's award. But as soon as the Collector's award was made, the land vested absolutely in His Majesty under section 50 of the City of Bombay Improvement Act, 1893. The tenants had no other interest left to them except the right to receive compensation awarded, and Jalbhoy cannot claim to have got anything more than such right by reason of the said purchase.

The Tribunal of Appeal erred in allowing the cases to be consolidated before them. The consolidation cannot be allowed where its effect is to enable a party to put forth a claim which he could not make if the consolidation were not allowed.

Further, the Tribunal have erred in valuing the land here on the basis of an unencumbered free-hold and then proceeding to divide the amount into different interests. Property to be acquired must be valued *rebus sic stantibus* at the date of declaration. Land in the abstract can have no market value. There can be no such thing as the market value of land in the abstract separate from the interests therein. What one buys in the market is the interest in the land. The market value of land must mean the aggregate value of various interests in it. The words used in a conveyance of land are always “the right, title and interest of X, Y, Z.”

[488] The difficulty of attempting to value land in the abstract will be apparent from the following instances :—

(1) It has been held by the Privy Council that the Collector's award is merely an offer made on behalf of Government. If the Collector is to value in the abstract, how can he make an offer to various persons having an interest in the land? In *In re Esufali Salebhai* (1) Macleod, J., has held that the term “claimant” in the Land Acquisition Act, 1894, means the aggregate body of claimants and that the offer has to be made to the claimants as a body. I submit that this is not a right interpretation.

(2) The land is acquired free from all incumbrances, *e.g.*, easements. How can you value land in the abstract free from easements? The easements might be more valuable than the land and you must value them separately.

(3) In cases of Toka tenure, the interest of the Toka tenant has a market value and is sold every day. Free-hold is never sold. It was held that the Government was not a party interested in the valuation of Toka tenure land under the Land Acquisition Act. The City of Bombay Improvement Act was, therefore, amended subsequently so as to make the Government a party interested.

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(1) (1908) 10 Bom. L. R. 994 at p. 993.



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(4) In lands held on Sanad tenure, there is a chance of Government resuming the land. How can you value such land as unencumbered freehold? If you do, how can you apportion the interest of Government, which is merely a change of Government resuming the land?

I submit that even under the Land Acquisition Act the separate interests in land and not land in the abstract are to be valued. Section 9 of the land Acquisition Act speaks of claims to compensation for all interests in the land. Section 11 also refers to interests in the lands, sections 19, 20, 21 and 23 contemplate separate awards of compensation in case of persons holding separate interests in the lands. The whole scheme of the Land Acquisition Act is to compensate individuals for their separate interests. The principles of English Law, therefore, apply here, [489] according to which the value to the owner and not to the acquiring body is to be determined and awarded. See *Stebbing v. Metropolitan Board of Works* (1); *Penny v. Penny* (2); *Abrahams v. Mayor, Aldermen, and Commons of the City of London* (3); Cripps on compensation (4th Edn.,) p. 109.

The appellants further submitted that owners of separate properties cannot combine so as to secure a larger value for their combined properties. Value of a large area made up of irregular plots if sold as one plot would be much larger than the aggregate values of the separate irregular plots. Such valuation is not allowed, for by so valuing you would be giving each separate owner more than he is entitled to by way of compensation for his interest. See *Mayor of Tynemouth and Duke of Northumberland* (4).

You may give something more for the possibility of the claimant acquiring the adjacent lands and thus increasing the value of his interest. But the possibility must not be very remote. The tenants in the present case are Fazandar tenants and have a permanent interest in the land. Jalbhoy is the Fazandar and has the right to receive the ground-rent and nothing else. The tenants are the owners of the land subject to the payment of ground-rent, there being no power of re-entry in Jalbhoy. The tenants and Jalbhoy, therefore, cannot combine.

Further, it is not the tenants who come and ask to combine but a person who has bought up the tenant's rights after the notification. No difference exists between an outsider and a Fazandar buying up the tenants' rights. If the tenants cannot claim to combine, how can a person who has bought their rights do so?

As regards the principle of valuation, the observations in *Government of Bombay v. Merwanji Nuncherji Cama* (5) and *Collector of Belgaum v. Bhimrao* (6) are against me.

The true principle is to value the interest of each holder of a tenure and give him a sum equivalent to the purchase-money of [490] such interest: *Dinendra Narain Roy v. Tituram Mukerjee* (7); *Fink v. Secretary of State for India* (8). These cases were decided under the Land Acquisition Act. But the present case falls under section 49 (2) of the City of Bombay Improvement Act. It shows pointedly that you must value the separate interests separately.

(1) (1870) L. R. 6 Q. B. 37 at p. 41.

(2) (1867) L. R. 5 Eq. 227 at p. 285.

(3) (1868) L. R. 6 Eq. 625 at pp. 629, 632.

(4) (1903) 19 T. L. R. of 630.

(5) (1903) 10 Bom. L. R. 907 at p. 918.

(6) (1903) 10 Bom. L. R. 65.

(7) (1901) 30 Cal. 801.

(8) (1907) 34 Cal. 599.



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Jalbhoy is not entitled to valuation on the quarrying basis. Originally, there were two alternatives before the owner of these plots. (1) Hanging on to the land without the prospect of any return in the immediate future on the chance of quarrying it later on when the same could be profitable, or (2) letting out the land immediately for building purposes and getting an immediate return for the same. The owner here chose the second alternative and got a large return during these years. He cannot now claim the profits of quarrying.

*Strangman* (Advocate-General) with *Inverarity* (instructed by *Pestonji Rustam and Kola*) for the respondent.—The question as to how the value is to be assessed resolves itself into two other questions. (1) Is it land or various interests in land which are to be valued; and (2) Is the Collector to be allowed to prejudice the owner by splitting up the land as he thinks fit and making separate sales and separate awards for the parcels into which the land is split up. I submit, the answer to the first question is land; and the second question must be answered in the negative. As to the first question, I rely on the plain meaning of sections 3a, 4, 6, 9, 11, 13, 20, 21, 22, 29 and 30 of the Land Acquisition Act; and on the case of *Collector of Belgaum v. Bhimrao* (1). If the argument of the appellants is to be given effect to then you must substitute "market value of the separate interest in the land" for the phrase "market value of land" in section 23 of the Land Acquisition Act, 1894.

In the present case, Jalbhoy was the common owner of the soil and the quarry. It is quite immaterial to what use the owner may have put his land. If you treat the interests as having [491] combined, then why not assume a combination for a common owner. The claimant was at the date of the declaration entitled to the value of the land on the quarrying basis minus what it would cost him to buy out the tenants. The market value is what a purchaser would give for all the interests combined.

*Lowndes* in reply :—Once you assume combination there is no obstacle to valuing the land on a quarriable basis. But the combination must either rest on fact or be assumed in law. There is none in fact, under what law then can it be assumed? The whole scheme of the Land Acquisition Act is compensation; therefore the enquiry must be what is the man losing? The Court cannot undertake to "compensate" for land in the abstract. The English practice is to compensate for separate interests. See Lands Clauses Consolidation Act, 1845, (8 and 9 Vict., c. 18), sections 9, 12, 15, 16, 18; Housing of the Working Classes Act (53 and 54 Vic., c. 70), section 21 (1).

BATCHELOR, J. :—This is an appeal from a decision of the Tribunal of Appeal appointed under section 48 of the City of Bombay Improvement Act, 1898, and has reference to the amount of compensation to be awarded to the claimant, Jalbhoy Ardesir Sett, in respect of nine parcels of land which have been acquired by Government for the Improvement Trustees under the Improvement Act, 1898. The compensation awarded by the Special Collector was Rs. 11,803, and on appeal to the Tribunal this sum was increased to Rs. 42,364 with interest at 6 per cent. on Rs. 30,560. Against this award the Improvement Trustees bring the present appeal contending that the Tribunal has applied wrong principles in assessing the compensation and that an excessive sum has consequently been allowed.

(1) (1908) 10 Bom. L. R. 657.



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The facts are not in dispute, and for present purposes may be shortly stated as follows. In December 1898 the nine parcels were notified in connection with a scheme under section 27 of the Improvement Act, and at that time Jalbhoy was in unencumbered ownership of only one of the parcels, No. 505, the others being let on leases. The land is such that the whole plot, consisting of the nine parcels, forms in itself a valuable quarry, but it is not profitable to quarry any small area such as a single parcel. [494] Between the notification and the acquisition Jalbhoy bought out the interest of the tenant of parcel No. 510. In acquiring the land the Special Collector dealt separately with parcels 505 and 510, to which apparently a part of No. 512 was also added, and refused Jalbhoy's claim to receive compensation on a quarrying basis. Jalbhoy appealed to the Tribunal, his general claim for quarrying value being included in the reference. As to the remaining parcels, the Collector made separate awards, valuing the house-holders' interests on a rental basis, and assessing the interest of Jalbhoy as Fazandar at 25 years' purchase of the rents. None of the tenants claimed a compensation reference to the Tribunal, but Jalbhoy did claim this reference in each case, and in each case he made it without prejudice to his general claim for quarrying value as embodied in his appeal regarding parcels 505, 510 and 512. After the Collector had made his award, and before the references to the Tribunal came on for hearing, Jalbhoy bought out all the remaining tenants. When the references were taken up by the Tribunal, Jalbhoy applied that they should be consolidated and that his claim for compensation on a quarrying basis should be allowed. Mr. Lowndes's first objection to the decision under appeal is that the Tribunal was wrong in allowing the references to be consolidated with the result that Jalbhoy was thus permitted to advance a claim—namely, the claim to the quarrying value—which otherwise he would not have been able to make. But in my opinion the consolidation had not this effect, and was rightly allowed. Mr. Lowndes concedes that Jalbhoy could not be prejudiced by any parcelling out of the land which the Collector might choose to make, and, that being so, the objection seems to me to fail. For it was not by reason of the consolidation of references that Jalbhoy was enabled to put forward what may be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector. Moreover it must be remembered that Jalbhoy as Fazandar owner of some of the plots and as lessor of the others with the prior right of buying out the lessee had an interest in the whole area acquired.

[493] To pass now to the main argument which has been addressed to us: it turns upon the meaning of the words "the market value of the land" in section 23 of the Land Acquisition Act. The Advocate General has contended that the compensation to be awarded must be ascertained by reference to the value of the land itself considered, as he put it, as unencumbered freehold, that is, on the assumption that all interests combine to sell; Mr. Lowndes, on the other hand, has urged that the true meaning of the Act is that compensation should be awarded by the valuation of the separate interests existing in the land. It appears to have been assumed at the bar that the choice between these alternative constructions must determine the result, but for my own part I am not clear that such an assumption is well founded. However that may be, I think that the point in controversy is, so far as this Court is concerned, concluded by the case



of *Collector of Belgaum v. Bhimrao* (1). While that case stands, I can see no room for the appellants' present contention, and I did not understand Mr. Lowndes to suggest that the contention could be allowed under the Land Acquisition Act so long as the case retains its authority. The decision, to which I was a party, is a decision of this Appeal Court and has the high authority of Jenkins, C. J., who in delivering the judgment laid down that for the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act "the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it." That, as I understand it, was said in general terms upon the construction of the Act, and formed the *ratio decidendi*. So far as the Land Acquisition Act is concerned, I think the ruling is decisive, and it is of course binding upon us now. The only ground upon which Mr. Lowndes sought to avoid this decision was, if I followed his argument correctly, that here the land was acquired not under the Land Acquisition Act, but under the Bombay City Improvement Act. The distinction certainly exists, but in my opinion it is not material. For the Improvement Act incorporates the relevant provisions of the Land Acquisition Act, including section 23, and I can find no good reason for supposing that [494] the Improvement Act intends, or operates, to effect a fundamental change in the methods of the Land Acquisition Act. No such far reaching effect ought, I think, to be given to section 49 (2) of the Improvement Act, which merely reproduces section 21 (b) of the English statute, the Housing of the Working Classes Act, 1890, and which may receive ample meaning without recourse to the unlikely hypothesis that so important a change in the Acquisition Act was intended to be made by way of in direct and somewhat far-fetched inference. In my opinion, therefore, it would be enough to say that the decision in the *Collector of Belgaum's* case (1) is fatal to the contention that the land here should be valued on the footing of assessing the separate interests.

But as I am anxious to avoid any appearance of treating unceremoniously the careful and elaborate argument we have had from Mr. Lowndes, I will notice briefly the main points which he has discussed. His chief reliance was placed upon certain particular sections of the Land Acquisition Act, such as sections 3 (g) (iv), 9 (3) and 31 (1) (2) (3) and (4) as showing that the word "land" was used in the Act as equivalent to "interest in land." The Advocate-General, on the other hand, has pointed to a number of other sections where the word "land" appears to denote the physical object. It would be tedious to analyse all these sections individually, nor do I think it necessary to do so. There can be no doubt that the word "compensation" is occasionally used to mean the particular sum awarded for the acquisition of a particular interest, but that is quite consistent with the position taken by the Advocate-General. Reading the Act as a whole, I can come to no other conclusion than that it contemplates the award of compensation in this way: first you ascertain the market value of the land on the footing that all separate interests combine to sell; and then you apportion or distribute that sum among the various persons found to be interested: sections 3, 11, 18, 19, 20 and especially sections 29 and 30 are to my mind decisive upon the point. Section 31 (3) which Mr. Lowndes claims in his favour appears to me to tell the other way, for, though the sub-section is not perhaps worded with [495] perfect accuracy, we have the antithesis marked between land and

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(1) (1908) 10 Bom. L. R. 657.



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an interest in land. That distinction is, as I understand it, preserved throughout the Act, where "land" is always used to denote the physical object, which is after all the thing that has to be acquired. Provision is made for compensation to all persons interested, but claims on this head are, I think, to be adjusted in the apportionment prescribed under sections 29 and 30, and do not fall to be considered till after the Court has determined the market value of the land under section 23 (1).

Then Mr. Lowndes urged that the theory which I am endeavouring to justify would lead to unwelcome results in its practical application, and he gave us two or three instances of such difficulty. I have considered those instances to the best of my ability, but am not prepared to concede that the difficulties suggested are inevitable under my view of the Act, and in any case, if that view is right, the argument is no more than an argument *ab inconvenienti*, and the answer would be that our Act is less convenient than would be an Act prescribing valuation by separate interests. I must not of course be taken to express an opinion that an Act drawn so as to impose as a first step the valuation of separate interests would in fact be a better or more convenient statute than that which we have: my opinion goes no further than that that is not the meaning of the Land Acquisition Act.

As to the argument that under the English Acts dealing with similar subjects it is the established practice to value separate interests, I can only say that the English Acts in their scheme and structure differ so materially from the Land Acquisition Act that in my opinion it would be unsafe to make any inference from the practice prevailing in England. I repeat that I by no means assert that the difference in procedure must necessarily lead to any substantial difference in the result; I limit myself to saying that in my judgment the method contemplated by the Land Acquisition Act is that of ascertaining first the market value of the land as if all separate interests combined and then of apportioning that value among the persons interested. It is said that that method may on occasion prove downright impracticable or unfair, but it will be time to consider such a case when it actually arises.

Then comes the question; does this view of the methods of the Act decide the appeal in the respondent's favour? In my opinion it does not. For, though the market value of the land has to be ascertained on the assumption that all separate interests combine, that, I think, only means that the separate interests are taken to combine so as to give a complete title to the assumed purchaser and the acquiring body, not so as to impress upon the land a character which it did not bear or to give to it a value which it never had in the market; for it is still the "market value of the land" which has to be determined; and by that is meant, I think, the price which would be obtainable in the market for that concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights. If that is correct, it furnishes an answer to the contention that the full quarriable value must be allowed because this land is in fact by natural formation a quarry. That may be so: but it was never a marketable quarry at the material time, and did not become so till after the Collector had made his award. At the material time the claimant could not have obtained a quarry price for the land in the market because admittedly the permanent building leases, containing no provision for re-entry, stood between him



and any immediate ability to quarry; and the determining factor is the value to the owner, not the value to the acquiring body after acquirement. The case, therefore, seems to me to fall within the principles which have been applied in English cases to owners of land adaptable for use in reservoir sites, and to use the language of Vaughan Williams L. J., in a recent case of that sort, *In re Lucas and Chesterfield Gas and Water Board* (1), I would say that the land here had an adaptability value on the footing of its possibility as a quarry, but that it was not a realised possibility, nor was it competent to the claimant to convert it into a realised possibility, by the expedient of buying out the permanent tenants [497] after the Collector's award had been made; see sections 49 (2) and 50 of the Improvement Act.

If I am right in thinking that that is the law, there is an end of the matter; but since the point was taken, I may add that in my judgment there is really no particular hardship in this view. For it was the claimant himself who, in pursuance of his own financial interests, sacrificed and abandoned the quarry user of the land for the consideration of the rents obtainable from the permanent tenants; in other words, he himself put it out of his power to use the land as a quarry and he did so with his eyes open and for what he regarded as sufficient consideration. I do not think that he has any fair grievance if when the land comes to be acquired, it is acquired in the character in which alone he had the power of using it.

The most that he can fairly claim, in my opinion, is the market value of the land in that character plus a special allowance for its adaptability as a quarry at some future date; and to that I think he is entitled. There is no evidence as to the amount at which this special allowance should be calculated. The Tribunal recognising that the full quarriable value might not be sustained in appeal, give us an alternative finding that as allowance for the special adaptability value the number of years' purchase adopted by the Collector should be increased from  $14\frac{2}{7}$  to 18'18. The correctness of this method was at first challenged by Mr. Lowndes and defended by the Advocate General, but subsequently Mr. Lowndes informed us that he would not dispute it, as his clients were more interested in getting this Court's decision on the questions of principle than in cutting down the allowance suggested by the Tribunal.

The result is that if I am right as to way in which this land should be valued, there is now no dispute as to the quantum of compensation. In these circumstances and having regard to the special knowledge and experience possessed by the Tribunal on such points, we must adopt the alternative finding, that is to say, the market value of the land will be determined on the valuation made by the Collector subject to this modification that the number of years' purchase will be increased from  $14\frac{2}{7}$  to 18'18 years as allowance for the special adaptability value.

[498] In the circumstances of the case we make no order as to costs.

HEATON, J.—I agree in the order proposed.

The Tribunal have given two valuations: That which they prefer is arrived at by computing the market-value of the land as a whole. But the computation is vitiated because they have taken the quarrying value of the land as realized and not as latent. They have, in short, given to the owners what they consider the land is worth to the acquirer after

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acquisition, not what they estimate, it would have fetched in the market at the date of the acquisition. Because there is this defect in the computation, I agree with my learned colleague, that the valuation cannot be accepted.

The second and alternative valuation was arrived at by taking each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarriable area. How precisely this was done is not explained in detail. The Honourable the Advocate General on behalf of the claimants did not attack that valuation in particular; his argument was that the other valuation must be accepted. Mr. Lowndes for the Improvement Trust withdrew the objections to the alternative valuation which at one time he urged. That being so it seems to me we must accept the alternative valuation.

On the general question, which was most strenuously argued, it is necessary to say a few words.

Mr. Lowndes for the Appellant argued that the correct method of ascertaining compensation for land taken up is to value separately each interest in it. The Honourable the Advocate General for the respondent argued that the correct method is to value the land as a whole and then to apportion to each person interested the share to which he is entitled. Both appealed to the provisions of the Land Acquisition Act in support of their arguments; and we have had those provisions carefully read and commented on. Taking the scope of the Land Acquisition Act and its words and giving them the best consideration I can, it seems to me that neither method is excluded and that what is intended is a fair and reasonable estimate of the compensation to be [499] awarded and that this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to me to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land either by the method advocated by Mr. Lowndes or by that which receives the support of the Honourable the Advocate-General. I do not think this opinion conflicts with what was decided in *Bhimrao's* case (1); for in that case it was not held that valuation by computing different interests separately was universally wrong, but that it was correct to follow the other method in that case. But Mr. Lowndes argues that even if the Land Acquisition Act leaves the question open yet section 49, cl. (2) of the Bombay Improvement Act, which Act incorporates certain portions of the Land Acquisition Act, absolutely requires that the compensation must be ascertained by valuing separately the separate interests. The argument does not convince me. I think the Bombay Improvement Act leaves the choice of method open, just as the Land Acquisition Act does. The latter part of clause 2 of section 49, no doubt does contemplate the valuation of a separate interest and when a case such as is contemplated there actually arises—it has not arisen before us—no doubt such valuation as is required will be made.

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(1) (1908) 10 Bom. L. R. 57.



33 B. 499 (=11 Bom. L. R. 726=3 I. C. 770.)

APPELLATE CIVIL.

Before the Honourable Mr. Justice Chandavarkar, Acting Chief Justice,  
and Mr. Justice Heaton.

JIVANJI JAMSHEDJI LAKDAVALA (*Original Defendant*),  
Appellant, v. BARJORJI NASSERVANJI AND OTHERS (*Original*  
*Plaintiffs*), Respondents.\*  
[21st June, 1909].

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33 B. 499=11  
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726=3 I. C.  
770.

*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title.*

The Parsi Panchayat at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property [500] for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners, nor the nominees of the Anjuman.

*Held* that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser.

[Ref. 24 M. L. J. 642=1914 M. W. N. 67=19 I. C. 721.]

SECOND appeal from the decision of W. Baker, Acting District Judge of Surat, reversing the decree of G. M. Kharkar, Additional, Subordinate Judge of Surat.

The land in suit known as the Lal Agiari and situate in the City of Surat was formerly occupied by an Agiari (a Parsi temple). The Agiari was burnt down in the great fire of 1837 and since then the land remained waste. The land formed part of the property of the Parsi Anjuman at Surat. In the year 1846 certain property of the Anjuman was entrusted to a committee for management and the committee managed the property in suit at least since 1871 and continued to do so till about the year 1904 when the defendant trespassed on the land. The plaintiffs who were the representatives of the committee of management, thereupon, brought the present suit to eject the defendant from the land.

The defendant contended *inter alia* that the land in dispute was not the property of the Parsi Anjuman, that the plaintiffs were not the managers of the property and had never been in possession, that the property was the ancestral property of the defendant and had been in his possession as such. He further contended that the suit was not maintainable inasmuch as the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1882) was not followed.

The Subordinate Judge found that the plaintiffs were the managers of some of the properties of the Parsi Anjuman at Surat, their appointment as managers being made by the trustees at Bombay and not by the Parsi Anjuman at Surat and that the suit was not maintainable for non-compliance with the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1882). He, therefore, dismissed the suit.

[501] On appeal by the plaintiffs the District Judge found *inter alia* that the suit was not barred by section 30 of the Civil Procedure Code (Act XIV of 1882), that the land in suit belonged to the Parsi Anjuman and was under the management of the plaintiffs and that the land did not

\* Second Appeal No. 121 of 1903.



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belong to the defendant and he had encroached upon it. The District Judge, therefore, reversed the decree and allowed the claim. The following are extracts from his judgment :—

I may point out that they (managers) do not render accounts to the trustees, but the trustees render accounts to them, and that they have absolute discretion as to the manner in which the income is to be spent; provided of course it is spent on charitable objects. It might therefore be argued that their position is not that of ordinary agents. But apart from this there is evidence that though they have not been formally appointed managers by the Anjuman, which apparently never meets, there is evidence that they are in possession and management of a considerable portion of the Anjuman property, and that they are regarded as representatives of the community of Parsis at Surat. Further, it is to be noted that all their management is quite open and that their accounts are printed and published yearly, (there are about 50 volumes of accounts on the record of this case), and that the Parsi Community have acquiesced in this management. Now after 60 years the authority of the managers is challenged and though the actual property in dispute is not very valuable or important, the decision of this case will have far reaching effect on the whole question of the manager's position, which is the reason why the present case is so hotly contested.

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The fact that they are agents for the trustees in Bombay for the distribution of certain funds has nothing to do with this. I have already pointed out that these properties are not under the management of the Bombay trustees and that they could not appoint the managers their agents for the management of them. The plaintiffs are not suing as agents of the Bombay trustees but as persons who with the tacit acquiescence of the Anjuman have managed the bulk of the Anjuman property for 60 years. I am of opinion that section 30, Civil Procedure Code, does not apply to a case like the present, which is analogous to the case of the trustees of a Hindu temple and Mahomedan mosque suing to recover property belonging to the temple or mosque. It may be that the plaintiffs were never formally appointed by the Anjuman, but they and their predecessors (and the succession has been regularly kept up) have acted as managers of the Anjuman property for 60 years. It is now too late to question the validity of their acts.

The defendant preferred a second appeal.

[802] *L. A. Shah* for the appellant (defendant).

*Robertson* and *H. C. Coyaji* with *N. K. Koyaji* for the respondents (plaintiffs).

CHANDAVARKAR, Ag. C. J.—The respondents brought this suit to recover possession of the lands in dispute from the appellant alleging that from time to time a Committee of Managers had been appointed at Surat for the purpose of managing the properties of the Parsi Anjuman of that place; that the respondents were the present Committee, the first respondent being Chairman thereof; that the lands in dispute belonged to the Parsi Anjuman and had been in the management and possession of the respondents. They sought to recover possession in the capacity of managers. They also alleged that the appellant was a mere trespasser and was therefore liable to be ejected.

The first issue in the Court of first instance was :—"Whether the plaintiffs are the managers of the property of the Parsi Anjuman of Surat." The appellant applied to the Subordinate Judge that that issue might be modified by adding to it the words "appointed by the Parsi Anjuman." The Subordinate Judge thought it was unnecessary to allow the amendment, because, in his opinion, the words proposed to be added were mere surplusage.

It is common ground that the appointment of the respondents as a Committee was not by the Parsi Anjuman. The finding of the District Judge is also to that effect. He finds that they and before them their predecessors forming the Committee, of which the respondents are members, were appointed by the Parsi Panchayat in Bombay to administer



certain trusts and the appointments had nothing to do with the Parsi Anjuman of Surat. Basing his argument on this finding of fact, Mr. Shah for the appellant contends that the respondents have no right to sue for recovery of the lands in dispute since these admittedly belong to the Anjuman and the respondents are not the Anjuman's nominees. But the District Judge has also found on the evidence that with the acquiescence of the Parsi Anjuman of Surat the respondents have been managing certain properties including the property in dispute, having received them in the year 1846 from one [503] Bhikhaijee who till then had held them under and with the authority of the Parsi Anjuman.

Now upon those facts found by the learned District Judge it is quite clear that the respondents are entitled to succeed. Though they are not the owners of the property and though they were not appointed Board of Managers for the purpose of holding this property by the Parsi Anjuman, yet, for sixty years they have managed the property with the authority and acquiescence of the Parsi Anjuman. Therefore the case falls within the principle enunciated by the late Chief Justice of this Court in *Navroji Manekji Wadia v. Dastur Kharsedji Mancherji* (1).

In that case a similar objection to the title of plaintiff there was raised, but it was disallowed on the following ground: "Even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion that, which for brevity, we will call the temple property, and it appears to us that those who can predicate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled." In the present case the management, authority and supervision of the property have been vested in the respondents since 1846 and that with the knowledge, consent and acquiescence of those who are admitted to be the owners of this property, namely, the Parsi Anjuman.

For these reasons the District Judge was right in the conclusions at which he arrived and his decree must be confirmed with costs.

HEATON, J.:—I also have no doubt that the District Judge who has written a very careful judgment is right in his conclusions.

The plaintiffs seek to recover possession from a trespasser. The trespasser seeks to retain possession on the ground that the plaintiffs are not entitled to sue for possession, because, they were not the owners. But it is established in the case that the plaintiffs have actually been in possession for a long period of [504] years, I think, more than 30 years, with the tacit acquiescence of the true owners. If that is not a sufficient title on which to sue a trespasser for possession, it is very difficult to say what is; at least in the case of any claim to possession by any person not an absolute owner.

*Decree confirmed.*

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33 B. 499=11  
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726=8 I. C.  
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(1) (1903) 28 Bom. 20 at p. 50.



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CIVIL.83 B. 504=11  
Bom. L. R.  
721=3 I. C.  
769.

33 B. 504 (=11 Bom. L. R. 721=3 I. C. 769).

APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Heaton.*

MAHADEV NARAYAN LOKHANDE (*original Plaintiff*), Appellant, v.  
VINAYAK GANGADHAR PURANDHARE AND OTHERS (*original  
Defendants*), Respondents.\*  
[21st June, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—Agriculturist—A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act.*

In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1886. The defendant was an agriculturist at the date of the mortgage: but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1886: it was admitted that the defendant was not an agriculturist at the date of the suit:—

*Held*, that the liability incurred by the defendant was to pay back the money borrowed by him; and that liability was incurred when the money was borrowed in 1871.

*Held*, further, that in 1871, the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879.

*Held*, also, that the defendant was not entitled to the benefit of the Act.

[Dis. 34 Bom. 65 ; 161.]

SECOND appeal from the decision of Ruttonji Muncherji, First Class Subordinate Judge, A. P., at Poona, confirming the decree passed by T. N. Sanjana, Subordinate Judge of Haveli.

[806] On the 6th December 1871 the defendant No. 1 executed a mortgage-deed in favour of plaintiff. The mortgage was not to be redeemed before 1886.

In 1905, the plaintiff brought this suit to foreclose the mortgage.

The defendant No. 1 was an agriculturist in 1871 and 1886, but he was not one in 1905.

The Dekkhan Agriculturists' Relief Act, which contained the definition of 'Agriculturist' was first enacted in 1879.

The defendant No. 1 contending that he was an agriculturist at the date of the bond sued upon and at the date when he incurred liability under it in 1886, claimed the benefit of the Dekkhan Agriculturists' Relief Act, 1879.

The Subordinate Judge who tried the case held that the defendant was an agriculturist: and in decreeing the plaintiff's claim against him, made the decretal amount payable in instalments under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge remarked as follows:—

The chief contention in this case is as regards the status of the defendants Nos. 1, 3, 4 and 5. Admittedly they were not agriculturists on the date of the suit. It is contended that the defendant No. 1 was an agriculturist on the date of the bond sued upon.

There is no other evidence adduced to prove this excepting the statement of defendant No. 1. But I see no reason to doubt his statement. He states that at the time

\* Second Appeal No. 894 of 1907.



he maintained himself out of the agricultural income of his lands and followed no other occupation. The plaintiff does not seem to deny this. But the learned pleader for the plaintiff contends that the words "an agriculturist within the meaning of that word as then defined by law" in rule 2nd of section 2 of the Dekkhan Agriculturists' Relief Act show that the persons claiming the status of an agriculturist after the passing of the original Act are only included in the term and not those claiming that status before the Act was passed.

The definition of the term is inclusive and not exclusive. The words "shall include a person in the 2nd rule" show that the intention was to apply the Act as well to persons who were agriculturists when the liability in the suit was incurred as to those who are so when the suit is instituted, *Banu v. Krishnambat, P. J.*, 1886, page 159. The above rule 2 lays down that in the former case, i.e., in the case of a person who claims to be an agriculturist when the liability was incurred his status should be determined in case the liability [506] was incurred after the passing of the original Act according to the definition of the term at the particular time. But it does not exclude the case of a person who claims to be an agriculturist before the original Act was passed when the liability as in this case was incurred before 1879. The defendant No. 1 was an agriculturist when the liability was incurred as he earned his livelihood at the time wholly by agriculture and I find that he is entitled to the benefit of the provisions of the Dekkhan Agriculturists' Relief Act.

On appeal, this decree was confirmed by the First Class Subordinate Judge with appellate powers on the following grounds:—

No exception is taken to the correctness of the decree passed by the Court below provided defendant No. 1 respondent) be found an agriculturist on the date the mortgage-bond was executed or on the date the liability was incurred. Mr. Lokhande for the appellant founds his argument upon explanation (2) section 2 of the Dekkhan Agriculturists' Relief Act of 1879. It says that "the term agriculturist.....should include a person, who when..... the liability was incurred was an agriculturist within the meaning of that word as then defined by law." Now what do the words "when the liability was incurred" mean, and much depends upon the way in which they are construed. The words are no doubt not happily chosen. At first sight they may mean that the liability was incurred on the day the mortgage-bond was executed. If so, there was then no enactment in force of the nature of the Dekkhan Agriculturists' Relief Act, and there was no law in which the word "agriculturist" was defined. If this construction be placed on the said words a *bona fide* agriculturist would be debarred from the benefit of the Dekkhan Agriculturists' Relief Act in respect of any bond or mortgage or any other writing executed prior to 1879 when the Dekkhan Agriculturists' Relief Act came into force. To construe these words we must look to the object, and scope of the enactment. The very title by which it is distinguished shows that the Act was passed to relieve the indebtedness existing among the agricultural population prior to 1879. The said words should therefore mean when the liability becomes due, or in other words when the right to sue occurs. This happened in 1886. The definition of the word "agriculturist" has undergone several amendments since the passing of the Act in 1879. Even according to the old definition defendant No. 1 was an agriculturist both when the bond was passed and the liability was incurred, for it is not disputed that he was then earning his livelihood wholly and principally by agriculture.

The plaintiff appealed to the High Court.

V. G. Ajinkya for the appellant:—Admittedly the defendant No. 1 was not an agriculturist in 1905 when this suit was brought. The question then is was he an agriculturist within the meaning [507] of the Dekkhan Agriculturists' Relief Act, 1879, when the liability was incurred? Here the liability was incurred in 1871, when the mortgage-deed was executed, but when there was no enactment defining the term "agriculturist."

The lower Courts have erred in holding that the liability was incurred in 1886, at that date the debt became payable; the liability was incurred in 1871.

P. P. Khare for respondent No. 1 (defendant No. 1):—The Dekkhan Agriculturists' Relief Act, 1879, was introduced for the first time in 1879

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with a view to relieve the then indebtedness as well as the future indebtedness of agriculturists. As the debt in the present case was contracted in 1871 and remained unpaid until after the passing of the Dekkhan Agriculturists' Relief Act, the case of defendant No. 1 is one of indebtedness contemplated to be relieved against by the introduction of the Act in 1879.

As to the debt in question here, the liability to pay was incurred in 1886, when it became payable or due till that date the mortgagor did not become liable to pay the debt though the deed sued upon was passed in 1871.

*P. D. Bhide* for respondent No. 2.

BATCHELOR, J.—This appeal arises out of a suit filed by the mortgagee to recover the mortgage-debt with costs and further interest by sale of the mortgaged property. The first defendant replied that he was an agriculturist and claimed the benefits of the Dekkhan Agriculturists' Relief Act. The lower Courts have allowed the first defendant the benefits of the Act, and the question involved in this appeal is whether he is entitled to them in this case. The particular shape which they have assumed is the form of instalments which have been granted at the rate of Rs. 150 a year. Whether the first defendant is an agriculturist or not turns upon the construction of sub-section (2) of clause (b) of section 2 of the Dekkhan Agriculturists' Relief Act. It is there provided that the term "agriculturist" when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the [508] meaning of that word as then defined by law. The mortgage bond in suit here was executed in 1871, and under the mortgage it was provided that the mortgagor should not redeem before 1886. It is contended before us that the first defendant's liability was not incurred till 1886, inasmuch as it was not till then that repayment of the debt became obligatory, and that we understand is the view adopted by the learned Judge below. But it does not appear to be possible to put that construction fairly upon the words of the section. What was the liability incurred here? The liability incurred was to pay back the money borrowed by the mortgagor, and it is clear that that liability was incurred when the money was borrowed in 1871. That is not the less so by reason of the stipulation that the payment was not due till 1886. The liability to repay in 1886 was incurred in 1871.

As to the other argument which was addressed to us, it is enough to say that since this liability was incurred in 1871, and since the Act of 1879 contained the first legal definition of the word "agriculturist" it follows that when he made this mortgage, the first defendant, whatever may have been his occupation in fact, could not have been "an agriculturist within the meaning of that word as then defined by law", for there was then no such legal definition existing.

The result is that the first defendant is not entitled to the benefit of the Dekkhan Agriculturists' Relief Act. This appeal must be allowed and there must be the ordinary decree for sale under section 88 of the Transfer of Property Act in the form prescribed by the Civil Procedure Code.

The mortgagee will be entitled to add the costs of this appeal to his mortgage-debt.

*Decree reversed.*



33 B 509 (=11 Bom. L. R. 85=5 M. L. T. 301=2 I. C. 701).

[509] ORIGINAL CIVIL.

Before Mr. Justice Davar and Mr. Justice Beaman.

SIR DINSHA MANEKJI PETIT, BART, AND OTHERS, *Plaintiffs*, v.  
SIR JAMSETJI JIJIBHAI, BART, AND OTHERS, *Defendants*. \*

[28th November, 1908.]

*The Trustees and Mortgagees Powers Act (XXVIII of 1866), section 34—Non-applicability to Charitable Trusts—Indian Trusts Act (II of 1882), sections 1, 2—Statute of Frauds (29 Ch. ii, C. 3), section 7—Civil Procedure Code (Act XIV of 1882), section 539—Religious or Charitable Trusts—"Further or other relief", meaning of—Parsis—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.*

The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did the Indian Evidence Act entirely superseded it.

*Held by Davar, J.* :—Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, viz. (a) the appointment of new trustees, (b) vesting trust property in the trustees, and (c) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882.

[510] Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

*Peshotan Hormasji Dustoor v. Meherbai* (1); and *Bai Shirinbai v. Kharshedji* (2) followed.

Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian Community of India has never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies,

\* Suit No. 639 of 1906

(1) (1888) 13 Bom. 302.

(2) (1896) 22 Bom. 433.

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he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

*Held by Beaman, J.*—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e.g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular [511] language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation.

Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trust in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

[Dis 32 All. 503; Ref. 62 I. C. 260=40 M. L. J. 173=1921 M. W. N. 121=44 Mad. 357=14 L. W. 200 (F. B).]

THE plaintiffs, as members of a body known as the Zoroastrian or Zarthosti or Mazdiyasnan Anjuman which includes all Parsis in Bombay professing the Zoroastrian (otherwise called the Mazdayasbni) religion, brought this suit under section 539 of the Civil Procedure Code (Act XIV of 1882) against the defendants who were Trustees of the Funds and immoveable properties of the Parsi Panchayat.

In their plaint the plaintiffs alleged that there were numerous rich endowments consisting of property both moveable and immoveable devoted to various charities and religious purposes for the benefit of persons professing the Zoroastrian religion. These properties were in the possession and control of the defendants who claimed to be Trustees of such properties by virtue of divers deeds of appointment executed under powers of appointment purporting to be created or conferred by a Deed of Trust dated the 4th of December 1851 and by a Deed of Trust dated 25th September 1884.

They contended that the said powers were altogether invalid, that the powers of appointment of Trustees of all the said properties had always been vested in the general body of Zoroastrians in Bombay, that the



defendants, against whom no charges of misconduct were made, were not validly appointed trustees of any of the said properties and they claimed that [512] trustees thereof should be appointed under a scheme framed by the Court.

The plaintiffs said that amongst the said immoveable properties were five Dokhmas or Towers popularly known as the Towers of Silence situate on Malabar Hill, Bombay, with certain other buildings connected therewith known as Sagdis, and also a Nasakhana or corpse-bearers' house situate at Agiari Mohalla Baharkote, outside the Fort of Bombay. These properties were, the plaintiffs claimed, built for the use and benefit of all persons professing the Zoroastrian faith including converts to that faith. They further contended that the trust deed of the 25th September 1884 purported to declare the trusts in terms at variance with the trusts and purposes for and to which the same were originally provided and dedicated the said properties being declared by the said deeds (according to the defendants' recent construction thereof) to be held for the use only of persons being Parsis by descent and also professing the Zoroastrian religion, whereas the plaintiffs believed that at the time the said deed was prepared and executed there was no intention to exclude from the benefit of the said trusts any person professing the Zoroastrian faith.

The plaintiffs prayed (a) for a declaration that the defendants were not validly appointed trustees of either the moveable or immoveable properties referred to and that the powers of appointment of new trustees purporting to be created or conferred by the two deeds of trusts of the 4th of December 1851 and the 25th of September 1884 were void and of no effect; (b) for a declaration that the power of appointment of new trustees of all the said properties had always been vested in the general body of Zoroastrians in Bombay and that the same should be exercised in accordance with such scheme as the Court might approve of; (c) for a declaration that the declarations of trust contained in the trust deed of the 25th September 1884 of or in respect of three of the Dokhmas and the Sagdis and the Nasakhana referred to above were *ultra vires* and void in so far as they differ from the original trusts thereof; (d) that the trusts upon which the said properties were held might be ascertained and declared.

[513] In their written statement the defendants stated that until the year 1903 there was no case known to the Parsi community of a person whose father was not of the Zoroastrian religion claiming to be a convert to the Zoroastrian religion. In 1903 the wife of the 6th plaintiff a French lady was invested with the sacred shirt and thread and claimed to be a convert to the Zoroastrian religion. The defendants declared that this suit was brought by the plaintiffs for the purpose of claiming for the said French lady rights in the properties mentioned in the plaint which she was not entitled to and they submitted that the plaintiffs were not entitled to maintain the suit in the interests of a person who was not a party to this suit. Further the defendants denied that they were not validly appointed trustees of either the moveable or immoveable properties and they denied that the power of appointment of new Trustees created or conferred by the two deeds of trusts of the 4th December 1851 and 25th September 1884 were void and of no effect. They denied that the powers of appointment of new Trustees of all the properties had always been vested in the general body of Zoroastrians in Bombay; that the declarations of trust contained in the deed of the 25th September 1884 of or in

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respect of the Dokhmas and Sagdis and the Nasakhana mentioned in the plaint were *ultra vires* and void as alleged and that the said declarations of trust differed from the original trusts thereof. They contended that it was quite unnecessary to frame any scheme for the administration of the properties as the whole Parsi community including the plaintiffs were well satisfied with the management by the defendants of the charitable properties of which the defendants were the trustees.

Further the defendants contended that whenever the terms "Zoroastrians," "Mazdiyasnan," "Zarthosti Anjuman," "Zoroastrian Anjuman" or other similar terms have been used by persons founding or endowing or wishing to found or endow any trust for the religious and charitable purposes referred to in the plaint, the intention of the founder or endower using such terms was to found or endow such trust for members of the Parsi community professing the Zoroastrian religion and not for persons converted to the Zoroastrian religion [514] who were not in the contemplation of such founder or endower; that the Parsi community had always been regarded as consisting of (1) the descendants of the original emigrants from Persia into India at the time of the persecution by the Mahomedan Conquerors of Persia of the followers of the Zoroastrian religion who profess the Zoroastrian religion; (2) the descendants of the Zoroastrian in Persia who were not amongst the original emigrants but who are of the same stock and have since that date from time to time come to India and have settled here either permanently or temporarily and who profess the Zoroastrian religion; and (3) of children of a Parsi father by an alien mother who profess the Zoroastrian religion; that no one is entitled to the benefit of the trusts of which the defendants were the trustees except members of the Parsi community as defined under the three heads above mentioned.

At the trial 36 issues were raised and a great many points were discussed but the two main questions in the case were:—

(1) Whether the defendants are validly appointed Trustees of the properties and funds of the Parsi Panchayet, and whether, in the event of death or resignation of one or more of them they have the right of filling up such vacancy or vacancies as they occur.

(2) Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants.

*Lowndes* with *Scott*, Advocate-General, *Padshah*, *F. S. Talyarkhan* and *F. P. Talyarkhan* for the plaintiffs.

There are really two main points in issue: (1) What are the trusts and who are entitled to the benefits of them? (2) Are the defendants validly appointed Trustees? We charge no misconduct in the general sense against the defendants. We only charge them with legal misconduct. They are biassed and do not represent the whole community.

We say that the trusts are held for the benefit of all Zoroastrians who claim them. The sole test is the following of the [515] Zoroastrian religion. According to the defendants they have absolutely unlimited discretion to admit or not a person to the benefit of the Trusts.

*Strangman* with him *Inverarity*, *Raikes* and *Kanga* for the defendants.

The plaintiffs cannot maintain the suit as framed. No right of theirs is attacked. They are fighting for persons who are not before the Court. The decree in this suit will not bind those who are not parties to it.



*Lowndes* in reply.

DAVAR, J.—[His Lordship after setting out the facts of the case went at great length into the history of the various trusts, and continued :—]

It was contended that, whatever may be the position of the defendants with regard to Funds and Properties that came into existence prior to 1866, their position as Trustees was "unassailable" with regard to all Funds and Properties that came into existence and in the possession of their predecessors after the 24th of October, 1866, on which date the Trustees and Mortgagees Powers Act, being Act XXVIII of 1866, came into force, and reliance was placed on section 34 of that Act.

This contention is certainly one that requires very careful consideration, and we have most anxiously considered the arguments addressed to us on this head by Counsel on both sides.

Section 34 of this Act gives power to Trustees, under certain circumstances, to appoint other persons as their co-trustees in the place of a Trustee dying, resigning, leaving British India for more than six months, or becoming unfit or incapable to act as Trustee. The first question with reference to this Act that arises for consideration is : Does the Act apply to Charitable Trusts? Although this Act came into operation as far back as 1866, there seems to be no authoritative decision on this point. It must be remembered that the tendency of legislature in India has been, as far as possible, not to disturb by special legislation existing usages and customs of the people of the country and not to interfere with their public, religious, and charitable [516] institutions. The considerations that apply to charities in India are wholly different from those that apply to charities in England. The Indian Trusts Act II of 1882 specifically exempts from its operation all public or private, religious or charitable, endowments. No such exemption is specifically made in this Act of 1866, but the wording of the Preamble seems to negative the idea of its applicability to Charitable Trusts.

Then, again, the provisions of this Act are taken verbatim from two English Statutes. The first nineteen sections—sections 32 to 36 and sections 38, 44 and 45—are taken from 23 & 24 Vic. c. 145, known as Lord Cranworth's Act.

Sections 20 to 30, section 31 with the omission of the last clause, and sections 37, 39, 40 to 43 are taken from 22 & 23 Vic. c. 35, known as Lord St. Leonard's Act.

Neither of these Acts, so far as we can see, has ever been held to apply to Charitable Trusts. They find no place in Tudor's Charitable Trusts; and, in answer to Mr. Lowndes' argument, no English case was pointed out to us where these Acts have been held to apply to Charitable Trusts. Mr. Strangman cited *In re Coates to Parsons* (1), but that is a case under the Conveyancing Act and throws no light whatever on the question. It is a remarkable circumstance, as I have observed before, that the question is not covered by any authority. I have never known this question raised in our Courts, and myself and my predecessors in office who sat in Chambers have on several occasions given opinion, advice, or directions to Trustees of Charitable Properties under section 43 of the Act on the assumption that the Act applied to Charitable Trusts as well as to all other Trusts. Now, however, that the question is elaborately argued before us, we have come to the conclusion that the Trustees

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(1) (1886) 34 Ch. D. 370.



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and Mortgagees Powers Act XXVIII of 1866 does not apply to Charitable Trusts.

Another answer to the defendants' contentions, based on section 34 of the Trustees and Mortgagees Powers Act, is that that section is no longer of any legal force. Section 2 of the Indian Trusts Act II of 1882 expressly repeals, amongst other sections, [517] this section 34 of the Trustees and Mortgagees Powers Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events, section 34 has ceased to have any force. But it is contended that section 1 of the Indian Trusts Act says:—"Nothing herein contained . . . applies to public or private, religious or Charitable Trusts." Therefore the repealing section does not apply to Charitable Trusts. To hold this would, I think, lead to endless confusion. It would mean that whereas Trustees of private Trusts have no longer the power to appoint their colleagues in substitution or succession to those that retire, die, or become incapable, Trustees of Charitable Trusts would still retain that power,—a conclusion which is obviously undesirable and one which the Legislature could never have intended. We are of opinion that the saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows. The words of the section are unqualified and absolute, and provides that "the Statute and Acts mentioned in the schedule shall be repealed in the territories to which this Act . . . extends." We must therefore hold that section 34 of the Trustees and Mortgagees Powers Act is repealed wholly, and that there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity.

But assuming, for one moment, that the Trustees and Mortgagees Powers Act applies to Charitable Trusts, and also assuming that the repeal of the section does not operate so far as Charitable Trusts are concerned, and that the section is in full force and is applicable to the present case—does it help the defendants? The section, shortly put and omitting the clauses that are not very important, provides as follows:—

"Whenever any trustee, either original or substituted, . . . shall die, etc. . . . it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person . . . then for the surviving and continuing trustee . . . by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, etc. . . ."

[518] Mr. Strangman argued before us that, so far as the Funds were concerned, the covering letter which accompanied each donation was an "Instrument creating the Trust." When these letters were tendered, plaintiff's Counsel objected to their being admitted as exhibits unless they were properly stamped. In a separate written judgment which the Court delivered on the 6th of April, 1908, we have fully discussed the typical letters tendered, and held that these letters, which were subsequently put in and marked Exhibit No. 84, were not "Instruments creating the Trust," so that that clause of the section goes out of consideration. But even if these letters were Instruments creating the Trusts, let us now consider the other clauses of the section and see if they help the defendants' case. Whom did the defendants succeed? Was the person in whose place each one of the defendants was elected either an "original or substituted Trustee"? We have held that the power of appointment conferred on the original five Trustees was bad. Assuming that the original five Trustees were properly appointed Trustees, those that followed them



were certainly not Trustees and could not be included in the expression, "Any Trustee, whether original or substituted." Then again, were those who nominated the present defendants "surviving or continuing Trustees?" Surely not. If the power conferred on the original Trustees by the Deed of 1851 was bad, every subsequent appointment of Trustees was bad, and no one that assumed office as Trustee after the original five Trustees could be said to be a Trustee. The successors of the original five Trustees—assuming that those five were validly appointed—were appointed by people who had no right to appoint them Trustees, and therefore in the eye of the law they were not Trustees. Not one of the original five Trustees was alive when the present Trustees were appointed.

It was argued that, in some instances, Funds were given to the then Trustees by name. That was on the erroneous assumption that they were validly appointed Trustees and could make no difference as to their real status.

Regarded from every point of view, the contentions of the defendants' Counsel, based on section 34 of the Trustees and Mortgagees Powers Act, appear to us to be wholly untenable.

[519] [His Lordship again dwelt at considerable length on the evidence bearing on the first branch of the case, and stated his conclusion as follows—]

We hold that the defendants are not validly appointed Trustees of any of the Funds enumerated in the three Schedules, Exhibits Nos. 54, 59 and 60.

We also find that they are not validly appointed Trustees of any of the properties comprised in the General Trust Deed of 1884, Exhibit U, except properties 10thly and 11thly described in the Schedule to the Deed.

Having adjudicated on what we consider to be the legal rights of the parties, speaking both for my learned colleague and myself, we feel it our duty here to record that we have been drawn to these conclusions with much regret and great reluctance; and in holding that the defendants are not validly appointed Trustees of the Panchayet Funds and Properties, we should not be taken to cast the smallest reflection on their integrity or honour. The plaintiffs themselves, at the very threshold of the case, in their plaint, have specifically stated that they "make no charge of misconduct against any of the defendants." The very first sentence of my notes of Mr. Lowndes's opening for the plaintiffs is:—"I charge no misconduct in the ordinary sense of the term."

These are the persons whom we are constrained to remove from office, but, in order to show our appreciation of them and their work in the exercise of the jurisdiction we have over public charities and of express authority conferred on this Court by sections 35 and 45 of the Indian Trustees Act, XXVII of 1866, we appoint the surviving defendants Trustees of all the Funds and Properties dedicated or devoted to Parsi charities and known and spoken of as Funds and Properties of the Parsi Panchayet, and we order that all Trust Funds and Properties do vest in them.

Soon after the death of the first defendant, the other defendants have filled up the vacancy amongst them by appointing the first defendant's only son in the place of his father. We think this is very injudicious conduct on the part of the defendants, as their [520] act may have tended to embarrass the Court. We find, however, that the choice of the new Trustee is not open to any objection. The present Sir Jamsetji has been, at a public meeting of the Parsi community, unanimously appointed the

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head or *મુખ્ય* of the Parsi community, and is elected to the same position as his father occupied amongst his own people, and we appoint him as one of the Trustees jointly with surviving defendants, and direct that the Trust Funds and Properties to vest in him jointly with his co-Trustees.

We do this because our findings will necessitate our referring the matter to the Commissioner for the purpose of framing a scheme for the appointment of new Trustees and it must necessarily take a long time to frame and sanction such a scheme. We think, therefore, that it is expedient to appoint Trustees immediately, and that cannot be done under the present circumstances without the assistance of this Court. We also think that these appointments, at all events, should not be for a limited period but must be for life. Till the scheme is framed and comes into operation the Court will have to fill in any vacancies that may arise in the meanwhile.

Our decree on this part of the case will be to declare that the surviving defendants are not validly appointed Trustees of all the Funds and Properties of the Parsi Panchayet, except properties 10thly and 11thly described in the Trust Deed of 1884, Exhibit U; but that the Court appoints them, together with the present Sir Jamsetji Jijiboy, Trustees for life of those Funds and Properties and vests all the Trust Funds and Properties in them.

We refer this matter to the Commissioner to frame a scheme for the appointment of a Trustee in the place of any one of the present Trustees dying, resigning, leaving Bombay for a period longer than six months, or more, or becoming incapable of performing his duties. Such scheme, after being framed, should be submitted to the Advocate-General for his approval and then be brought before this Court for final sanction. The Advocate-General will be at liberty to appear and make any suggestion he may desire to make to the Court when the scheme comes up for sanction.

[521] If, instead of it being referred to the Commissioner, either of the parties desire to refer the framing of a scheme to a Committee of Members of the Parsi Community, we give them liberty to apply to us on notice to the other party.

We could, if we choose, include in the scheme the 10thly and 11thly described properties. The case of the *Attorney-General v. The Dedham School* (1), is a direct authority enabling the Court to do so. Sir John Romilly, the Master of the Rolls, in that case held that though improper conduct was not even alleged against the Governors, that was a proper case for a scheme for the purpose of putting all the Funds and Properties under "one uniform system of management." We, however, do not desire to interfere in this manner. If the defendants desire it, they may continue to be Trustees of these two properties. We have no doubt, however, that if, in the end, we are held to be right in our conclusions and the order for framing a scheme is put into operation, the defendants will consent to include these properties in the scheme.

I now turn to the consideration of the second branch of this suit; and here I must speak for myself, as my learned brother, who is in entire accord with my conclusions on the first part of the case, may possibly not be in accord with some of the conclusions to which I have arrived on this part of the case.

(1) (1857) 23 Beav. 350.



The question for decision, involved in this branch of the case, is by far the more important of the two main questions in the suit. This question between the plaintiffs and defendants is, as defined in the earlier part of this judgment :—

“ Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the Religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants.”

Besides the religious and charitable Institutions under the management and control of the defendants, there are numerous other Institutions in Bombay, such as Atash Behrams, Agiaries, Dare Mehers, Sanitariums, etc., dedicated to the use and for the benefits of the Parsi community, with which the Court is not [522] concerned, as they are under the control and management of the donors—their successors or other Trustees. In fact the Court is not concerned even with *all* the Institutions and Funds in the possession and management of the defendants: for the plaintiffs' Counsel, at the hearing, has narrowed down his demands on behalf of the Converts to Zoroastrianism, whose cause the plaintiffs have so warmly espoused in this suit, and confined his contention to the Dockmas, Sagdis, Nasakhanas and the Godavra Agiary, and to only one fund—the one for carrying the dead bodies of *all* Zoroastrians to the Towers of Silence.

The plaintiffs contend that the Zoroastrian religion not only permits but enjoins the conversion of aliens born in another faith, and that the moment an alien is invested with a Sudra and Kusti, after undergoing the Navjot ceremony at the hands of a Parsi priest, he or she is invested with all the rights and privileges of a born Zoroastrian and is entitled to the benefits of all religious and charitable Institutions and Funds that exist for the benefit of the Zoroastrian community. They say the defendants have threatened to exclude such Converts from the benefits of the Funds and Institutions under their control and management, and they have instituted this suit as the champions of such Converts, to obtain from the Court a declaration that such Converts are entitled as of right to participate in the benefits of the religious and charitable Institutions and Funds established for the use of all Zoroastrians.

Although this portion of the suit is *one* of the two main branches of the suit, for all practical purposes, this suit is really a consolidation of two suits. The two branches have nothing whatever in common with each other. The two questions in the suit are wholly distinct and separate from each other. Each branch is a suit by itself. Entirely different considerations apply to each of the two branches. Counsel for both parties have divided their arguments under two distinct heads. There is scarcely an argument or consideration which is common to both branches. The two questions stand apart and are independent of each other. The two branches are practically two separate suits, quite independent of each other; and I propose [523] to treat the question involved in this branch of the suit as if it had been raised in a suit separate and independent of a suit involving the question of the validity or otherwise of the Trustees' appointment.

In the third and fourth paragraphs of their written statement, the defendants raise a question which, in my opinion, goes to the very root of this part of the plaintiffs' case. In paragraph 3, they question whether

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the plaintiffs are entitled to maintain the suit in the interests of a person who is not a party to the suit, and in paragraph 4 they say :—

The plaintiffs do not allege in the plaint that any rights of theirs in any of the properties referred to in their plaint have been denied. The defendants submit that the plaint discloses no cause of action in the plaintiffs.

In other words, the defendants contend that the plaintiffs are not entitled to maintain the suit in respect of the reliefs they pray for in this branch of their case. The questions that arise for consideration on this plea of the defendants are many and varied. Are the plaintiffs, collectively, or individually, entitled to the relief or reliefs they claim? Have they or any of them a right of action against the defendants? Have they any cause of action against the parties whom they have brought before the Court? Have they disclosed any such cause of action in their plaint? Have any of their rights been denied, infringed, or threatened to be infringed? Have the defendants been guilty of such acts as would entitle the plaintiffs, jointly or singly, to maintain an action against them? Have they suffered any wrong which calls for a remedy? If they are not entitled in their personal capacity,—individually or separately—to maintain this portion of their suit, does the consent of the Advocate-General to institute this suit—obtained in accordance with the provisions of section 539 of the Civil Procedure Code—make any difference in their position? Are they entitled to the relief or reliefs they claim?

Before entering upon the consideration of these questions, it would be useful to ascertain exactly what is the relief they claim. Shorn of all technicality and divested of all legal phraseology, the plaintiffs ask for nothing more than a bare declaration [524] that an individual born in an alien faith, but subsequently converted to Zoroastrianism, is entitled to all the benefits of all the religious and charitable Funds and Institutions which exist for the benefit of the Zoroastrian community, and which are under the control and management of the defendants. The prayers on this head are (c), (d), (e), (f) and (h). At the hearing, however, all that we were asked to do was to ascertain the real Trust on which the Funds and Properties in question were dedicated, to declare such Trust, and, if necessary, to rectify the Trust Deeds of 1851 and 1884 according to the decision of the Court. Are the plaintiffs entitled to these reliefs? Are *they* entitled to maintain this suit in pursuit of the relief they claim? My answer to these questions is in the negative. The plaintiffs are, every one of them, born of Parsi parents, and born in the religion of their forefathers. They all profess the Zoroastrian religion. They are undoubtedly entitled to enter the Godavara Agiary, and make as much use of it as any other Parsi is entitled to make. They are clearly entitled to participate in every Fund that exists for the benefit of all Zoroastrians, including the Fund for carrying all Zoroastrians to the Towers of Silence. They are entitled, as of right, to have their bodies disposed of in the Towers on their death. Has any one challenged *their* rights? Has any one disputed these privileges? Has any one even remotely or indirectly suggested that *they* are not entitled to those rights? Have the defendants denied to *them* any single one of their rights and privileges? Have the defendants done or said anything which, by any stretch of imagination, may be taken to be an invasion or an infringement of *their* rights? Have *they* a wrong to remedy or a grievance to redress? To all these questions, there is but one answer, and that is an emphatic negative. The word "relief" necessarily implies the pre-existence of a "wrong." To have that wrong redressed in a



Court of Law is the privilege of every subject of the Crown. That wrong can be redressed by an action. The right of action is vested in the person that is wronged. An action is a legal proceeding, whereby a person demands his rights, which may be denied or infringed or threatened to be infringed, and claims to have those rights enforced and to have his wrongs redressed. In Lord Halsbury's Laws of England (Vol. 1 page 2) "an action, according to the legal meaning of the term, "is defined as "a proceeding by which one party seeks in a Court of Justice to enforce some right against, or to restrain the commission of some wrong by, another party." In the same paragraph, defining an action, it is stated:—

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"More concisely it may be said to be 'the legal demand of a right' . . . It implies the existence of parties, of an alleged right, of an alleged infringement thereof (either actual or threatened), and of a Court having power to enforce such a right."

In this action, we have the parties, we have their rights, and we have the Court having power to enforce those rights, but where is the infringement, either actual or threatened? It is no use whatever disguising the fact that the plaintiffs have not come before the Court to claim or enforce *their own rights*, redress *their own wrongs*, or remedy *their own grievances*. The fight is not on their own behalf but on behalf of the sixth plaintiff's wife. With this lady is brought in another Rajput lady, of whom we have heard but very little. What the defendants in effect have done is to publicly notify that they will not allow these two ladies to participate in the benefits of the Funds and Institutions under their management. Although the resolutions and notifications in the pleading mentioned are in general terms, and refer to all aliens who may be converted to the Zoroastrian faith, they are undoubtedly aimed at these two ladies, who claim to have been admitted into the Zoroastrian faith. The action of the defendants was taken in obedience to the behests of the whole community, in a public meeting assembled; and such behests, the defendants rightly submit, they were bound to carry out. It is not therefore the rights of any of the plaintiffs that are infringed or threatened. Nobody knows—neither the plaintiffs nor the defendants—whether the Rajput lady desires to go to the Godavara Agiary, or to be carried to the Towers of Silence after death, but we do know that the French lady claims those rights, or rather, to be more accurate, the plaintiffs say she claims them—for I really do not know whether she does so or not. She is not before us as a party; she was not before us as a witness; and even her husband, who is a party to the suit and [526] attended the Court during most of the hearings, has not chosen to tell us whether his wife is really desirous of going to the Godavara Agiary, or, in the remote contingency of her dying in this city, of being conveyed to the Towers of Silence.

Are the plaintiffs entitled to carry on a fight on somebody else's behalf when that somebody does not come before the Court—does not ask for redress—does not appeal to the Court for its assistance? She is an entire stranger to this action. She has abstained from seeking the assistance of the Court and the *abstention appears to me to be intentional and deliberate*. Although the defendants have taken this point in their written statement and raised a distinct issue thereon, and although the point was pressed by their Counsel in the course of the hearing, no application was made, either before or even at the hearing, to add the lady as a party plaintiff. Is this Court to go out of its way and render assistance to a party who does not seek such assistance? Are we here to listen to discussions the value of which, as far as this suit is considered, are, in my



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opinion, purely academic; and exercise our powers in favour of a party or parties who do not ask us to do anything of the kind; and declare and adjudicate upon the rights of people who are not before us—and that at the bidding of other people whose rights are not infringed or threatened and who have themselves no wrongs to redress and no grievances to remedy?

"*Actio non datur non damnificato*" is a maxim of law which governs that branch of the law which deals with the rights of subjects to maintain actions at law. "An action is not given to him who is not injured."

The plaintiffs in this case, either collectively or individually, are not in any way injured or damaged by the action of the defendants. The Resolutions and Notifications published by the defendants have not injured the plaintiffs or invaded *their* rights. They have no complaint to make on their own behalf. All they say is: "The defendants have announced their determination to deprive converts to Zoroastrianism of certain rights and privileges of participating in Properties and Funds under their management. We are of opinion that their action is unjustifiable. [527] We ask the Court to declare that the defendants are guilty of wrongful conduct. They have threatened to infringe the rights of two ladies and their conduct amounts to an invasion not only on the rights of these two ladies but of others who may in the future embrace Zoroastrianism." We, sitting here, have not heard that these two ladies claim any such rights as the plaintiffs claim for them in this suit. The plaintiffs know nothing whatever about the Rajput lady; and, as to the French lady, none of the plaintiffs have taken the trouble of telling us that this lady has felt hurt at the action of the defendants, or has expressed a desire to participate in the Charitable Funds and Properties administered by the defendants.

The great mischief of entertaining actions of this kind would be that, besides laying the defendants open to all sorts of action at the instance of people who have no wrongs to remedy and no rights to vindicate, the judgment of the Court would not be binding on those very parties on whose behalf the action is filed. It is quite clear that the rights and remedies of these two ladies would not, in the least, be affected by our judgment in this suit. Assuming that, on the merits, this Court decided adversely to the contentions of the plaintiffs, there is nothing to prevent any one of these two ladies, or both of them, filing suits against the defendants for the ascertainment and declaration of those very rights which we are asked to adjudicate upon in their absence and behind their backs. They would very rightly say: "We were not heard in support of our claim and we are not bound by what the Court did in our absence." The parties supposed to be injured by the action of the defendants have not invoked the assistance of this Court, and I am of opinion that the Court ought not to go out of its way and pronounce its judgment on the rights of people who are not before the Court, at the bidding of people who must be regarded as mere strangers.

It is, however, argued that the plaintiffs having obtained the previous consent of the Advocate-General to the institution of this suit under the provisions of section 539 of the Civil Procedure Code, they, as persons interested in the Trusts created for public religious, and charitable purpose are entitled to maintain the [528] suit, even though they may not have been entitled to maintain the same in their individual or personal capacities. It is contended that the defendants are guilty of breach of trust



in the administration of the charities entrusted to them, and that the plaintiffs, as persons interested in the Trusts, are entitled to maintain the suit under section 539 of the Civil Procedure Code.

It seems to me that section 539 is wholly inapplicable to this portion of the suit, and the consent of the Advocate-General makes no difference whatever in the status of the plaintiffs. It is to my mind wholly immaterial whether the consent of the Advocate-General was or was not obtained for the institution of this part of the suit. Section 539 is very limited in its scope and operations. It contemplates the institution of a suit to "obtain a decree" for reliefs that are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of this section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.*, (a) the appointment of new trustees, (b) vesting Trust Property in the trustees, and (c) settling a scheme. It cannot be pretended that the reliefs asked for in this branch of the case—namely, the ascertainment and declaration of what are the trusts, the rectification of the Trust Deeds, a declaration that the defendants have either wrongly declared the trusts in the deeds or wrongly interpreted the trusts therein—fall under any of the five heads mentioned in section 539 of the Code. This branch of the case is most clearly not a suit instituted for obtaining a decree (a) for appointing new trustees, (b) for vesting property in the trustees, (c) for declaring the proportions in which its objects are entitled, (d) for authorising any trust property to be sold, mortgaged, or exchanged, and (e) for settling a scheme of management. The words "further or other relief" that follow must necessarily be construed to refer to reliefs "*ejusdem generis*" and not to reliefs wholly outside those specifically defined under these five heads.

Because the plaintiffs have a good cause of action to institute a suit for obtaining certain reliefs under section 539 and they institute that suit to obtain such reliefs, after obtaining the [329] Advocate-General's consent, they have no right to smuggle into it another suit claiming other reliefs wholly different from those contemplated in the section, and then contend that they are entitled to maintain the whole suit, simply because they choose to consolidate two suits into one—one clearly within the purview of the section, the other wholly outside of it.

Reliance was placed on the case of *Thackersey Dewraj v. Hurbhum Nursey* (1), but a careful study of it will show that there is nothing in the decision that militates against the view I take of the position of the plaintiffs in this suit. In that suit it was held that it did not fall either under section 30 or section 539 of the Code. It was there held that "if the plaintiffs had any right of action, it was a complete right of action *vested in each of them*. They sued as subscribers to the temple and devotees of the idol, and as such each had a right to complain of mal-administration." It was further held that "any person interested in the proper observance of a religious endowment may sue in his own name to have the Trust property administered." That suit mainly related to mal-administration of certain funds whereby large sums were lost.

The nature of the plaintiffs' complaint in this suit is quite different. They complain of no mal-administration of charity Funds or Properties in which they are interested. By the action of the defendants, the plaintiffs—either as subscribers to the Funds or as devotees of the temples or as participators in the benefits of the charitable institutions—are not in

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the least degree damaged or injured. All they say is : "defendants threaten to commit a breach of their duty whereby *somebody else* will be injured." Let that somebody come forward and complain. The learned Judge trying the suit in *Thackersey v. Hurbhum Nursey* (1) to which I have referred, held that section 539 of the Code is permissive or directory and not mandatory, and that it did "not prohibit a private suit."

Mr. Mulla, in his commentary on section 539 of the Civil Procedure Code (2nd edn.), deduces at page 487 of his book [530] the following proposition as the result of the authorities he cites there :—

"Suits brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right, are not within the section.

I am in entire accord with this proposition. I am of opinion that it correctly defines the scope of the section. This is undoubtedly a suit for the purpose of remedying an alleged infringement of an individual right, and, as such, is clearly not within the section.

This section contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. It seems to me very clear that "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. Otherwise the result may be the infliction of grave injustice on parties who are not before the Court and who are not heard.

It was contended before us that, this being a suit with the consent of the Advocate-General, the Court was competent to adjudicate upon the rights of converts to Zoroastrianism. Assuming that the decision is against the contentions put forward by plaintiffs, the converts would naturally say :—"We are not bound by our decision: we never asked you to adjudicate on our rights. You never heard us. You don't know what documents we have in our possession in addition to what the plaintiffs produced before you. What right had the Court to decide questions relating to our rights in our absence, behind our backs and without giving us a hearing?"

Even if the view I have taken as to the scope of section 539 was erroneous and assuming that the suit fell within the scope of that section, I would still hold that it was badly constituted and was not maintainable, the plaintiffs not having the "interest" contemplated by section 539. The object of having relators in a suit in the name of the Advocate-General, and of having plaintiffs who have an "interest in the trust" in a suit with the Advocate-General's consent, is to have in the suit parties who [531] are interested in asserting the rights and in redressing the wrongs for which the suit is filed. The converts whose rights we are asked to adjudicate upon have never been heard by us : they have never had a chance of putting their case before us : no one represented them ; the Advocate-General knows nothing of their case ; they never had a chance of putting their cases before the Attorneys or Counsel appearing for the plaintiffs. These are considerations that ought to govern our action on principle. It may be that the plaintiffs have presented to us the case of the converts in its best aspect, but the question whether this part of the suit is maintainable by them is a question of principle, and I feel that we ought to regard it from that point alone.

Regarding this branch of this suit, as a suit it is either a suit under section 539 or it is a private suit. As shown above, the reliefs claimed

(1) (1884) 8 Bom. 432.



are clearly outside of the scope of operation of that section, and the suit cannot be said to be a suit under section 539. If, then, that section has no applicability, it must be treated as a private suit. As a private suit, the plaintiffs not being the persons damaged, they have no right to maintain it.

Regarded from either point of view, I come to the conclusion that the plaint discloses no cause of action in the plaintiffs; that the plaintiffs have no cause of action whatever against the defendants; that they have no right of action in them to claim the reliefs they do; and that they are not entitled to maintain this branch of the suit.

I would therefore dismiss this part of the suit, and find against the plaintiffs on the issues which raise the question of their right to maintain this suit.

So far as I am concerned, I might stop here and refrain from finding on the merits of the questions raised in this part of the case. Such a course, however, is, I think not open to me. Although my mind on the point I have discussed is free from doubt, it is possible that I may be wrong in the conclusions I have arrived at. Having regard to what I have said above, I am most averse to say anything on the merits. I feel that it would be most unfair to the parties, whose fight the third [532] parties carried on before us, to express my findings on the merits in the absence of the parties whose rights are affected. I feel, however, at the same time, that it would be a disastrous thing for the parties if the case is sent back some months hence to find on all issues, in the event of my finding on the preliminary point being found to be erroneous. There has been an enormous expenditure of time, labour, and money in this case. I think it is extremely desirable that this litigation should reach the final Court of Appeal in as complete a form as possible. These considerations compel me to enter into a full discussion of all the points argued before us. However adverse my findings may be to the converts, I feel that they will do no injustice to anybody, as our judgment in this case cannot possibly bind those who now claim to be converts of those who may make a similar claim hereafter.

Even if I had come to a different conclusion on the technical point of law I have discussed above—even if, in the end, it is found that my conclusions on the point are erroneous—so far as I am concerned, my decision on the merits leads to the same result.

The plaintiffs are not content to base their case merely on the ground that the Zoroastrian religion not only permits but enjoins conversion: they go further, and contend that it has been usual and customary amongst Parsis to admit Juddins—that is, persons born in another faith—into their religion. They say that such Juddins, on being admitted into the Zoroastrian faith, became not only *Zoroastrians* but *Parsis*; and that such converted Parsis have been always allowed to be carried to the Towers of Silence on their death, and that during their life-time they have entered all places of religious worship, such as Atash Behrams, Agiaries, and Dare Mehers, as a matter of right.

The plaintiffs' contentions shortly put are:—It is both usual and customary for Parsis to admit Juddins into their religion and give them all the benefits of all religious Funds and Institutions endowed or dedicated for the benefit of their own people.

They further contend that by the mere performance of the Navjot ceremony by a Parsi priest, thereby putting on a Sudra [538] and Kusti

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on the person of a Juddin, he makes him or her a full-fledged Zoroastrian without any other religious ceremony.

The defendants dispute the correctness of these contentions: they say that, although the Zoroastrian religion permits of conversion into the faith, the Parsis, ever since their advent into India, have not admitted a Juddin into their fold; that no entire alien, that is, a person born of non-Zoroastrian parents, has even been admitted into the faith. They admit, however, that children born of a Zoroastrian father by an alien mother have been allowed to come into their fold by the performance of the Naviot ceremony, by investing such children with the Sudra and Kusti.

In order to controvert the contentions of the defendants that it is not customary to admit Juddins or entire aliens, into the Zoroastrian faith, and that even if the religion enjoined conversion, such tenet of the religion had fallen into utter disuse and that long-continued usage prevailing amongst the Parsis prevented the admission of Juddins to Zoroastrianism, the plaintiffs called certain witnesses who professed to give some concrete instances of conversions of Juddins into Zoroastrianism. It will clear the ground and facilitate further discussion if I deal with this evidence, in the first instance, and record my findings thereon. [His Lordship then proceeded to examine the oral evidence on the point in detail and then went on as follows:—]

Under these circumstances, while I find that although the conversion of Juddins is permissible amongst Zoroastrains, I also find that such conversions are entirely unknown to the Zoroastrian communities of India; and far from it being customary or usual for them to convert a Juddin, the Zoroastrian communities of India have never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism. [His Lordship again discussed evidence and continued—].

The last resting-place of the Parsis—the Towers of Silence—are regarded by them with sentiments of the utmost reverence. They are regarded as places of the greatest sanctity. When a new Tower is built it is consecrated with most elaborate religious ceremonies. Thousands of people travel long distances to be present at the consecration. Such presence is regarded as a pious act of great religious merit. Once the Tower is [534] consecrated, none but a Nassésalar can enter it; and the Nasse-salars lead a life of exclusion from the members of the community in various ways. The dead body of a Zoroastrian is regarded with peculiar veneration. On death the body is washed and purified and then handed over to the corpse-bearers, who recite prayers over it and clothe it in pure white linen. After the Suchukvani ceremony is performed, no one could touch it, not even the nearest relatives. Before being taken from the house for being carried to the Towers, other solemn ceremonies are performed; relatives and friends—and, in the case of a well-known person, all leading members of the community—assemble and prostrate themselves before the body when they are taking their last look. The face is covered up and then the body starts on its journey to the Towers. No Juddin or Durvand is allowed to look at a dead body after the purificatory ceremony is performed, much less touch it. Many a time it has happened that when a faithful servant of a European is dead, his master, entertaining kindly feelings towards him and wishing to have a last look at his faithful servant, goes to the house of the dead, only to find that his request is, with many explanations and excuses, refused. The bodies of persons who have suffered capital punishment, the bodies of suicides, and the bodies of



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people on whom *post-mortem* examinations are held, are supposed to be contaminated and not fit to be put in the same Dokhma as the bodies of ordinary Zoroastrians, because their bodies after death have been touched by Durvands. In Bombay, there is a separate place for these bodies known as Chotra. In other places, if there is no Chotra, some unused Dokhma which has fallen into disrepair is used for disposal of these bodies, as was said to be done at Surat.

[His Lordship went into an examination of the literature extant on the subject and arrived at the following conclusions—].

To sum up this part of the case, on the question of conversion the conclusions which I have arrived at on the evidence before the Court are :—

I.—That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

[535] II.—That although such conversion was permissible, the Zoroastrians, ever since their advent into India 1,200 years ago, have never attempted to convert anyone into their religion.

III.—That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India.

IV.—That the Parsi community of Bombay, at a Public Meeting, held on the 16th of April, 1905, expressed its disapproval of any conversions being allowed, and are strongly opposed to any such conversion in the present times, and resolved henceforth not to admit even the children of Parsi fathers by alien mothers. See Exhibit F.

V.—That, although conversion is permissible by the religion, there are certain conditions which the candidate must fulfil before becoming eligible for admission. The conditions are that it must first be satisfactorily established that he or she, in applying for admission, is animated by a good object and actuated by pure intentions, in other words, that he or she seeks admission from religious convictions and not from other considerations : and further, that the candidate is in all other respects fit to be admitted to the Zoroastrian faith.

VI.—That such an admission of a person born outside of the religion is only permissible if it is established that by such admission "no harm of any kind would be done to the Zarthosti Mazdiyasnans themselves."

VII.—That the ceremonies necessary to be undergone by the candidate for admission are (a) Navjot (b) Burushnum, and (c) a repetition of the Investiture ceremony of Navjot after Burushnum.

VIII.—That only those persons who have undergone these three ceremonies are entitled to the full rights and privileges of a Zoroastrian.

The only question of importance on this part of the suit that now remains to be considered is the general question raised by the plaintiffs, *as to who are the parties entitled to the benefits and uses of the Charitable Funds and Institutions now in the [536] possession and under the management of the defendants.* The contentions of both sides are fully set out in the pleadings. The plaintiffs say:—

"There exist numerous rich endowments, consisting of property, both moveable and immoveable, devoted to various charitable and religious purposes for the benefits of persons professing the Zoroastrian religion."

They say that the trust declared by the Trust Deed of the 25th of September 1884, are in terms "at variance with the trusts and purposes for and to which the same were originally provided and dedicated."



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The plaintiffs believe that, "at the time the said Deed was prepared and executed, there was no intention by the terms thereof to exclude from the benefits of the said Trusts *any person* professing the Zoroastrian faith." They complain that the defendants had interpreted the trust in a manner which would exclude from the benefits of the trusts persons born in other religions and subsequently admitted into the Zoroastrian religion; and they pray that, in so far as the trusts declared by the Deed of 25th of September 1884, differ from the original trusts, they may be declared *ultra vires* and void; that the true trusts on which the charitable properties are held may be ascertained and declared; that the deed of 1-84 may be construed; and that it may be declared who are entitled to the benefits of such of the trusts as may be held to be valid.

The defendants contend that the only persons entitled to the benefit of the Funds and properties are:—

*First.*—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

*Secondly.*—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

*Thirdly.*—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion.

Shortly put, the plaintiffs say: Every Juddin admitted into the Zoroastrian religion is entitled, as a matter of right, to all [537] the benefits of all the Charitable Funds and Institutions in the defendants' possession.

The defendants say: The parties entitled to the benefits of the Funds and Institutions under their control are persons who are Parsis who are the descendants of the Zoroastrian emigrants from Persia; their Iranian co-religionists who may come and settle either temporarily or permanently in India; and the children of Parsi fathers born of alien mothers, if they are admitted in, and profess, the Zoroastrian religion.

As the question is raised in a general form, I will discuss it on the assumption that the converts to Zoroastrianism, whose rights the plaintiffs assert and the defendants deny, are properly admitted into the Zoroastrian religion, after the performance of all the ceremonies which, according to the Ravayats and the experts, are necessary for the due admission of a Juddin to Zoroastrianism.

The Trust Deed of 1884 declares that the properties covered by that Deed were for the use and benefit of "the members of the Parsi community professing the Zoroastrian religion." This is the only declaration which the plaintiffs say is at variance with the original trusts declared by the founders and donors. They say, either this declaration is wrong, or the interpretation put upon it—that the trusts are confined to Parsis, thereby meaning persons of Zoroastrian descent—is wrong. They contend that a Juddin, by being converted to Zoroastrianism, becomes a "member of the Parsi community professing the Zoroastrian religion," and as such is a beneficiary under the trusts. In the alternative, they say, if this contention of theirs as to the correct interpretation is wrong, then the declarations of trusts are at variance with the intentions of the original donors and founders and the Trust Deed should be rectified by the Court.

A great deal of time and energy were expended on the argument as to the exact meaning and significance of the word Parsis, and as to whether the words *Parsis* and *Zoroastrians* mean the same thing and designate the



same persons, or whether there is any distinction in the individuals designated by the terms Parsis and Zoroastrians.

[538] I confess this question has never, at any time, presented any difficulty to my mind: a Zoroastrian is a person who professes the Zoroastrian religion. A Zoroastrian need not necessarily be a Parsi. Any one who professes the religion promulgated by Zoroaster—be he an Englishman, Frenchman, or American—becomes a Zoroastrian the moment he is converted to that Faith. But how can he become a Parsi? It was argued that the sixth plaintiff's wife was now a Parsi. Supposing a Parsi lady becomes a Christian and marries a Frenchman, can it be said that she had become a French woman. And if she adopts Christianity and marries an Englishman, does she become an Englishwoman? One has only to see how the word Parsi came into existence and what it was meant to designate to realize that the word Parsi has only a racial significance and has nothing whatever to do with his religious professions. Mr. Dossabhoy Framji in his "*History of the Parsis*," says the word takes its derivation from Pers or Fars, a province in Persia, from which the original Persian emigrants came to India. Several witnesses corroborate this. One witness, Mr. Jamsetji Dadabhai Nadershah, who has visited Persia and studied the cuniform inscriptions in Persia, throws more light on the subject. He says:—

"In the Assyrian records I find the earliest mention of the word Pers. The word is applied to the country called Fars and to the people of that country . . . The word originally used for a province was applied to the whole country of Iran. (Persia) later on. The word Pers in the Babylonian inscriptions was first used to indicate the country, and then it came to indicate the inhabitants of that country."

It will thus be seen that the word Parsi, when used in India could only mean the people from Pers. When the emigrants from Persia settled in India, the people around them probably knew little of their religion but they knew they came from Pers or Fars, and they called them Parsis. Thus, all the descendants of the original emigrants came to be known as Parsis. A Parsi born must always be a Parsi, no matter what other religion he subsequently adopts and professes. He may be a Christian Parsi, and he may be any other Parsi, according to the religion he professes; but a Parsi he always must be. The word Zoroastrian simply denotes the religion of the individual: the word Parsi [539] denotes his nationality or community, and has no religious significances whatever attached to it. To my mind, the distinction between the two terms, Zoroastrian and Parsi, is most clearly defined when one sets about carefully examining the real meaning of the two expressions; but before the French wife of the sixth plaintiff proposed to be converted to the Zoroastrian religion and claimed to have become a Parsi, I doubt if anyone ever cared to make the smallest distinction in the use of the two words. Before 1903, no one ever gave a thought to this distinction. As late as 1872, in a legislative enactment (Act III of 1872) the manifestly unmeaning expression "Parsi religion" is used to designate the Zoroastrian religion. Surely, there is no Parsi religion in existence. What, however, was intended to be conveyed by the expression was the religion generally professed by the Parsi community. To my mind, the expression "Parsi religion" is as meaningless as the expression: "English religion," "French religion," or "Dutch religion." Before the controversy in connection with the French lady arose, no one had the remotest idea that a Zoroastrian could be anybody other than a member of the Parsi community. For centuries, the only people who in India professed the Zoro-

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astrian religion were the members of the Parsi community born in the religion of their forefathers. No one had for twelve centuries ever made an attempt to convert persons professing other religions. Proselytising was wholly unknown amongst them. No one preached the religion or attempted to teach it to an alien. There was not an instance known either in modern or ancient times, of anybody but a Parsi who professed the Zoroastrian religion. The Zoroastrian religion was professed by the Parsis alone in India; and small wonder, therefore, if the expressions Zoroastrians and Parsis came to be loosely used, as if the two words meant one and the same thing. In 1884, it was not within the contemplation of any one that, in the near future, converts to Zoroastrianism would come into existence, and neither the English Solicitor who drafted the Deed of the 25th of September, 1884, nor those who instructed him to prepare the Deed, and who subsequently executed the same, had the remotest conception of such a class or such an individual as an alien Convert to Zoroastrianism [540] coming into existence; and therefore there could be no possible object in intentionally declaring wrong trusts or trusts at variance with the intentions of the donors and founders. In fact, in paragraph 12 of their plaint, the plaintiffs themselves say that, in declaring the trusts as they are declared in the Deed of 1884, there was no intention "to exclude from the benefit of the trusts any person professing the Zoroastrian faith," meaning thereby Juddin converts to Zoroastrianism. This, at all events, is an admission that there was no intentional wrong declaration of trusts in the Deed of 1884. Till 1903, the two expressions, Parsis and Zoroastrians, were used most promiscuously to mean one and the same thing. When the members of the Parsi community professing the Zoroastrian religion were sought to be designated, some used the word Parsis and some used the word Zoroastrians. Since the controversy, some persons who established new charities have in order to avoid all possible misunderstanding and to have no room for doubt, used the expression Parsi Zarthosti. This is by no means a new combination. As far back as 1836, Framji Cowasji Banaji uses the expression 'Parsi Zoroastrian' in his letter to his colleagues of the Panchayet (Exhibit A59). Many witnesses were questioned on the subject and they were all unanimous that Parsis and Zoroastrians were used as synonymous terms and conveyed the same meaning. Plaintiffs' witness, Mr. Sheriarji Bharucha, says:—

"I would use the two terms Parsis and Zoroastrians as synonymous terms. This is the way in which these terms have always been used and are still used. As soon as the word Parsi is used the only idea suggested is that he is a Zoroastrian."

Beram Sheriar, an Irani priest, another of the plaintiffs' witnesses, says:—

"Some Mahomedans in Persia call us Parsis; some call us Zarthostis. The word Parsis is in common use in Persia. It means Zarthosti. Mussulmans in Persia use the word Parsis commonly to designate our people—the Zarthostis."

Another of the plaintiffs witnesses, Mr. Jamsedji Dadabhai Nadersha, points out how the words Parsi and Zoroastrian are used indiscriminately in certain Pehlvi and Persian works. The defendants' principal witness Mr. Jivanji Mody, says:—

"In India, the word Parsis or Zoroastrians has the same signification".

[541] The Parsi high priest, Dustoor Darab, says:—

"The two terms Parsi and Zoroastrian are synonymous, because in India we have made no conversions. Every one in India knows that they are convertible terms."



This discussion as to the exact meaning and signification of the words Parsi and Zoroastrian was addressed to us on the question as to whether, if the trusts declared in the Deed of 1884, were correctly interpreted by the defendants and those declarations excluded Juddin converts, such declarations were not at variance with the intentions of the donor and founders of the charities. It so happens that there are no documents, either in original or in copies, existing at present with reference to some of the immoveable properties; in the case of other immoveable properties, the defendants have amongst their records copies of original documents. Mr. Lowndes, for the plaintiffs, correctly contended that in cases where no originals or copies of any documents evidencing the trusts in connection with a particular property existed, the question for whose benefit that particular charity was established must be gathered, to use his own words, "from usage and tenets of the founders." He contended that the question for the Court to ascertain was "What were the intentions of the founders of these various charities as to persons who were to benefit by them." He argued: "Where words are ambiguous, you must look at the tenets of the founders." And he claimed the right of proving copies and tendering them in evidence, contending that the documents were "admissible for the purposes of ascertaining the meaning of the words Parsis and Zoroastrians." I have here reproduced the arguments of the learned counsel in his own language as I find them in my notes made at the time.

These arguments appeared, both to my learned brother and myself, to be absolutely sound; but what was the attitude adopted by the defendants? Their counsel contended that section 7 of the Statute of Frauds, XXIX of Charles II, Chapter III, was in force in British India, and that under the provisions of that section, copies of documents evidencing trusts of immoveable properties were neither *proveable* nor *admissible* in evidence.

This position, adopted by the defendants, appeared to me to be most extraordinary. They admitted that they were trustees [542] holding a large number of immoveable properties on certain Charitable Trusts for the benefit of their community. They were in possession of copies of documents evidencing those trusts. They were not in a position even to suggest that those copies were not genuine and authentic. In fact, they knew that they were authentic and genuine copies. They were subsequently proved to be such before us. The records in their possession which contained the copies were not their property but were the property of the Parsi community. They knew that a question of the greatest importance to their Community was being dealt with by the Court. Their obvious duty as trustees, it seemed to me, was to place all available materials in their possession and at their disposal before the Court and to assist the Court to come to a correct decision. Instead of that they made a determined effort to keep back important documents, by pleading a section of an English Statute of 1677! We felt, however, that if the defendants had a legal right to withhold these documents, they were entitled to do so, and that the Court was not concerned as to whether the attitude the defendants were advised to adopt was a correct attitude for trustees of large public charities to adopt; and we had to listen to long and learned arguments on this point with the result that we held that there was no substance in the defendants' contentions. I do not propose to wander through the labyrinth of legal authorities which were cited before us, for

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in my opinion the defendants' contentions on this head could be very shortly and summarily disposed of.

Section 7 of the Statute of Frauds runs thus :—

"VII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

It was argued on behalf of the defendants that, under this section, no trusts of immoveable properties could be proved, unless the trusts were manifested and proved by some writing signed by the settlor or founder. In other words, the defendants contended that the plaintiffs could prove no trusts whatever of [543] some of these immoveable properties held by them as there were not in existence original documents signed by the founders themselves manifested or proving those trusts. This contention came to this, that the trusts of immoveable properties, in respect of which there were no documents signed by the original founders, were, in the words of the Statute, "utterly void and of none effect." It appears that in 1881, in the case of *Bai Manekbai v. Bai Merbai* (1), Mr. Justice West held that the Statute of Frauds applied to "the inhabitants of Bombay," and he thought also to the Parsis. I do not think it is necessary to go into the question argued before us, whether the Statute of Frauds really ever did apply to India. Assuming that Mr. Justice West was right, what happened was that, in the following year, the Legislature simplified matters when they passed the Indian Trusts Act by repealing section 7 of the Statute by section 2 of that Act. The learned Counsel for the defendants, however, contended that inasmuch as section 1 of the Indian Trusts Act provided that nothing therein contained applied to public or private religious or charitable endowments, the repealed section still applied to Charitable Trusts and was only repealed so far as it related to private trusts. This argument, if true, leads to some manifestly absurd situations. If correct, it means that the Legislature deliberately removed a legal enactment which, might have proved a powerful instrument for the purpose of defeating trusts in the hands of dishonest trustees, so far as private trusts were concerned, and yet left all public Charitable Trusts open to this infirmity.

If, for instance, a man conveys two of his immoveable properties to trustees on trusts, one for the benefit of his family and the other for public charitable purposes; executes two Trust Deeds and registers them; and then by some mischance the two Trust Deeds are lost, burnt, or destroyed, the beneficiaries of the family trust could always prove the trust by the copy from the Registrar's records; but inasmuch as the copy relating to the public Charitable Trusts is not signed by the party "who is by law enabled to declare the trusts"—which, according to Mr. Strangman's argument, means the founder and no others—the [544] Charitable trust becomes "utterly void and of none effect." I put this view to the learned Counsel and he said that that was the law. I decline to believe that the Legislature intended anything so manifestly absurd and so repugnant to one's common sense. In my opinion, the saving clause in section 1 of the Indian Trusts Act has no applicability to the repealing section that immediately follows, and that section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act of 1882.

(1) (1881) 6 Bom. 863.



That this view is correct appears also from "A collection of Statutes relating to India," published in 1899, under the authority of the Government of India. In Volume I, Appendix 1, at page 490, I find it distinctly stated that sections 7 to 11 of XXIX of Charles II, Chapter III, are repealed by section 2 of the Indian Trusts Act of 1882.

There is, I think, another equally effective answer to the objection based on section 7 of the Statute of Frauds. Do the words "the party who is by law enabled to declare such trust" mean only the founder and no one else, as contended on behalf of the defendant? I think not. In *Rochevoucauld v. Boustead* (1), where the defendant pleaded section 7 of the Statute of Frauds as a defence to a suit in which a declaration was sought that he had purchased certain immoveable property as a trustee for the plaintiff, the Court of Appeal held that the letters signed by the defendant himself were sufficient to satisfy the requirements of the Statute. Lord Justice Lindley, in delivering the Judgment of the Appeal Court, after citing *Forster v. Hale* (2) and *Smith v. Matthews* (3), says (at pages 205-206):—

"According to these authorities, it is necessary to prove, by some writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance: it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial."

The Court of Appeal also admitted parol evidence in addition to the defendant's letters, "holding that other evidence was [545] admissible in order to prevent the Statute from being used in order to commit a fraud."

Now, in this case, the commission of a fraud was, of course, farthest from the defendants' intentions. It is hardly conceivable that the defendants desired to contend that the trusts in respect of those Towers of Silence in respect of which there are no documents at all, and the trusts of other properties in respect of which there are no documents signed by the founders, were therefore "utterly void and of none effect." It appears to me that all that their legal advisers intended to do was to put obstacle in the way of the plaintiffs' proving what they said they could prove by a reference to the documents in the defendants' possession, namely, that the founders of the charities to which these copies in defendants' possession related were intended for the benefit of all Zoroastrians, including Juddin converts.

However, that may be. *Rochevoucauld v. Boustead* (1) is authority for holding that admissions of being trustee and what those trusts were—contained in the letters of the trustee himself, the defendant in the case—were sufficient to satisfy the provisions of section 7 of the Statute of Frauds, and that it is immaterial at what date such writings came into existence.

I am of opinion, therefore, that in this case the Trust Deed of the 25th of September 1884, would satisfy the provisions of the Statute, even if the 7th section had not been repealed. The defendants' predecessors in 1884 were "persons enabled by law to declare" that they held certain immoveable properties in trust and also to declare what those trusts were. They did so by the Trust Deed of 1884. The question between the parties is whether, if their interpretation of the Deed of 1884 is correct, the trusts they declared were in accordance with the original

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(1) [1897] 1 Ch. 193.  
(2) (1798) 3 Ves. 696.

(3) (1861) 3 D. F. & J. 139.



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trusts as intended or declared by the founders, or whether they were at variance with the trusts declared or intended by the founders. In order to ascertain this, it was necessary that we should have before us all such documents as were properly proveable and admissible under the provisions of the Indian [546] Evidence Act, and we accordingly allowed the plaintiffs to prove and put in copies of the various documents relating to the foundation of various Charitable Institutions. The persistence with which this point was pressed seems very extraordinary, in the face of the fact that the defendants themselves, in paragraph 25 of their written Statement, submit the question "whether persons in whose possession and under whose control the said properties were, were not entitled to declare the trusts thereof as they did by the said Deed of the 25th of September 1884."

Further, it appears to me, on a careful study of the section, that, in spite of the concluding words "shall be utterly void and of none effect," the section is really one that regulates procedure, and that, even if it did apply to India at one time, the enactment of the Indian Evidence Act would supersede this section of the Statute. The scheme of the section is undoubtedly to regulate how trusts were to be proved in a Court of Law, and the concluding words merely denote what the result should be if a particular mode of proof was not available. What Lord Justice Lindley says in his judgment in *Rochevoucauld v. Boustead* (1) lends support to this view. Referring to the contention, that the Statute of Frauds had no application to lands in Ceylon, Lord Justice Lindley says (at page 207) :—

"The Statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this; it regulates procedure here, not titles to land in other countries."

I am inclined to hold that section 7 of the Statute of Frauds was mainly intended to regulate procedure, and that it never applied to this country at any time; but, even if it did, I hold that the Evidence Act, when it came into force, entirely superseded it. The Legislature, however, without waiting, and in order to avoid complications—on the assumption that his view was correct—repealed the section as soon as they found that Mr. Justice West thought it applied to the inhabitants of Bombay and to the Parsis. Possibly, the view was correct. I have not gone into the question very fully, because I hold that [547] if it did apply, it was wholly repealed by the Indian Trusts Act of 1882, both as regards Public and Private Trusts. I also hold that the Trust Deed of the 25th of September 1884, fully satisfies the provisions of section 7 of the Statute of Frauds, even if it had not been repealed and was still in force as regards Public Charitable Trusts.

The immoveable properties in respect of which we have to ascertain what the real trusts are, in order to find out whether Juddin converts were intended to be included amongst the beneficiaries, are the Five Towers of Silence at Malabar Hill and the three Sagdis, the Sagdiwala's house, the Fort and Baharkote Nasakhanas and the Godavara Agiary. [His Lordship enumerated those documents and proceeded :—]

These are all the documents relating to the immoveable properties dedicated to charities which are the subject-matter of the contentions between the parties, and after carefully going over every one of these documents, I have set out in full, I believe, every expression relied on by the

(1) [1897] 1 Ch. 196.



plaintiffs in support of their contentions, that these expressions were intended to include all Juddin converts to Zoroastrianism.

The language used in all these documents is, to my mind, most clear and unambiguous. The people for whose benefit these institutions were established, the persons for whose use these religious establishments were founded, *were the members of the Zoroastrian Community of Bombay*. The expressions most frequently used are "Zoroastrian population of Bombay," "the Zoroastrian *Anjuman*," "the people of the Zoroastrian *Community*," "the people of the *Anjuman of the Mazdiasni faith*," "the whole *Anjuman*," "the Holy Zoroastrian *Community of Bombay*," the Dustoors, Mobeds, Herbuds, and Behedins of the Mazdiasnian religion of the Holy Zoroastrian *Community*," "the entire Zoroastrian *Anjuman of Bombay*," "persons of the *Firka* of the pure and best Mazdiasnian religion," the Zoroastrian *Community of Hindustan*," and "the Khas-va-Aam of the Zoroastrian *Anjuman*."

The utmost stretch of imagination cannot convey to my mind the impression that the Founders, when they used the expressions set forth, meant or intended to include amongst the objects of their benefaction, the Lalias of Bombay, the Dubras from Surat, and the Bhangis, Mahars, and Kahars of Gujarat.

A Juddin may become a Zoroastrian, but how he ever could possibly become a member of "the Holy Zoroastrian *Anjuman of Bombay*," or be one of "the members of the Zoroastrian *Community of Bombay*," or become one of "the *Anjuman of the Mazdiasni faith*," passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants. It would be a most violent presumption to make—a presumption utterly unjustified by the circumstances existing at the time when these institutions were founded—that the possibility of a Juddin convert to Zoroastrianism was ever present to the minds of these founders and that they intended to include him.

I have not the smallest doubt that if the contingency of an alien being ever admitted into the religion had been present to the mind of the founders as being even most remotely possible, they would have made special provisions to *exclude* them. The conditions made by Bisni, when handing over his Tower to the *Anjuman*, are typical of the feelings entertained by religiously inclined Parsis of those days. It was only such Parsis as were most religiously inclined and were devout followers of the tenets of the religion as they understood them then, that would found and endow such institutions as those the Court is dealing with now. And if they objected to even a Parsi corpse touched by Durvands being disposed of in the Towers of Silence—if they considered that the corpse of a Parsi was polluted by having a *post mortem* performed on it, or by even an inquest held on it, or by being brought from upcountry through Durvand Agency—[549] how could they be expected to have contemplated a Durvand's body being disposed of in the Towers; for, no matter what five or ten thousand years ago the Zoroastrian religion laid down as to proselytisation, their ideas since their advent into India had crystallized into the belief that a

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Durvand's touch, or even his gaze, was enough to defile a Parsi corpse, and if such a corpse is not allowed to be carried to the Towers for disposal and is placed on a Chotra or an unused Tower, how could they be supposed to have contemplated the possibility of a Durvand corpse being carried to the Towers so zealously guarded from even the approach of a Durvand? A Durvand Zoroastrian was a being who never entered their thoughts.

To my mind, the language is clear and unambiguous. The plaintiffs, however, argue, that the language is capable of including and does include, Juddin converts. In interpreting documents, there is abundant authority for saying that the Courts must so construe documents that, when the intentions of the donors and founders are clearly ascertainable, they must be given effect to. I will assume, for the sake of argument, that the language of the document is ambiguous, meaning thereby that it is such that it is capable of both interpretations—the one urged by the plaintiffs and the other contended for by the defendants. In that case the documents should be interpreted according to certain well-established canons of construction.

In Tudor's Charitable Trusts, page 169 (4th edn.), the result of the authorities is summed up as follows:—

"If the intention is expressed in the instrument of foundation . . . no difficulty arises. When, however, it is not so expressed, or is expressed in ambiguous terms, recourse must be had to extrinsic circumstances, such as the known opinions of the founder . . . contemporaneous usage, or the like, for determining who are the objects of the charity."

In *Smith v. Packhurst*, (1) Lord Chief Justice Willes says:—

"Before I proceed to the questions, I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim that such a construction ought to be made of deeds *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

[550] "Another maxim is that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor . . . we have no power, indeed, to alter the words or to insert words which are not in the deed; but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible: These maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*, the cunning of Judges in construing words in such a manner as shall best answer the intent: the art of construing words in such manner as shall destroy the intent may show the ingenuity of Counsel, but is very ill-becoming a Judge."

In the Case of the *Attorney-General v. Drummond*, (2) Lord Chancellor Sugden, says:—

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."

This case went to the House of Lords, *Drummond v. The Attorney-General* (3) where Lord Campbell, laid down this rule:—

"In construing such an instrument, you may look to the usage to see in what sense the words were used at that time; you may look to contemporaneous documents . . . to see in what sense the words were used in the age in which the deeds were executed."

Sir John Romilly, Master of the Rolls, in *Attorney-General v. The Dedham School*, (4) says:—

(1) (1742) 3 Atk. 135.

(2) (1842) 1 Dr. & W. 853 at p. 368.

(3) (1849) 2 H. L. O. 897 at p. 863.

(4) (1857) 23 Beav. 350 at p. 355.



"What this Court looks at, in all charities, is the original intention of the founder, and . . . this Court carries into effect the wishes and intentions of the founder of the charity."

While looking at the various authorities laying down general rules of construction, I came across a case which goes further than any case I have ever known. In this case, *Fowell v. Tranter* (1), Baron Bramwell says:—

"The plaintiffs labour under this difficulty, that they admit the natural and grammatical meaning of the words to be against them. The golden rule of construction, is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless [551] there be some very cogent reason of convenience in favour of a different interpretation."

I have referred to this last case only for the purpose of showing to what lengths Courts will be prepared to go to carry out the intentions of the parties in the Instruments that come before the Court for construction. In the view I have taken of the meaning of the expressions used in the Instruments before the Court in this case, it is unnecessary to invoke the assistance of the rule laid down by Baron Bramwell. If, however, the "natural meaning" of the words used had been differently construed, if the natural meaning had been what the plaintiffs contended for, I should not have hesitated to hold that in the present case there are many "very cogent reasons of convenience in favour of a different interpretation." The reasons would not only be cogent reasons, but they are, to my mind, very imperative reasons. If the interpretation sought to be put upon these instruments by the plaintiffs was to prevail, the plaintiffs would succeed in encompassing the disintegration and ruin of the whole Parsi community. We were told by the learned counsel for the defendants that the Parsis were proud of the fact that there were no street beggars and professional prostitutes amongst the Parsi community and the community took care of its own paupers and cripples. If the plaintiffs' contentions prevailed, the community would very soon have no reason to boast of these characteristics of their race, and the Parsis would soon cease to exist as a community by reason of the rapid invasion of all pauper Sweepers and Dubras of Gujarat, who would, no doubt, be attracted to the *Holy Mazdiasni religion* by reason of the *fifty-three lacs of rupees* in the possession of the defendants, and the other advantages of belonging to the Anjuman of the Holy Zoroastrians of Bombay. It must be remembered that the question must not be judged from the standpoint that, in the present instance, the plaintiffs are fighting for the admission of an educated and cultured lady, belonging to one of the most civilized nations of Europe. That is a mere accident. If the Court had to take into consideration "cogent reasons of convenience," it would necessarily have to consider what would be the immediate and natural result of reading the documents [552] in a way which would throw open the door to general and promiscuous admissions of converts.

As, however, I have said before, there is no necessity, so far as I am concerned, for departing from the ordinary rules of construction. As Mr. Jiwanji Mody pointed out in his evidence, the Parsis of India constitute distinct communities at the various places where they have settled down. We have the Parsi Anjuman of Bombay, the Parsi Anjuman of Surat, the Parsi Anjuman of Navsari, the Parsi Anjuman of Calcutta, of

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(1) (1864) 3 H. & C. 458.



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Madras, and even of such places as Cambay and Ootacamund, where there are only a very very limited number of Parsis. When establishing Charitable Institutions, or endowing Funds for religious or charitable objects, the ruling idea appears always to be that it is for the benefit of the community of the place where the Institution is founded or the Fund is endowed. Wherever Parsis settle down in a place in sufficient numbers to feel the want of a Tower or an Agiary or Fund for maintaining an establishment of corpse-bearers, they founded these Institutions either by general subscriptions amongst themselves, or some wealthy charitably-inclined Parsi founded them at his own expense. The Institutions and Funds are for the use and benefit of the community of that place. New comers, who settle permanently in the place, contribute towards the upkeep of the Institutions and add to the Funds according to their means on all auspicious and inauspicious occasions. When some coreligionist visits the place, he is, as a matter of course, allowed to use the Agiary of the place, and if he should die in the place, he would be carried to the Tower of Silence of that place; but unless he has settled down in the place, he is not a member of the Anjuman of that place. Supposing a party of Parsis was travelling in Gujarat, they would all be allowed, without question, to go into the Atash Behram or Agiary of the places they visit, to say their prayers, to make their obeisance to the Sacred Fire, and present sandalwood to the Fire Temple, and make money presents to the priests attached to the Institutions. If some one of the party died, his corpse would be carried to, and disposed of in, the nearest available Tower. The mere extension of those privileges do not make them the members of a particular [553] Anjuman of a particular place. The Institutions and Funds that are the subject-matter of contention in this suit, were all of them endowed and founded for the *Parsi Community of Bombay* and every expression used conveys but one meaning, viz. that they are for the use and benefit of the members of that community.

On this subject, it is important to remember that we are not asked to construe formal documents founding the Institutions. They are more or less informal documents, relating in some way to the Institutions, none formally founding any one of them, such as a deed of conveyance or a declaration of trust.

It is also of importance to remember that, in many instances, there are no documents at all. For instance, there are no documents relating to three of the most ancient Towers out of five; there are no documents relating to one of the Sagdis; there are no documents relating to the Fort Nasakhana and the Sagdiwalla's house; and the only document relating to the Baharkote Nasakhana is a release passed by the executors of the founders, years after the death of the founder.

How is the Court to ascertain the Trust relating to these Institutions, which are the greater portion of the Institutions in question in the suit? By ascertaining the usage prevailing in the community and by the tenets of the founders. The Court must ascertain the intentions of the founders, by first ascertaining what has been the usage prevailing in the community and what were the tenets of the founders of those charities. That is what the learned counsel for the plaintiffs has himself urged. I entirely concur in this view, and am willing to apply those tests to find out who were the objects intended to be benefited by the founders of these benefactions. [His Lordship referred to certain documentary evidence at this point and continued—]



The facts to be gathered from these Exhibits appear to be that, in the early part of the last century, Parsi children by alien mothers were allowed to be invested with Sudra and Kusti without much difficulty, but when the evil grew, there was opposition to this practice, and at first such practices were sought to be [554] restricted by making the previous permission of the Panchayet necessary, but later on the feeling against admissions grew stronger and it was resolved not to admit such children at all, and various pains and penalties were prescribed for those who transgressed the Resolutions passed by the Anjuman.

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The defendants called a number of leading members of the Parsi community—members of well-known Parsi families who had made contributions to some of the Charity Funds. They all said it was never their intention that Juddin converts should profit by their benefaction; in fact, they said such a class was not present to their minds till the present controversy arose. If this is true of present times, *a fortiori* it must be true of remoter times and of people of former generations, who appear to be much more fervent, not to say bigotted, in their religious beliefs and observances than Parsis of the present day.

All the materials available for the purpose of ascertaining the tenets of the Founders tend to show that they never could have intended their benefactions to be for the use of Juddin converts. One can gather the tenets of the Founders by ascertaining the tenets of their predecessors, their contemporaries and their descendants; and taking all the surrounding circumstances of the times into consideration I find that all the indications most unmistakably point out that the idea of admitting a Durvand to their religion must at all times have been repugnant to the Parsis of the olden times. It is only on the advent of "reformers of religion," such as Mr. Sheriarji and possibly the birth of the reforming Subbha he served, that has instilled this idea of Durvand conversion in the minds of a very small section of the community.

For the reasons I have recorded above, I come to the conclusion that even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies he or she would not, as a matter of right, be entitled to the use and benefits of the Funds and Institutions now under the defendants' management and control; that these were founded and endowed only for the members of the Parsi community; and that the Parsi community [555] consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

I ought not to conclude the consideration of this branch of the case without referring to two cases relating to Parsis, decided by our Courts, which have, I think, a most important bearing on the present question. The plaintiffs say: the Zoroastrian religion permits and enjoins conversion, therefore admit Juddins. The defendants say: the usage of 1200 years is not to admit such Juddins, although the religion may allow of such admission. What is to prevail? The tenets of the religion or the ancient usage of those professing the religion?



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In *Peshotam Hormasji Dustoor v. Meherbai* (1) the late Mr. Justice Scott held that usage must prevail over tenets. He says:—

"The Zoroastrian system would seem not to have contemplated marriage in infancy. The marriage ceremony of *Ashirvad* includes a prayer (the *nikah*), or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The Zend Avesta contains many passages which exclude the idea of infant marriage . . . . .

"But custom seems to have wandered from the pure doctrine of the Zend Avesta; and the law, whether English or Persian, can only be applied subject to any well-established usage.

"When the Parsis settled in Western India eleven hundred and sixty years ago, they probably brought with them a system, both of law and custom from Persia. But it was all unwritten, and gradually fell into desuetude, and this mere handful of Persian strangers gradually and naturally adopted much of the law and usage that obtained in the Hindu community, in whose midst they were forced to dwell."

The effect of this judgment is that, although—according to the tenets of the Zoroastrian religion, as gathered by the learned Judge from the Zend Avesta, the Ravayats of which he speaks as the opinions sent by the wise men of Persia and from other [556] sources—infant marriages were not permissible or legal, a usage had sprung up amongst the Parsis of performing infant marriages, and he allowed usage to prevail over the tenets of the religion and held an infant marriage to be legal and binding, though not permissible or legal according to the tenets of the Zoroastrian religion.

This judgment of Mr. Justice Scott was approved of and followed in *Bai Shirinbai v. Kharshedji* (2) by our late Chief Justice Sir Charles Farran and Mr. Justice Hosking.

These are very clear authorities for holding that a well-established and ancient usage prevailing amongst a community must over-ride such of the tenets of their religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

The result is that I hold that the plaintiffs are not entitled to any of the reliefs claimed by them in this branch of their case, and I would dismiss their suit so far as it seeks relief on all points relating to the conversion of Juddins and their right to participate in the Charitable Funds and Institutions in the possession and under the management of the defendants.

I think I have dealt with every point of any importance raised by both sides. The transcript of the very excellent shorthand notes of counsel's address, taken down verbatim by the Court shorthand writer, Mr. Nakra, has been of great assistance to me in keeping before my mind every point argued before us by Counsel on both sides.

[His Lordship recorded findings on issues and went on:—]

The defendants throughout the hearing before us attached far greater importance to the question of the validity of their appointment and their right to appoint their own nominees in the place of their dying or retiring colleagues. The larger portion of the time occupied in the hearing of this suit was taken up by this part of the case. On this branch of the case the plaintiffs have succeeded. Although the plaintiffs have lost on the second branch of the case, they succeeded in defeating the defendants' [557] contentions based on the Statute of Fraud, the argument of which took up a great deal of our time. The questions raised in this part of the suit were of greater importance and by no means free from difficulty. The questions involved were bound to be raised sometime or another. It is very unfortunate that the suit is not so constituted as to settle these

(1) (1888) 18 Bom. 302 at p. 311.

(2) (1896) 22 Bom. 490.



questions finally; but I think the Court's pronouncements on the questions raised will serve some useful purpose and may avert all further litigation. It has not been a secret from us that with the exception of the fourth plaintiff, who bears his proportionate share of responsibility as to costs the whole risk and responsibility is on the sixth plaintiff. Having regard to the letters written to him by Mr. Jivanji Mody and Dastoor Darab and to the circumstances under which certain ceremonies were performed in connection with his wife, I do not think the sixth plaintiff has by any means been fairly treated. He has made an honest manly fight, and I feel that if he had to suffer in pocket it would be a very grave injustice to him.

Then as to the defendants' costs. Apart from the question as to whether they were wise in giving so much prominence to the fight on their right to appoint successors and trying to cling so tenaciously to the privilege of bringing in their own nominees, I feel that they were not personally responsible for the state of affairs as it existed before the suit. It was their predecessors who arrogated to themselves the right and conferred it on their successors and the late Sir Jamsetji, in the course of a discussion before us, told us that he and his colleagues would not have fought this question if they had not felt that the attempt to oust them was due to ill-will against them and made for the purpose of humiliating them before the community. This may have been an erroneous impression,—probably it was erroneous; nevertheless, it was genuine and was communicated to us with a good deal of honest feeling. As trustees they have rendered valuable services to the community in the most disinterested manner, and their administration of the Trust properties has been absolutely faultless. They must have their costs as trustees.

My order as to costs would be that the costs of the plaintiffs, taxed as between party and party, and those of the defendants, [558] taxed as between attorney and client, be paid out of the Charitable Funds in the possession of the defendants. If the plaintiffs and the defendants agree as to which Fund or Funds the costs should come out they should be paid out of such Fund or Funds. Otherwise the matter must be mentioned to us, and we will either decide the question or refer it to the Commissioner.

I cannot conclude this judgment without expressing my sense of obligation to Messrs. Lowndes and Strangman for the very valuable assistance they rendered to the Court during the hearing of this case.

BEAMAN, J.:—On the first part of the case, I am in complete agreement with my learned colleague. We had thoroughly discussed it, laid down the main lines of our reasoning upon every material point, and settled our conclusions before we separated in April. All that then remained to be done was to embody the results of these discussions in a judgment upon that branch of the case. I have only now to gratefully acknowledge the masterly manner in which my brother Davar has given methodized and exhaustive expression to our joint conclusions.

It was not, however, by any means clear, at the end of the case, that we were wholly agreed upon the various questions involved in the second part of the case. When I left India, in April, I did not feel prepared to adopt, in their entirety, what I then understood to be my brother Davar's reasoning and conclusions upon the rights of converts to Zoroastrianism to participate in the benefits of the Charitable Funds administered by the defendant trustees. It was therefore understood that we should deliver separate judgments on this head. But it was also understood that, in the time which must elapse before we could meet and deliver judgment, we

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would give unremitting attention to the principal points and to each other's views upon them, so that, if possible, we might, after all, avoid the necessity of any difference of opinion, even of pronouncing separate judgments. A considerable amount of correspondence passed between us, and since my return we have further elaborately discussed the whole evidence and every argument which has occurred to us, or been suggested to us by Counsel, for and against the right [559] of converts to participate in the benefits of the Funds. In addition to these personal conferences, I have carefully studied the elaborate second part of Davar, J.'s judgment; and while I am doubtful still whether we look at all parts of the complicated question eye to eye, it is a source of great satisfaction to me that I am able to agree with the main conclusion. Perhaps I am led to that result by slightly different trains of reasoning, but that is comparatively unimportant. I think I do not flatter myself when I say that the criticisms I freely offered have led to the modification of many parts of my learned brother's judgment, and have thus made it easier for both of us to take common ground and give to the principal question an unanimous answer. But I have felt, and I have understood too, that this was my brother Davar's wish, that I ought to add a few observations of my own, before disposing of the question which aroused so much feeling in the Parsi community of Bombay. I shall make those observations as short as I can; they will, indeed, take the form of a few supplementary comments upon Davar, J.'s judgment. My object will be to make it as clear as I can, in the fewest and simplest words, why I, too, hold that the Trustees were right in excluding converts from the benefits of their Trust Funds and Properties. But I hope that the relative brevity of my contribution will not be accepted as a measure of the time and thought I have bestowed upon the case. It would have been easy for me, in the ample leisure of my recent holiday, to have gone with the utmost minuteness into every detail; I refrained from doing so,—first, because I hoped that we might end by agreeing as substantially we now do; secondly, because I am sure, that the true ground upon which our conclusion rests is, while a very sure, yet a narrow ground, the character and limits of which admit of short and easy statement.

Before I come to that, I must deal with a preliminary legal objection which has occasioned my learned brother and myself much anxious thought, very grave difficulty, and—speaking for myself—real and serious doubt.

It arises in this way. In the Deed of 1884, the Trusts are declared for the benefit of all members of the Parsi community [560] professing the Zoroastrian faith. Now, when those words were used, we must remember two things: First, they were used by an English draftsman, who surely had not the slightest idea—could not have had, unless prophetically gifted, the faintest premonition—of the use to which they would be put or the trouble to which they would give rise. No practical question had been raised about what did, or might, constitute membership of "the Parsi Community:" whether the qualifications were solely religious, or solely racial, or a mixture of both. The draftsman thought, as probably every one else thought at that time, that the Parsi community was a phrase of sufficiently precise and definite connotation; and that there never could be any question about the class denoted. Secondly, the qualifying words "professing the Zoroastrian faith" were inserted not to exclude converts *to*, but converts *from*, the Holy Zoroastrian faith. About



that there can be no serious doubt; and, if not expressly admitted, it was impliedly admitted during the progress of this case, over and over again. The Parsis of Bombay were beginning to be exercised in mind over the cases of converts to Christianity; and they naturally wished to make it clear that no such converts, though originally of the Parsi community, would be allowed to share the benefits of the Funds and Properties.

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So far all went well. It was only when the sixth plaintiff married a French wife, who openly professed the Holy Zoroastrian faith and was publicly and formally received as a convert into the Zoroastrian religious communion, that the jealous bigotry of the orthodox was aroused, and all the possibilities involved in the acceptance of such a fact began to be vividly realized. In the ferment which followed, the Trustees threw their weight on the side of local Parsi orthodoxy. Finally, they publicly announced, as Trustees of virtually the whole public religious establishment of the Parsi community of Bombay, that they would not extend the benefits of their funds to converts, or allow converts, the use of their places of worship and burial. Thereupon seven members of the Parsi community of Bombay obtained the consent of the Advocate-General and brought this suit [561] with the object, *inter alia*, of getting a declaration out of the Court that converts were entitled to all the benefits of the Trusts administered by the defendants. There is no convert amongst the seven plaintiffs; for all the purposes of this branch of the case, their rights are fully admitted. And the defendants contend that they cannot maintain this suit for or on behalf of unascertained and undefined persons. Put in the simplest, least technical language, that is what this preliminary objection comes to. My brother Davar, after, as I have the best reason to know, very long and very anxious consideration, has been forced to the conclusion that the objection is well founded and that the suit, so far as this relief is sought, must fail. I need scarcely say that I entertain the highest opinion of my learned colleague's learning and ability, that his mature conclusions thus painfully reached must and do command my respect, and that should I feel bound to dissent from them, it would only be with the utmost diffidence and a lively sense that I am on extremely debateable ground. First, I want to clear the air of some high-sounding and justly-venerated phrases. Chief of these are, that no Court could, without abhorrence, decide against parties who have had no opportunity of being heard before it. Secondly, that even if we were to depart so far from fundamental principles of the administration of justice, the decision, if against the converts and in favour of the trustees, would be utterly nugatory, as it would not bind those who were not parties to the suit. I may, I hope, humbly say that no Judge is more desirous than I am of doing justice—no Judge can be more sensitive than I am to any breach of sound judicial principle. And if I do not feel that abhorrence which I understand my learned colleague feels, at the bare idea of deciding this question on the present array of parties, which does not include a single convert, I think there must be a reason and a reason not very difficult to find. We must not, I think, allow reason to be drugged by sonorous phrases, or our judgments to be so overweighted by a splendid and time-honoured maxim, that we cease to be able to discriminate between cases in which it is, and cases in which it really is not, applicable. Sometimes it is not easy to correctly discriminate. It may as in the present case, need searching analysis. But, in every case, we [562] must carefully scrutinize the actual facts, before we apply any wide generalization to them; and



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we must be sure, before we consent to do so, that the result will not be to defeat, rather than further, the true object, to attain which the generalization has been formulated.

Now, if I thought for a moment that by deciding in this case—and on the abundant materials which have with unremitting industry and consummate ability, been collected and laid before us—against the right of converts to share in these Trusts, there was the least, the remotest chance of doing injustice to any convert now in existence or yet to be born, I should go wholeheartedly with my learned brother, and say emphatically “I will be no party to such a decision.” But are we not allowing ourselves, in making such a supposition, to be carried away by the sound of familiar words? Here we have wealthy and representative men of the Parsi community coming forward to fight for the right—a right which may fairly be treated as an abstract right—of all converts, present and future, to share in certain public charities. They spend money like water to have this question thoroughly thrashed out; they retain the most eminent men at the Bar; everything which human ingenuity can do is done to make out the strongest possible case for the converts. It is not as though any particular convert could have a case of his own. The question has to be answered by reference to matters finally settled before any person now living was born. It is as certain as anything in human affairs can be, that no convert yet to be made could have anything more to say to any Court on his own behalf than has been so ably said for the whole of his class (if it is strictly correct to speak of potential and future converts as a class), at the instigation and expense of these plaintiffs. If it were conceivably possible that at a future day some fresh convert were able to lay before the Court materials which have not been laid before us, that, I apprehend, could only be by the connivance and assistance of old Parsi families who at the present time belonging to the orthodox party, have intentionally kept those materials hidden from us. But that is so unlikely a contingency that, except for the purpose of re-enforcing an academic argument, it seems [563] to me that it might be wholly ignored. Now, I understand that my learned brother, who has felt the pressure of this argument so strongly, admits (for its limited purpose) that had there been one convert joined with the seven plaintiffs, the argument would have had the bottom knocked out of it and would have been utterly annihilated. If that is so, and it clearly must be, it is easy to show that the high ground it takes is, in fact and truth, utterly illusory and untenable. Let us suppose, for example, that one of the alleged converts of the lowest class had been made a party plaintiff—some illegitimate child of a Dubri woman. Is there any human being who can seriously contend that such an addition to the array would have strengthened the plaintiff's case, or made a decision of the Court, adverse to converts generally, less unjust to all reputable converts yet to be born and made? If it is abhorrent to any Judge's sense of justice to decide against parties who have not been heard, that abhorrence ought not to be capable of being so easily removed. Yet, for the purposes of this argument only, I repeat, it would have been completely and effectually removed, if, for example instead of making Sonabai a witness she had been made a party. What would have been the real, the substantial difference? Absolutely none. She has already told us everything she knows. She claims to be a convert, she has been examined and cross-examined. Because she is not a party, it is suggested that we should be violating



the best traditions of justice by now deciding against the right of converts to share in these charities. If she had been a plaintiff, we might have come to the same decision on exactly the same materials, without a qualm. I confess that this seems to me hyper-sensitiveness. Again, it has been suggested that in the absence of a convert-party-plaintiff, we have no guarantee against this suit being, from beginning to end, collusive. How are we to know, I am asked, that this is not a deep plot, concocted between the plaintiffs and the defendants, to obtain a decision, barring the rights of converts? The short answer to that is that the learned legal gentlemen in charge of the plaintiffs' case are hardly likely to have countenanced, in the first instance, and to have spent themselves as they did in brilliant and persist-[564] ent efforts to make good a collusive case, and a case which they must have known to be collusive. Of course, that objection is not seriously pressed against this particular case; it is merely brought upon the general question of principle. No one who has taken any part in this case, no one who has attended the hearings or read the reports really doubts for a moment that everything which money, talent, and energy could do has been done for the converts, for more than any one—or any dozen of them—could have done for themselves. So far, then, as there is any risk of doing injustice to persons not before the Court goes, I cannot speaking for myself, treat that risk here seriously. If in any suit of this kind, joining single convert, would have enabled us to decide the question, and in the event of our decision being against the rights of converts to share in the funds would have made our decision binding on all converts present and future, I think, notwithstanding the impressive and imposing line of argument I have been dealing with, we might with the lightest hearts have held ourselves free to give the same decision, in a suit framed as this suit was framed, upon the materials collected by the plaintiffs, resting confidently assured that any number of actual converts added would not have helped us to a fuller or better and fairer understanding of the collective case or individual cases on which their joint or several claims rested. So, too, when it is contended that, if we were to decide this question in a suit constituted as this suit is constituted, our decision would not bind any one who was not a party to it, we must be quite sure that that is so, before we give such final and far-reaching effect to the argument; for this really begs the whole question. Concisely put, that question is: Whether this relief can be obtained, at all in a suit under section 539? Of course, if it cannot, then *cadit quaestio*; for this suit is under section 539, and under no other section. Obviously, then, if this relief is not of the kind contemplated by the section, we cannot give it in this suit. But this, though interlaced with the argument upon general principle which I have just dealt with, is really quite a distinct argument. It has to be faced. The point is subtle and difficult. No authority seems to cover it. If it should turn out that the relief is of a kind which might be sought and [565] awarded in a suit under section 539, when we do away at one with the second of the first-mentioned general objections; for an Advocate-General's suit under that section does, I apprehend, bind every one, and a decision in such a suit—that the Trust did not contemplate the admission of converts—would be final and decisive of the rights of all converts, present and future. And further, it must, I think, be admitted, that if this relief could be claimed in a suit under section 539, then the addition of a single convert to the array of plaintiffs would remove the last objection to

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the view that the decision in such a suit would bind all converts. But I have already shown, I hope, that that objection has no substance, is purely sentimental and academic—at any rate, for the purposes in hand; that the addition of a convert would not have thrown the millionth part of an additional ray of light on the vexed question—would, in fact, have been no more than a purely formal and deferential compliance with a most salutary principle. I shall in a moment have occasion to point out a much more substantial reason, than any reason of that kind could be for adding a convert to the array of plaintiffs, against doing so. But first let me consider very carefully whether the contention that no relief of this kind can be obtained in a suit under section 539 is sound. We heard a great deal during the argument about “rectification” and “construction.” It seems to me to be hinted, if not clearly stated, that, while the rectification of a Trust Deed might possibly be asked in an Advocate General’s suit, Courts could only be asked to construe by persons who were directly interested in the construction they wished to get. Now, I do not think there is so much magic in the words “construction” and “construe,” or any such sharply-defined distinction (for the purposes of this argument) between construction and rectification. However that may be, I am now more concerned to see whether what the plaintiffs really want the Court to do, is what the Court can do, when a suit under section 539 is brought before it. It will, of course, be at once observed that that section, after an introduction containing very general words—as, *e.g.*, “whenever the direction of the Court is deemed necessary for the administration of any such Trust,”—goes on to say that the plaintiffs may obtain a [566] decree for five specified objects, after which come the words “or granting such further or other relief.” And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. I confess that this is a most serious difficulty, and if my learned brother is right as he very likely is, there is an end of the matter. I am not myself—and never have been—much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous re-affirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind so like as to be practically indetical. That would make the words mere surplusage. I should be disposed to think they meant such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in a suit of this kind. As, for example removing fraudulent trustees, restraining a breach of the trust, and so forth. The words I have already quoted seem to me to be peculiarly applicable to the concluding words, “such further or other relief.” When the direction of the Court is deemed necessary for the due administration of the trust,” then any person interested in the trust can come in and ask for such directions. Now what direction could be deemed more necessary for the due administration of such a trust as this than a clear enunciation of the true scope and object of the Trust Funds and Properties? We have the beneficiaries divided on a question—and a very difficult question—of principle, namely, whether the Funds and Properties were intended for the use of converts. Some say they were, others say they were not. The Trustees took up a strong partisan attitude, and announced publicly that in their opinion they were not; and further declared that they will enforce that view,



whether the rest of the community like it or not, by excluding all converts. Here is a fundamental question of principle affecting the whole scope of the trust. It is not really a question of the right of this or that convert, but so stated a profoundly religious question which may be assumed to lie at the root of all great public religious endowments. Any [567] person who believes that his religion enjoins proselytising, and wishes to spread it and make converts, might, it seems to me, without any undue straining of language, be said to be directly interested in ascertaining whether the monopolists of the whole local religious endowments were right or wrong in declaring that they would not allow converts, whatever the religion might say about it, to use those places of worship and burial, or to have the benefit of the Funds. Let us look for a moment at what would be the practical consequences of adopting the view which has commended itself to my learned brother. No suit for this kind of relief will lie under section 539. Very well. Then there are only two other suits possible: one, the ordinary suit; the other a *quasi* public suit under section 30. But those are private suits, in the important particular that the decision in them would not bind anyone who was not a party. Nor, as was suggested, do we derive any assistance from section 437. I will prove this shortly and conclusively. Let us suppose this case reversed. Let us suppose that the trustees had decided to admit, instead of to exclude, converts of every nation, caste, and creed. Now, there can be no doubt, I think, that any orthodox Parsi, who objected to worshipping with the so-called Bhangi converts, would have a very real and substantial grievance. But if he could not bring a suit under section 539, to get the matter set at rest, once for all, what must he do? He cannot use section 437, for *ex hypothesi*, as the most cursory perusal of the language of that section will show, it would land the suit in an *impasse* and a glaring *reductio ad absurdum*. We should have the trustees brought into Court to ask the Court to make them undo just what, in defiance of the sense of the community, they had resolved to do. The Trustees would want to let the converts in—the converts who could be the only defendants would want to come in; and yet the trustees (if that section is to be used) would have to ask the Court to order them to keep them out. This is plainly absurd. Then, are the aggrieved orthodox party to bring private suits? If they do, no convert is a party: it will be a suit between them and the trustees, and there will at once be a failure of the cause of action. If they add as many converts as they can find, still the decision will only bind the [568] parties. And precisely the same if the suit is brought under section 30. There might not be more than two or at most ten converts alive. If they were joined under section 30, then of course they would all be bound by the decision. But the day the decision was pronounced, another half score of converts might be made, and the trustees might say: Well, we don't know anything of these people: they may have new and special claims; we are going to admit them; and so *ad infinitum*. The unfortunate orthodox party would have to be bringing suit after suit, till they and the trusts and all concerned were utterly ruined. Just the same if the case stands as it does now—there could be, there can be, no finality. Surely, it could not have been the intention of the Legislature to expose great public charities to eternal litigation. But if not, then it must have been the intention of the Legislature to have questions of this kind settled once and for all by a suit under section 539. If that was the intention of the Legislature, as I can hardly help thinking that it was, let me revert

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to the point whether it is necessary—or for that matter lawful—to join one of the unascertained X class, to establish the principle for which they represent the suit is brought, as a party plaintiff. The difficulty I adverted to, and which I still feel to be a real difficulty, pointing clearly to the true nature of a suit of this kind, is that a suit can only be brought under section 539 by a party interested in the trust—"any two or more persons having an interest in the trust." Now, it is clear that the object of the suit I am dealing with is to have it judicially determined whether converts *qua* converts (not whether this or that individual convert has any individual right) are or are not interested in the trust. To join them or any one of them as party plaintiffs would beg the whole question in issue. One section of the beneficiaries says converts are interested in the trust; another body says they are not. It seems to me that if that is a question proper to be agitated in a suit under section 539 at all, it must be agitated by persons who are admittedly interested in the trust, and are really fighting not for individuals but for a great principle of administration. These are some of the principal reasons which have led me—though, I have [569] already said, with the utmost deference and respect to my learned brother Davar—to dissent from his finding on this preliminary issue. I believe that we have the power, at the instance of the plaintiffs in a properly-constituted suit—as I also believe this for this purpose to be under section 539—to go into the question whether the Founders of the trust intended that it should be for the use of converts as well as those born in the Parsi faith.

I cannot help adding that I think it would have been better if the legal advisers of the defendants had pressed this preliminary issue on us for decision when the case began. They may undoubtedly well reply: "We took the point in our written statement; we raised it in our issues; what more could we do?"

But that is not such a complete answer as at first sight it appears. When the case opened, we had to listen, as the practice is, to the pleadings read at a great rate. These were immediately followed by a string of thirty-six issues—many of an involved and technical kind. These we had to take down as fast as we could, and in such circumstances it is utterly impossible for a Judge to take in the full significance, or, for that matter, a tenth part of the significance, of the case which is being made. Here, the moment the issues were down and before—speaking for myself—I had had time to give a thought to them, Mr. Lowndes got up, and, on behalf of the plaintiffs, protested against the practice of counsel for the defendants framing the issues and flinging them like this at the Court. He added that, in his opinion, there were really only one or two material issues (amongst which this one was of course not included) to which the attention of the Court need be directed. And he asked us to frame issues on these lines for ourselves and to neglect the thirty-six issues which had just been read to us. To this, my brother Davar—who has had very great experience at the Bar before he was elevated to the Bench—replied that all who frequented the Original Side Courts knew what the practice was; that it was well established; that defendants were always allowed the freest hand in framing issues; but that, as the case went on, a very large percentage of [570] them dropped out and were never heard of again. All this time counsel for the defendants sat by and made no comment. And it was after this protest by Mr. Lowndes, and my learned brother's answer to it—an answer which, looking back on it, I think distinctly invited con-



tradition, if, as it has turned out, there were included in this long list of issues, issues other than those which Mr. Lowndes told us were the only material issues—that the trial began. Davar, J., had intimated that we might take it that many of these issues were in accordance with the usual practice, merely raised *ex majore cautela*. He had intimated that, as usually happens, we did not expect to hear more of a large percentage of them. We had had our attention drawn to all that the plaintiffs' counsel thought material. The defendants heard all this. They must have known that we did not realize that there was among these issues a very serious preliminary objection to going on with the suit on the understanding stated by Mr. Lowndes. Then was the time, it seems to me, for the defendants learned counsel to inform us that, whatever might often happen, here there was a preliminary objection, not raised at all *ex majore cautela*, but an objection which the defendants contended would be fatal to this, which was, when the suit began, by far the most important part of the whole case. Had counsel told us then precisely what the nature of the objection was; had counsel insisted, as I think they ought to have insisted, upon our disposing of it as an issue of law *in limine*, we could have heard all that was to be said about it in a few hours, at the most, and have then given our decision upon it. Had that decision been in favour of the defendants, there would have been an end of the suit. For it is almost certain that at that time the plaintiffs would not have gone on with the issue dealt with in the first part of my learned brother's judgment, if the sixth plaintiff had known that the one question in which he was vitally interested could not be decided. Either the plaintiffs would have amended their plaint and got a proper array of parties, or the whole litigation would have been brought to a summary end. But the course which the defendants took has led, in the case of my learned brother—and might have led in the case of both of us—to this most unsatisfactory result. After spending [571] months of time and thousand of rupees; after inflaming the passions of the whole community and flooding the Court with unsavoury evidence; after squandering the moneys of the trust as well as those of private individuals who believed, and had every reason to believe, that the Court was enquiring into this question of the converts, we are told, that we really have no power to deal with that at all, and we are very likely told so quite rightly. Now, I do think that the Court has a right to expect that, when leading counsel are engaged in a great case, a point so vitally important as this point has turned out to be, shall not be kept in reserve for a single hour. I think we ought to have been told, the moment the issues were read, that the defendants confidently relied on this point; that the defendants relied on that issue as one that would prove fatal to the plaintiff's claim in respect of the convert question; and that, being purely a legal preliminary issue, the defendants insisted upon the Court dealing with it *in limine*. As it is, the whole of my brother Davar's otherwise valuable and instructive judgment on this part of the case is merely *obiter*; and, of course, if he is right, any thing which I may have to add is *obiter* too. I cannot help thinking that this is deplorable. It may be the fault of the system, it may have been largely our own faults. I certainly do not wish to shirk any part of the responsibility which may fairly be mine. But it is clear that counsel and Judges are very differently situated at the beginning of a heavy case. Counsel presumably know every in and out of it. Counsel know the strong and the weak points. A Judge must come to every case with a perfectly open

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mind, and he is at a great disadvantage, where the case is extremely complicated, if counsel will not help him in every way with the utmost candour

Having now partially cleared the ground, I will deal as shortly as I can with the main question. To understand the question itself and the manner of its development before us, we must turn again to the Trust Deed of 1884. Here, as I have said, the trustees declare themselves to be trustees of practically the whole public religious establishment of the Bombay Parsis, for the benefit of "members of the Parsi community professing the Zoroastrian faith"; and later, when it was sought to introduce [572] a foreign convert, they construed the terms of that declaration in such a way as to exclude from the benefits of their trust all who were not born of Parsi parents or who did not come within the definition of Irani Parsis; and further, they limited Parsi parentage to the father, thus excluding children of a Parsi woman by a foreign father. To this the plaintiffs demur. They contend, in the first place, that the trustees have wrongly declared the Trust in the phrase I have quoted; in the next that if that phrase correctly declares the scope and objects of the trust, the defendants have wrongly construed it. The plaintiffs say that the phrase may be unobjectionable in itself, but its real meaning includes all who become members of the Parsi community by conversion and thenceforward profess the Zoroastrian faith. In other words, that the Parsi community means nothing else, and consist of no other persons than those who profess the Parsi or Holy Zoroastrian religion. And the plaintiffs propose to prove this contention by leaving evidence of the practice from old times of the Bombay Parsis in this respect, as well as any and all evidence throwing any light upon the true intention of the Founders of these Trusts at the time of their foundation. This course was at once and strenuously resisted. The defendants contended that the Statute of Frauds was a conclusive bar, and that the plaintiffs could not go behind the Deed of 1884. I may say at once that my learned brother and myself fully discussed the elaborate arguments which were addressed to us for days together on this point. We have read and duly considered all the authorities. And long before the case ended, we were agreed that the defendants' contention was unsustainable. I shall content myself with saying now that I entirely concur in what has fallen from my learned brother in disposing of this objection. He has expressed—admirably if I may say so—our joint views, with the principal reasons upon which we rest that part of our decision. I would only add, avoiding technicalities and using the simplest words, that where a body of persons solemnly declare in a formal Deed that they hold properties and money on trust; where they further declare the objects of that trust, as they understand them; where they are in possession of whatever documentary evidence there may be accompanying the foundation [573] of the trust and showing what was the intention of the Founders, it appeared to me, and still appears to me, preposterous that they should seek to prevent the Court from obtaining, whencesoever it can, by parol or writing, proof of what the Founders of these trusts really meant. The defendants say they meant one thing; the plaintiffs say they meant another. The defendants say that the plaintiffs may not prove their allegation because of the provision of section 7 of the Statute of Frauds. In effect they say: We are the final authorities by reason of that Statute: we are the only people who can now decide what the object of the settlors was.



There is nothing in the case law, as far as I can see, to warrant such an obviously perverted application of the Statute of Frauds. So applied, it might well indeed, be called a Statute of Frauds: not as a Statute to hinder, but to further, fraud. In my opinion, the Statute—or, let me say, the section of the Statute on which the defendants rely—is no longer applicable, if it ever was applicable, to this country. And I am also quite clear that, even if that section is applicable, its requirements are amply satisfied on the authority—to cite one case only—of *Roehefouscauld v. Boustead* (1), by the facts of the present case. I have not and never had any doubt that the course proposed by the plaintiffs is not only a proper course, but the only course we ought to follow. We have to decide—if we have to decide anything—whether the trustees have rightly understood and given effect to the objects of those who entrusted the properties and monies to their keeping. How are we to do this, if not by searching exhaustively into the past, and weighing whatever evidence may be there found throwing light on the intentions of the Founders? The defendants avow themselves trustees, and it is not for the trustees, who are virtually charged with—as I understand it—a breach of trust, to shelter behind the Statute of Frauds and say to their accusers: “You may not prove anything at all behind our own construction of the trusts committed to us.” Doubtless, having brushed aside a technical bar—which, I think, should never have been interposed—we are still to be strictly guided by the rules of evidence. We are not [574] so to extend our enquiry as to take in mere hearsay, or any matter which ought not to be the material of proof in a Court of Law. That is a distinction which, after our interlocutory ruling on the technical plea, seemed to me to be ignored and to have given rise to some dissatisfaction in the minds of those learned gentlemen who had the onerous and responsible duty of conducting the defendants’ case. And in many instances I, speaking for myself, felt that we were going much too far afield, and encumbering our record with what was not, strictly speaking, evidence at all. But my learned colleague thought, that, in a case of this kind, we should always err—if we must err—on the side of liberality. And very likely he was right. It is after all easy, when a case is finished, to sift out the good from the bad evidence. It is not so easy to do this in the stress and heat of the actual enquiry. If, on close examination, our record shows that we have let in a good deal of useless, or even irrelevant matter, I am sure that my learned brother’s able and exhaustive judgment will show that we have not given any weight to that portion of the evidence.

Starting, then, from the *causa causans* of this litigation—the words of the Deed of 1884 and the subsequent construction put upon them, the plaintiffs’ case—put summarily and syllogistically, as I understand it—is, all these trusts are public religious endowments and charities. They were founded not for racial or tribal, but for religious purposes. The founders *ex hypothesi* intended them—since they are not only part of but virtually the whole public religious establishments of the Parsis—for the benefit of all professing the faith of that community. Who, then, profess that faith? Can it be said that only those who are born in it profess it? Certainly not. For we can easily prove (and this has since been admitted over and over again before us) that the Zoroastrian religion was originally a proselytising religion; that its tenets not only permit but energetically

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enjoin the making of converts. It, therefore, follows that, where a religion notoriously enjoins conversion, and where devout members of that religion found public places of worship and burial for the use of those who profess that religion, they must have contemplated—they must be deemed to have contemplated—[575] converts to the religion participating in the benefits of such endowments. Any other view leads at once to this practical absurdity, that you have a great religion ordering conversion, and yet refusing to allow converts any lot or part in its public religious communion.

That is, I believe, a fairly accurate statement of the plaintiffs' main argument. It is an extremely powerful and convincing argument. For many months, reflecting over the whole case, I was inclined to accede to it. I was greatly pressed by its simple logic. And I may add that I do not think it gained anything from the oral evidence which was led by the plaintiffs to supplement it, and to show that not only was this conclusion *a priori* irrefutable, but that the practice of the community was consistent with it. The *a posteriori* line of demonstration almost at once showed signs of inherent weakness; these rapidly accumulated, till the able and indefatigable counsel for the plaintiffs himself awoke to the rather obvious pitfalls in his path, and appealed to the Court to help him to decide whether he should go on with this kind of evidence. We, of course, could say nothing; and Mr. Lowndes rather abruptly stopped calling his convert evidence. That evidence has been fully dealt with by my brother Davar. With the exception of one or two semi mythical cases—as, for instance, the Habshis—it must be perfectly plain to every one who heard the evidence given, or who has taken the trouble to study it since, that it had nothing to do with conversion in the sense in which we are asked to deal with that question. Admitting illegitimate children, or, for that matter, adopted waifs—to put the most charitable construction possible on some of the instances—into the Parsi faith and communion, is altogether different from allowing adult conversion from one faith to another. By far the strongest instance was that of Sonabai. And even if we concede that all those who have given evidence about her have told the truth, and nothing but the truth, what does it amount to? She may have been smuggled in infancy into a Parsi family, and brought up as a daughter of the house, duly invested with the Sudra and Kusti, and married to a Parsi. Thenceforward she may have been allowed to worship in the Fire Temples. But who was to know anything about her real origin?

[576] Having regard to the rest of the evidence, it becomes only too plain that illegitimate children of Parsi fathers were in the same way smuggled into the Community, especially in the mofussil, where the Parsis were scattered and under little or no communal control. If any orthodox Parsi, after Sonabai was grown up, had entertained suspicions, he would probably have quieted them by assuming that she was a natural child of her adoptive father. There was too much dirty linen of this kind, in too many reputable Parsi families, for any one to be over eager to wash it all in public for the sake of a doubtful principle. As to what happened when Sonabai came to Bombay to give evidence, the same considerations apply. I do not doubt she did frequent some of the Fire Temples in Bombay. But, dressed as a Parsi woman, who was to know anything about her? I do not say, of course, that had the priests known, they would at once have turned her out. That would be going too far yet, and begging the question raised by this part of the evidence. For the



plaintiffs' case is that because she was a convert, she was allowed free access to the public places of worship. All that I can yet feel justified in saying to that is that I do not see how any one was to know whether she was a convert or not. It would, of course, have been different had she, before entering, announced herself as a Hindu converted to Zoroastrianism. But nothing of that sort is alleged. Suppose we in England were as strict as the orthodox Parsis in Bombay are, how could anyone in, say, St. Paul's Cathedral, know whether every quiet and orderly member of the congregation had the requisite qualifications? I consider the whole of the oral evidence touching alleged conversions in Surat and other places utterly worthless. No doubt, had it been possible for the plaintiffs to prove a well-established custom in conformity with the precepts of their religion, of making converts and admitting them to full religious communion, this would have done them great service. But the failure to prove this does not, in my opinion, do them anything like proportionate disservice. Indeed, I think too much stress has at various times been laid upon usage. I thought from the first that when the plaintiffs had established the propositions,—(a) that the Zoroastrian religion [577] enjoined conversion, (b) that the properties and funds in suit constituted virtually the whole public religious establishment of Zoroastrianism in Bombay, it lay rather on the defendants to show that converts were not entitled to participate in the benefits of that establishment. But the plaintiffs went cheerfully on at once to try to convince us that many converts had, from time to time, in comparatively recent times, been made and admitted to the Temples and Towers. So far from proving anything of the kind, all that that evidence has revealed is that many mofussil Parsis kept alien mistresses, had illegitimate children by them and brought up those children as orthodox Parsis. Now, the defendants have admitted all along that the bastard children of a Parsi father are eligible and may be admitted to the Zoroastrian communion. So far, then, as the oral evidence goes, the plaintiffs were very soon seen to be beating the air. It is true that this evidence was meant to prove conversions in the proper sense of the word; but no one can seriously contend that it does do so. What the defendants deny is the right of any foreign convert, in whose veins no Parsi blood runs, to become a member of the Parsi community, and as such to share in the benefits of their public religious and charitable endowments. And I cannot say that the oral evidence discloses any instance of the kind contemplated, or any instance remotely resembling it. Again, I must insist upon the distinction between conversion of the kind we really have to deal with, and adoption in infancy. One solid reason is that while, in the first case, all the circumstances would be at once known, in the second, it must always be a matter of real doubt whether the adopted infant was really of foreign extraction or an illegitimate child of a Parsi father. And when we are asked to decide whether converts *qua* converts, as distinguished from bastard children of Parsi fathers, are entitled to share in these trust properties, such evidence as the plaintiffs have offered us—oral evidence, I mean—is seen at once to be utterly valueless. This is not necessarily so when we come to consider the documentary evidence. That stands on quite another footing. But, while I think of it, I will shortly deal with one point which seems to have obtained undue prominence at some stages of [578] this long litigation. I may be wrong, but I think the defendants relied, and strongly relied, upon what they called the long, uninterrupted, and uniform usage

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of the Parsis in India to the contrary. And, speaking here with the utmost deference and respect, I think that that consideration had some weight with my learned brother. With me it carries absolutely none. What is the position? The defendants admit that their religion enjoins the making of converts. But they say that, since the Parsi emigration from Persia some twelve hundred years ago, the Indian Zoroastrians, commonly known as Parsis, have never carried out that religious precept. And they rely on the absence of all conversions, in the proper sense of the word, to prove a custom abrogating one of the fundamentals of their religion. In this connection, reference will probably be made to a case decided by Scott, J. some years ago, in which it was held that long-established usage overrode the canon law. The Zoroastrian religion forbade, as the learned Judge held, infant marriage. But the Indian Zoroastrians were shown to his satisfaction to have uniformly practised it. He accordingly decided in favour of infant marriage. That no doubt was a very proper and just decision in the circumstances of the case. But how does it bear on this question? I do not think it has any bearing at all. There is a perfectly plain and intelligible distinction between a positive or affirmative, and a so-called merely negative custom or usage. The latter is not, in strictness, a usage or custom at all. It is, as soon as the proposition is fairly stated, clearly absurd to reason from mere non-use to the contrary affirmation. The Zoroastrian religion enjoins making converts. But for many years we have not made converts. Therefore, although we still profess that religion and revere all its essentials, we rely on a custom of not making converts, to abrogate the positive commands of our religion. That is what the defendants would say on this point, and it only needs to be stated to be set aside as absurd. There cannot be a custom of not doing a thing. Circumstances may have combined to render it undesirable or impossible, and so a practice may have fallen into desuetude. But as long as the cardinal dogmas of the religion itself have remained unchanged, their efficacy, where, as here it is freely admitted, cannot be [579] impaired, much less destroyed, by inability or unwillingness to obey them. It is as much the duty of every pious Zoroastrian to-day to make converts as it was in the remote past. As a general abstract proposition, I think that is self-evident.

Now, let us look a little closer into the origin and justification of the alleged negative custom. The most orthodox, the most bigotted, champions of the defendants' case are agreed here. We did not make converts, they say, since we came to India, because we could not. That naive explanation is, of course, perfectly true. But what of its effect upon the use to which this inability is now sought to be put? Look at the facts. The Zoroastrians were expelled from Persia, or fled from Persia, before Mahomedanism. Those who reached India were a scattered remnant. They were only too glad to receive an asylum, to be allowed to live in peace and profess their ancient faith. In such circumstances, the idea of proselytising was impolitic and impracticable. They had enough to do to preserve their own faith, their own little society, against the impact of great surrounding forces (which, if not actively hostile, were not altogether sympathetic), religious and social. The danger which the early Indian Zoroastrians had to face, was the danger of being absorbed into the masses among whom they sojourned: their chief care must have been to maintain the purity of their own faith and the traditions of their own people. Any attempt at proselytism in those days would have invited



reprisals. It would have been—regarding them as a body politic—politically suicidal. They were the strangers: they were the weak and broken fugitives. Of course, they did not seek to make converts: all they desired was that their own people should not be converted. Because, under these conditions, there is no trace of any proselytising actively for centuries—until owing to the influence of many other evident causes, the essentially religious had been superseded by an essentially caste spirit when another and equally potent explanation begins to emerge—no inference can fairly be drawn that a local custom against making converts had grown up.

Yet, in the records and documents before us, there is ample evidence. I think, to show that although no practical effect was [580] given to it for reasons of policy the idea of conversion was quite familiar to the whole Indian Zoroastrian community and frequently formed the subject of elaborate references, hypothetical cases, and controversial treatises. I shall have a word or two to say on that later. I will now dismiss the point I have been discussing with this observation, that while the absence of any well-accredited instance of a genuine conversion has, in my opinion, little or no bearing—as usage or custom negating the canon law—on the plaintiffs' *a priori* case, the fact may, and probably will, give rise to considerations of some importance when we try to ascertain what the intentions of the founders of these trusts were at the time they founded them. And this clearly invites a precise statement of the real question we have to answer. *That question is not, whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that Converts should be admitted to participate in them.* Too much stress cannot be laid on this, because the first question really does not arise, while the second is the only question that does arise on this part of the case. It may at once be said that the Zoroastrian religion does admit—even does enjoin—conversion. That cannot be and has never been categorically denied. It is true that the so-called learned men who have come before us to support the defendants' case have wasted hours of our time in puerile attempts to gloss away the plain letter of the law. But that must be attributed partly to invincible bigotry which proverbially dulls the sharpest wits, and partly to a natural stupidity and want of training in clear thought, which prevented witnesses of the type of Mr. Modi from disentangling his own ravelled thoughts and opinions. Passing over these interminable silly sophistries, and admitting that Zoroastrianism enjoins conversion, we are only one step—and that not, in the result a very important step—on the way to our conclusion.

Here I will take up another point which occupied days and days, seemingly turning on the connotation of the words Parsi and Zoroastrian, but really going deeper, and touching the root of the whole matter. Put shortly, the plaintiffs say that Parsi is a term of primarily religious connotation, the defendants that it [581] is a term of primarily racial or tribal connotation. We were referred to dozens of books, not a passage in one of which helped or could have helped to an intelligent solution of the difficulty. Everyone speaking loosely knows the facts, as well as everybody else. When on those facts a peculiarly subtle question arises, which was certainly never present to the minds of any of these amiable savants and travellers, their casual and unconsidered use of this term or of that is in itself worthless, while such observations as some of them made upon scraps of custom, never rise above the level of the ordinary traveller's tale. The case had been

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much better, not to say shorter, without that mass of pedantic rubbish. The Indian Parsis, as everyone admits, came to India from Persia. They were soon locally designated Parsis, because they came from Fars, or Pars, or Persia. Applied to them by the peoples of India, this term simply denoted place of origin. They would not have called themselves Parsis, any more than at first their fellow Persians who had not come to India with them would have called them Parsis. And in this connection it is interesting to note that, in the twenty to thirty passages referring to these properties which have been discussed at great length—early dedications by the Indian Zoroastrians themselves—the word Parsi does not once occur. In all probability, Parsi was a name which no Parsi would have recognised or thought of applying to himself or his people in any special tribal or national sense, when first their exiles landed in India. Then the question arises whether, at that time, it could have any meaning for the community, whether it signified any national as opposed to religious bond? I should say probably not. And it is just here that the significance of the contention dives below the surface verbal definition to the root of the matter, namely, had this body of exiles any common distinguishing bond, marking them off from others and constituting them a peculiar people, except the bond of religion? When they landed in India they were the only people in all that vast and teeming Continent who professed the Holy Mazdiasnian faith. Was it not the profession of, and adhesion to, that faith which consolidated them and made of them a separate people? Or were they a separate people because, in the loose [582] geographical notions of those who were not of their faith, they had come from Pars? Looked at from either point of view, they were foreigners. The outsider might have chosen to label them, for purposes of identification, by a term denoting their place of origin. But what did they themselves regard as their bond of union? Was it the religion for which they had fought, and been exiled, to preserve which they had sought refuge in a strange land, just as the Pilgrim Fathers carried their religion to the free air of America; or was it some national or tribal sentiment, originating in and inseparable from the place of their birth? The answer to this, in those remote times, is, I think, clear and certain. What feeling of patriotism could have survived? There are still, and there then were of course, numerous Zoroastrians in Persia. But amongst themselves, Indian Zoroastrians do not call them Parsis, but Iranis. The fact that the Indian Zoroastrian immigrants were, rightly or wrongly, supposed to have come exclusively from the Province of Fars, amply accounts for the fact that the people among whom they settled labelled them Parsis. But we are concerned now rather with the way in which they regarded themselves. They owed no allegiance to any Persian King: they had no special civil or religious rights as Persians: they had no special political characteristics as Persians—less still of course merely as men from Fars. What they did have was a very special, elevated, and ennobling religion—their own exclusive religion as far as India was concerned, in the practice and profession of which they stood apart from all the alien races by whom they were surrounded. They were in much the same case as the Jews—a peculiar people, with no country of their own, no separate national life of their own, owing allegiance to no Parsi or Zoroastrian temporal sovereign, guests on sufferance of races, of peoples, who had nothing whatever in common with their religious organization. They did not know themselves, I have no doubt as Parsis, in any national sense, if in



any sense at all, but as members of the Zoroastrian community in India. And if that is correct, does it not follow that the original bond of union between these settlers was the bond of religion, not of nation? Here we must not forget that while there may be a plain absence of anything [583] like what we understand by National or Patriotic feeling, its place is not infrequently taken by a tribal feeling. And it may be contended that, while the first immigrants of the Zoroastrian faith were united primarily by a common religion, they were also united as a tribe, which was a tribe because it remained the sole repository of the one true faith. And once the tribal sentiment comes into being, it cannot be doubted or denied that in appropriate circumstances, it will develop to a degree of exclusiveness exceeding anything which is truly national. That is a consideration which must not be lost sight of and may be noticed later. But it is probably incorrect to describe the first Zoroastrian immigrants as a Persian or even a Zoroastrian tribe. So far from that being the case, they were the shattered remnants of a great nation. Usually what has had a complete and national organization on a grand scale does not on disintegration, break up into tribes. We have no Greek, or Roman, or Peruvian tribes. But here again it may be necessary to distinguish between the integral factors of the whole national Unit, to see whether the predominant factors are temporal or religious. In the latter case, the break up of the Nation or Empire—its overthrow by infidels or barbarians—might force those who survived and still regarded their old religion as their chief national treasure to carry it off with them, and, where the environment required, constitute themselves a kind of tribal guardians of this sacred possession.

The importance of applying a searching analysis to the use of the terms Parsi and Zoroastrian from the earliest times is obvious. If, as the plaintiffs contend, Parsi means—and never at any time meant anything more than—a person professing the holy Zoroastrian faith, then any person professing that faith, and formally admitted into it, would *ipso facto* be a Parsi and a member of the Parsi Community. Such a person would, under the express terms of the Trust Deed of 1884, be entitled to share in all the benefits of these Trust Properties. If, on the other hand, Parsi means something more than this, if it means one of the tribe of immigrants from Pars, then it follows that mere conversion to Zoroastrianism will not make—say, a Frenchman—a Parsi, or entitle him to be considered a member of [584] the Parsi community, or to share in the benefits of these Trusts. In the latter case, the plaintiffs fall back upon another, and really a much stronger, line of argument. They say that the insertion of the words “members of the Parsi Community, etc.” in the Deed of 1884 were unauthorized and at variance with the intentions of the founders. I have already observed that those are the words of an English draftsman who could not possibly have foreseen the trouble they were to cause. I have said that they were chosen to exclude converts from, not converts to, Zoroastrianism. And I do not think that, in view of the plaintiffs’ second line of attack, they really need the elaborate verbal criticism which has been spent over them. But I do think that the underlying contention is fundamental, namely, that mere conversion makes a man or woman a full member of the Parsi—or call it if you please Zoroastrian—Community, and entitles him or her to all the benefits of the Trusts instituted for the public religious worship of that Community. I think that the words in the deed are not very

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important, because when we turn back to the earlier documents, we shall find that the Founders of all these trusts never used the word Parsi, but invariably spoke of Zoroastrians, those of the good Mazdiasnian faith, or members of the Holy Zoroastrian Community, and so forth. And the real question is not to distinguish between the modern connotations of Parsi and Zoroastrian, but to ascertain what the founders meant when they dedicated these properties and moneys to Zoroastrians or members of the Zoroastrian Community. Still I have thought it right to point out what I conceive to have been the true origin, connotation, and application of these terms, when they first appear side by side. In my opinion, Parsi was first used by outsiders to describe to each other—by reference to the place of origin—this strange new people. Outsiders could not, of course, have known, and presumably cared little, about the religious tenets of such immigrants. They were foreigners, and they came from Persia. Enough then to describe them as Parsis. Among the Parsis themselves the case was altogether different. They had no reason to be proud of their place of origin, they had nothing to look for from Persia. But they had their religion. They were [585] first and last Zoroastrians, irrespective of the fact that persecution had driven Zoroastrianism out of Persia. As time went on, no doubt the tribal sentiment grew and throve, and there was super-imposed upon the first simple bond of a common religion, the bond of a common tribal descent. So that, as the community prospered and acquired wealth and importance, it accepted the popular name of Parsis, as though it really were a national or tribal distinction. And along with this secularizing process, went a corresponding weakening of the original religious tie, so that, I dare say, it is quite true to-day to say that it is more accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or comunal, or tribal organization—than it would be to define them as men and women professing the Holy Zoroastrian faith.

And that makes it the more unfortunate that the Trust Deed of 1884, drafted by an Englishman, should be expressed as it is. For when we come to compare it with the earlier documents, one thing is plain, that whether the defendant's have put the right construction on disputed words or not, those words ought not to have been used. It would have been much better to follow the language of the founders at the time they dedicated these trusts to public religious uses. Had that been done, we should have been spared a great deal of refined, and on the whole, profitless argument, and we should also have been spared the useless labour of following counsel through dictionary definitions, and the tales, opinions, and gossip of more or less well qualified savants and travellers.

If I were to find that it was the intention of the founders of these trusts using the words "for the use of the Anjuman of the Zoroastrian Community" or "for all those of the pure Mazdiasnyian faith," and so on—to include in their benefactions genuine converts to Zoroastrianism, then I should not feel the slightest hesitation in saying that the Trustees had no right to substitute for such words popular language like "the members of the Parsi Community," still less to construe those popular terms in such a way as to exclude persons whom the founders meant to include.

[586] Before going on further, right into the heart of the matter, I may as well clear away some possible confusion. When we were engaged upon the evidence offered to prove that converts were frequently made, some discussion arose as to what constituted a convert, or, in other words,



whether any specific ceremonies were necessary. As the case went on, it became more and more clear to my mind that too much attention was being bestowed upon this point. When it was first suggested, the defendants at once uncompromisingly refused to go on with it. They told us, in the plainest language, that their case was converts or no converts. They did not care to go into distinctions between the making of this or that convert. Conceding that a convert was made in the most approved and perfect manner, they still denied that he was entitled to the benefits of their funds. For my part, I at once, and finally, accept that position. It is simple and reasonable, and it shuts the door on what might have been long enquiries into ancient ritual that appeared to me likely to lead to no good result. It cannot, however, be denied that, while everyone admits that, theoretically, the Zoroastrian religion enjoins the making of converts, the leading "experts" for the defendants, from the time of the Select Committee's report, have endeavoured very strenuously to introduce certain qualifications. The most general of these has, strictly speaking, nothing to do with this point, though it is apt to be confused with it—I mean the condition upon which all these religious leaders insist, that such conversions should not do harm to the good religion. That is an opportunist gloss upon sound religious doctrine which, I think, a sound Churchman would find it hard to defend upon any but the plainest secular grounds of expediency. The fact that it has gained and held the prominence it has throughout this case, is a convincing proof, if any were needed, of how completely the pure religious sentiment has been subordinated to the caste or tribal sentiment of the present day community. Further than this, however, strenuous efforts were made at various stages of the case to convince us, that no conversion could be a real effectual conversion, unless the convert went through certain ancient, ceremonial, and purificatory rites. Now, I do not propose to go [587] into that question at all. We have here a very simple issue. The defendants say, let your convert be converted and admitted in any way you please; impose upon him the strictest ordeals known to your ritual: and we still say that he is not entitled to share in the benefits of our trust. That being the defendants' position, it is superfluous to go into the question what constitutes a valid, from the religious stand-point, conversion. But I cannot refrain from making one observation. The extreme orthodox party, who are most jealous of the prestige and exclusiveness of their community, appear to think that were this a question for us to decide, we ought to lay it down that what is called the nine nights' Burushnum ceremony is indispensable. And in adopting this line, I have not the slightest doubt they are honestly actuated by zeal for their religion and the desire to keep it as select and unpolluted as possible. But, surely, they must see that they are taking a mistaken course. If that were an indispensable condition precedent of conversion, the only practical result would be to throw the door open to the lowest, least refined, least desirable class of converts, while shutting it in the face of all reputable persons who, out of sincere conviction, desired admission to the Holy Zoroastrian faith. I find it difficult to believe that any cultured adult foreigner could bring himself to submit to this extremely primitive ceremony of initiation, while certainly no grown cultured woman, who wished to join the Zoroastrian faith, could conceivably be asked to do so. It is only people in the lowest stages of development who could be at all likely to consent to go through such an initiation, and those are precisely the kind of converts zealous Zoroastrians do not wish to make. Everything, therefore,

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in the record which deals with degrees, if I may so style it, of conversion—every question and answer about what ceremonies are necessary and what ceremonies are unnecessary—seem to me now to be wholly irrelevant. I shall not say another word about them.

I have now to make one or two remarks upon the documentary evidence relating to conversions in the past. We have three leading instances: (1) the Pandits, (2) Akbar, and (3) the Mazagon converts. The first is, more or less, mythical. I do not think I [588] can go quite so far as my learned brother in disposing of it. He attaches more weight than I am able to do to the learning and researches of Mr. Modi. I can only say for myself that such additional researches as he made, while the case was in progress, served no other purpose than to convince me that his mind was so obsessed by the cause he had at heart, that he was utterly incapable of reasoning or even thinking correctly. Of course, it is possible, as my learned brother suggests, that these Pandits were Parsis; or that if they were not Parsis, they were goodmen who had helped the early settlers, and were therefore remembered in their prayers. Those are quite possible explanations. But taking the evidence about them as it stands, I should have been inclined to say that it did show that these Pandits became Zoroastrians. But the time is so remote that the point has little practical importance. It may amuse the curious, it may interest the scholar, but it does not, I think, throw much light on the question we have to answer.

There seems to be a pretty deeply-rooted and widely-spread tradition among the Parsis that some of the Navasari priests went to Akbar's Court and converted him. Whether he really was converted or not has, of course? only a secondary and comparatively unimportant bearing on the present case. But there is a good deal in this connection which does directly bear upon it and is not unimportant. We have to bear in mind that the defendant's case is, that conversions in India, since the Parsi immigration, are altogether unknown. None, they say, have occurred. We have never tried to make any. And the practice, enjoined by the founder of our religion, has fallen into total desuetude. That is one thing, and as a reply to it, the fact that Akbar was converted, if he was, would be a telling reply. But we have to carry this line of opposition further, as I have already indicated, when we come to consider after preparing the way carefully, the cardinal question: "What had the founders in their minds when they created these trusts?" It would help the defendants greatly to be able to say—as, indeed they do say with dogged insistence—that not only were no conversions ever made, but that the idea of making converts, never occurred to any of the Indian Zoroastrian Community, [589] and it is in answer to this that the evidence about Akbar is so important. For what do we find? Not only, as I have said, a widely-spread tradition, popular ballads, extolling the achievement as the crowning glory of the Bombay Parsis, but Mr. Modi himself—the most bitter uncompromising opponent of conversion, the root and branch representative of orthodoxy—even he writes an elaborate treatise, or, one might say, almost a book, to prove that the priests of Navsari are fairly entitled to the credit of having converted the Emperor Akbar. After making all possible allowances for priestly *esprit de corps* and for the exuberances of learned authorship, I cannot help thinking that this leaves Mr. Modi in a delicate position. When, from time to time, in the course of his cross-examination, he was confronted with his own written and published opinions, I think he must have bitterly regretted that he ever set up to be



a learned author. Not only in this instance, but in many others—right up to the time when the storm broke, Mr. Modi, with guileless indiscretion, went on committing himself to opinion after opinion, from all of which he had of a sudden to resile, with almost startling agility and vehemence! That is one of the many misfortunes of being a popular author. Of course, when Mr. Modi was writing these books and expressing as a recognized sacerdotal authority—these opinions—he allowed himself to be carried away by the impulse of the moment. Engrossed in the fascinating task of flattering the vanity of his co-religionists, he expends his learning and talents in a brochure proving that certain godly priests of Navsari converted Akbar, or, at any rate, if they did not quite convert him, certainly no one else did, and they at any rate, were entitled to all the glory and credit of the attempt. I will not say that Mr. Modi had not the honesty—because like many other worthy fanatics he is probably as honest as he is perverse on his particular hobby, but I will say that Mr. Modi had not the wit—to take the only possible course by which he could have extricated himself from the embarrassing consequences of his too exuberant authorship with dignity and credit. Instead of telling the simple truth, that he had taken up these subjects without the least idea that they would ever have more than a scholarly and academic interest, and committed himself [590] to opinions which, when brought to the test of a shattering concrete case, he could no longer maintain, he made the most pitiable efforts to show that he was perfectly consistent with himself, and that his “Yea” of to-day was his “Nay” of yesterday. I suppose few witnesses of equal éminence, character, and I hope, I may add, sincere honesty, have made a more deplorable exhibition of themselves in the witness-box than Mr. Modi. But the point of all this is, not whether Akbar was or was not converted a century or two ago, but that right up to the present time one of the leading scholars and ecclesiastical lawyers of the Parsi community of Bombay, so far from saying that such a conversion was contrary to the tenets—or, for that matter, the practice of the community—set himself elaborately to appropriate the merit of, let us say, the attempt to convert Akbar to his own co-religionists. Two most important facts emerge: (1) that the idea of converting aliens had not become extinct; and (2) that some, at least, of the religious leaders of the community regarded it favourably within a very short time of this controversy breaking out.

The case of the Mazagon converts is useful for the same purposes. It is, in my opinion, quite immaterial to enquire whether they were converted, or, for that matter, whether they were capable, in the broad general sense, of becoming converts. It may be that they were all illegitimate children of Parsi fathers. What is important and material is, that in their case, in quite recent times, two eminent Parsi Divines engaged in a heated controversy as to what ceremonies were, and what were not, essential to conversion. This shows, again, with convincing clearness, that conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. Scattered about the voluminous papers which have been laid before us, there is plenty of evidence to support this view. In the case of one alleged disreputable convert, we find the leaders of the community objecting, not on the broad ground that no conversions could or ought to be made, but on the much narrower ground that his conversion had not been notified

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to the Anjuman or that the proper ceremonies had not been performed. Again we have the Ravayats or *Responsa prudentium*. These are [591] answers sent by the heads of the Zoroastrian community in Persia, to questions put to them on points of religious dogma, ritual, and so forth by Bombay Parsis. Both questions and answers show, with unmistakable clearness, that the question of making converts,—both in the abstract, as a general question, and, more concretely, as to who were fit and proper to be made converts and how they ought to be made—was very much alive over the whole period to which we need confine our investigations. It is true that the Ravayats may not command much respect. That is not the point. The point is that questions were put by pious men about conversion, and answers were received from the heads of the official Hierarchy in Persia, which most certainly did not deny that conversions could or ought to be made. As to the qualifications, I am not now concerned with them. Nothing in what I may call the official or expert part of the case creates a very high opinion of the intelligence of the good, devout gentlemen who had to some extent the consciences of the Zoroastrian community in their keeping. But it is undeniable that, rightly or wrongly, they, as well as the recipients of the Ravayats, were fully alive to the possibility of conversions; and, with certain reservations of a secular rather than a religious kind, were quite ready to sanction and approve them. In the face of all this evidence, it is idle for the defendants to contend to-day that the idea of conversion, although an integral part of their revealed and accepted religion, had fallen so completely into disuse, that no member of the Bombay Parsi or Zoroastrian community could ever have dreamed of regarding it as a practical and living question.

Before proceeding to develop and explain the final ground on which I rest my conclusion, I must guard against being thought to have looked too much to the consequences of any decision we might give: in other words, to have allowed the expediency to outweigh the rights of the case. *The question, as I understand it, is a simple question, being, in effect whether the defendants have virtually committed the breach of trust, by excluding from the benefits of the trusts persons whom the founders meant to include.* It appears to me, though I express this opinion with diffidence, that any extension or limitation of the [592] scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is really a breach—and a very serious breach—of trust. If I am right so far, it would follow—as I held in disposing of the preliminary issue—that this is quite a proper case to be dealt with in a suit under section 539 and that the issue raised is a direct issue of right which will not allow of the introduction of any collateral considerations of what might be profitable and what might be injurious to the community. If the founders of the trusts really meant them to include converts, then the Court would assuredly have to declare that the trusts are meant for converts, even though that decision might have, as was often said in the course of the trial, what the community at large now feel to be disastrous consequences. A Judge has no business with sentiment. He has only to decide upon the evidence before him what are the legal rights in issue. Nevertheless, where, after fully considering all that evidence, the issue remains fairly doubtful where there is no decisive preponderance in the one scale or the other, no doubt a Court might then, and then only, allow its mind to turn to ulterior considerations of the kind I have mentioned. Let me now, once more and for the last time,



state the conditions of the problem we have to solve. *We are to ascertain what the intentions of the founders of these trusts were.* We are to put ourselves as nearly as we can in their place, to study the history of the Indian Zoroastrians, tracing the operation of all the influences which must have been brought to bear upon them in their new environment, and more particularly endeavouring to obtain a clear idea of the stage the community as a community of foreign immigrants had reached when these trusts were founded. We have then to study again such documents as are available to us, manifesting in their own words what the founders did intend; and we have to construe those documents, not necessarily, with absolute verbal literalness, but in the light of contemporary sentiments, as far as that has been made clear to us. It is by this process, and this process alone, I think, that in a case of this kind we can hope to get at, or even near, the truth.

[593] I am quite ready to start with the assumption that the plaintiffs make, namely, that when the Zoroastrian exiles fled from the Mussulman persecution, they brought with them to India, as their common bond—and practically their only common bond—their ancient religion. I will go further and add that, at that remote time they would probably have not only approved but welcomed converts if—to use the phrase that has so often since been repeated—those converts would do no harm to the good religion. They needed help, they needed countenance, they needed, above all things, powerful allies. And no allies were likely to be better disposed to them than such as had been converted to their own faith. They were not then a dominant, but a servient, timid, and scattered people, the mere remnant and struggling fugitives of an overturned kingdom. They were in a strange land, surrounded by strange peoples, professing an unknown religion. In these circumstances, it is easy to understand that while they dared not proselytise, they would have been only too glad to welcome influential converts from Hinduism and Mahomedanism. And this, I have no doubt, is the real explanation of the Pandits and the Akbar story. But two main causes must have been steadily at work to re-mould and by degrees altogether to transform, the attitude of the community towards conversion. The first, and no doubt the most powerful of these, was the immemorial Indian caste sentiment, with which the whole atmosphere in which they lived was charged. The second was their own growing prosperity. This had a natural and inevitable tendency to reinforce the pressure of the caste principle and to accelerate its growth. Caste must always be more acceptable to a high, than to a low, order in its organization. In proportion as the Indian Zoroastrians were able to compare themselves and their circumstances freely, without apprehension, with the peoples about them with whom they came into the most direct and frequent contact, and from whom they were most likely to receive the infusion of new racial and social strains, it is almost certain that the caste idea must have struck a deeper and deeper root, and coloured all their relations with the indigenous Indians in their neighbourhood. This is not a merely fanciful speculation. I think it is as [594] certain a fact as any which could be proved *a posteriori* before us by evidence; and all the evidence which has been laid before us does, in my opinion, conclusively establish it. I cannot too strongly insist upon this substitution of a caste for a religious basis of the organization of the Indian Zoroastrians, because that is the ground upon which I have, *after long and anxious reflection, felt that our common decision can be most securely founded.* While theoretically adhering to their ancient religion and consistently avowing its

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principal tenets—including, of course, the merit of conversion as a theological dogma, they erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to me to have as distinctly a caste meaning, as essentially a caste connotation, as that used to denominate any other great Indian caste. This, of course, by analogy only; but yet by an analogy that was forced upon the Indian Zoroastrians by the circumstances and conditions in which they found themselves, and by adaptation to which their corporate existence was alone made possible, therefore by an analogy which was both imperative and inevitable. Skipping the intermediate stages, the slow steps of this transforming process—skipping I say, from the beginning twelve hundred years ago to the end to-day, revealed in the defendants' written statement, we need go no further for a complete and unanswerable vindication of the truth of this theory. The first glance at the defendant's definition of members of the Parsi community professing the Zoroastrian faith, satisfied me, once for all, that the basis of the controversy had shifted, and that we were not really concerned with a religious, but with a caste question. If that is so, we must obviously re-adjust our perspective, rearrange the principles applicable, above all prepare ourselves to adopt different criteria in testing the rival cases. The neat logical syllogism with which the plaintiffs opened and upon which they were never able to improve is now seen to require material modifications. It is so—undeniably it is so. The defendants, expressing as we now know the orthodox Parsi view, are prepared to overlook immorality, bastardy—anything but alienage. [595] They are ready to admit any and every Iran Zoroastrian about whose antecedents they cannot possibly know anything. But they will not admit the purest, most blameless foreigner, of whose character and conduct they may have the completest assurance. They will admit all the illegitimate children of Parsi parents, begotten of prostitutes or kept mistresses, but they will not admit the noblest, most exemplary foreigner. Why? Because a foreigner is outside the caste, and caste is an institution into which you must be born. Of the modern Parsi they say emphatically *nascitur non fit*. This is not religion, it has nothing to do with religion: it is essentially distinctly irreligious: but it is pure unadulterated oriental caste. This is so plain that I do not apprehend any unbiassed and competent person would dream of contradicting it. Then, what is the consequence? That, too, is equally plain. We have here, what in its origin was not but has undoubtedly become a caste and a singularly powerful, influential, and, in every sense, a superior caste. And our duty is to find out from the materials before us, if we can the period at which the caste sentiment, as the predominant factor of the organization of the Indian Zoroastrians, substituted itself for the religious sentiment. Put in another way: if, at the time these Trusts were founded, the religious sentiment was still decisively predominant, then I think the plaintiffs' contention would be sound, and for my part I should be disposed to give effect to it; but if by that time caste had so far overriden early religion as to have become the decisively predominant factor of the Indian Zoroastrian organization, we should have to apply quite different criteria, and I think that the defendant's contention would correctly express the intention of the founders. The Indian Zoroastrians had been settled in their adopted country, roughly, for a thousand years before the period with which we are directly concerned. During the whole of that time, they had been



exposed to the powerful impact of all sorts of social and religious conceptions, yet they were not absorbed. They emerge to-day as distinctive and peculiar a people relatively to the peoples, infinitely out-numbering them, as when they first landed. They have kept their ancient faith pure and undefiled, [596] and it is only in our own day, with the great inflation of their wealth and increased facilities of communication with the western world, that we are able to see any disposition at all to relax the rigour of what must have been throughout that period the strongest conservative caste spirit. Immorality there was, and, in the circumstances, of course must have been ; but there was never any open public recognition of the slightest deviation from the most rigid caste principle. It is also to be noted that, however liberal they might have been when first they came to India, the Indian Zoroastrians were precluded—by the very means which they, growing in numbers and influence, adopted for the preservation of their own caste purity—from dissipating and losing themselves in the vast ocean of Hinduism about them. Caste again. Just as now that they have assimilated in every sense the caste idea, and made it the bulwark of their tribal or caste unity, so they were themselves hemmed in by it. They could not have entered the societies about them, because those societies, were caste societies and refused to allow anyone who was not born into them within the pale. The very air they breathed for a thousand years was heavy with caste : caste was the condition of all social existence. As a caste, they might hope to preserve and improve their own status ; as anything else, they could only expect rapid disintegration, and dissipation on the lowest levels, as unclassified outcastes and pariahs. Yet, of course, there must have been a long conflict between the religious and the caste sentiment, between the claims of religion and the claims of society. They had to serve God, but they also had to serve, to some extent, mammon, or there would shortly have been none of the faithful left to uphold the Holy Mazdiyasnian faith. As we have seen, even to this day, and regarded rather as a theoretical than a practical question, the terms on which conversions are permissible and commendable have been the constant subject of more or less academic discussion. But as a matter of fact, few if any genuine conversions have ever been made ; and, so far as our information goes, the conversion of Mrs. Tata is the very first instance of a genuine open conversion of a person in every respect fitted to be a credit and an ornament to the community. I mean, of course, in recent times, [597] and in circumstances which admit of no doubt or uncertainty. We cannot be sure whether Akbar was converted. In all probability he was not. The Pandits take us back to the dark ages, where myth and legend have free play. All the other alleged instances may be dismissed as cases of illegitimate children or adopted children, or, at the highest, cases of persons smuggled in as converts. Now that the question is fairly brought to the test, where every circumstance, every condition is perfectly well known ; where there is not a word to be said against the lady ; where she was openly and with great pomp and ceremony received into the communion by one of the leading high priests of Indian Zoroastrians, what do we find ? All the learning which used to be spent on the academic discussions I have referred to is thrown to the winds, and the very professors and doctors—who were ready enough when the question was abstract, and in the air, to allow that conversion under certain conditions and with some reservations was commendable—are unanimous in withstanding the attempt to give this new convert full rights of religious communion and

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sepulture. All this is mere frippery and shallow sophistry. Either admission can be obtained to the Parsi community by conversion, or it cannot. It is simply puerile to pretend, for instance, that the admission of such a refined and cultured lady as Mrs. Tata would do harm to a religion which opens its doors to all sorts and conditions of bastard children. It is still stupider to resist her claims on the ground that she was not duly admitted. She was publicly admitted by a person corresponding in our religion, let us say, to the Archbishop of York: every one knew of it: leading citizens, English as well as Parsi, were invited to be present at the ceremony. The priest who ought to know says that she was fully and regularly admitted. I really had no patience with the quibblings of the learned men who spoke for the defendants, and, while evading the plain direct point, spent hours of our time in trying to reconcile their own absurdly irreconcilable inconsistencies. The real, the plain point was simply this, that notwithstanding anything in their sacred writings, notwithstanding their own published utterances to the contrary, notwithstanding the Ravayats, notwithstanding [598] everything, they took their stand not on religion but on caste, and when it came to a practical test, denied that any one could become a member of the Parsi community except by birth. That in a nutshell was the whole case for the defendants, and exasperatingly though it was presented to us, curiously enough, in the end, I think, that it is a good case and must prevail.

In saying this I must be understood to limit myself strictly to the Trust Funds and Properties, which are the subject-matter of this suit. I do not want to make any general pronouncement or to go one step further than I am obliged. Perhaps, then, I should say that I think—as I shall now shortly, and I trust conclusively, show—it was not the intention of the founders of these Trusts to extend their benefits to anyone who was not in the most rigid caste sense a Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

Let us now briefly examine the contemporary documents relating to the immoveable properties, the language of which afforded Mr. Lowndes materials for his most strenuous, impressive, and forcible arguments. These have been set forth in my brother Davar's judgment, and I shall therefore confine myself to what appears to me to be pertinent comment upon them. They are twenty-eight in number. I will just quote the material words of each: (1) "Need of another Dakhma in consequence of the great rise of the Zoroastrian population of Bombay." (2) "The entire Zoroastrian Anjuman." (3) "For the people of the Zoroastrian Community." (4) "For the use of the people of the Mazdiasni religion." (5) "For the people of the Mazdiasni religion." (6) "In accordance with the tenets of the Mazdiasni religion," by the "people of the Anjuman of the Mazdiasni faith" (7) "Persons of the Mazdiasni religion." (8) "Whole Anjuman." (9) "People of the Holy Zoroastrian Community of Bombay." (10) "People of the Zoroastrian Community." (11) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (12) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (13) "In the service of the entire Zoroastrian Anjuman of Bombay." (14) "To the Anjuman for the use of all [599] Zoroastrians" (15) "People of the *firka* of the pure and the best Mazdiasni religion." (16) "By the people of the whole Zoroastrian Anjuman." (17) "Holy Zoroastrian Community of Hindustan." (18) "For the use of the Zoroastrians." (19) "For the use of the people of the



Mazdiasni religion." (20) "For the use of the Anjuman of the Zoroastrian people." (21) "Anjuman of the Zoroastrian Community." (22) "For the use of the Zoroastrians on the land of the Anjuman." (23) "Khas-o-Am of the Zoroastrian Anjuman." (24) "For the use of the Zoroastrian Anjuman." (25) "Relating to the Zoroastrian Community." (26) "For being used by the Zoroastrian Anjuman." (27) "For the entire Zoroastrian Community." (28) "By the entire Zoroastrian Alum (world)." It is evident that several of these are couched in the most general terms, and it is principally on these that the plaintiffs rely. Others, and a larger number, contain expressions indicating that the caste spirit was active, such as the Zoroastrian community, and the constant reference to the Anjuman. But in not one do we find the word Parsi. In their own solemn religious utterances, the Indian Zoroastrians had not, even so late as this, thought of designating themselves, or their religious communion, by the popular caste appellation of Parsi. Such a term in such a connection would probably have had no meaning for them. On these expressions the plaintiffs have argued that the various religious endowments were clearly intended by the founders for all genuine professors of the Holy Zoroastrian or Mazdiasni faith. And there are among these extracts some that certainly support that contention. Here it is said: "We know that the Holy Mazdiasni religion recommended the making of converts: we have before us contemporaneous proof of what the founders of these Trusts really meant. They say that the trusts are created, not for born 'Parsis'—a word with which they were not familiar—but for all members of the Holy Zoroastrian Church. And since that Church enjoined conversion, they must have contemplated the extension of those benefactions to converts, who, properly admitted, would, of course, profess the Holy Mazdiasni religion." That is a reinforced form of the original syllogism, which I own carried the very greatest weight with me throughout the entire case. [600] Still, it will not do to be carried away by one or two isolated phrases. We must first appreciate the collective effect of the whole, if we are to gain anything like a correct insight into the minds and intentions of those who used them. And in doing this, I think that it may fairly be said that the cumulative effect of all these expressions is rather in favour of the view, that the prevalent idea at that time was to provide the community with suitable places of public worship and burial and to place those Institutions under the control of the communal Anjuman. This term Anjuman, with its allied notion of "panchayet," deserves attention. In the first part of his fine judgment, my learned brother has traced these Institutions from their birth in India to the period where one of them, at any rate, vanished. Both, however, suggest an assimilation of the prevalent Indian sentiments relating to caste and the management of caste and communal affairs. The Anjuman is the tribal or caste body politic. Amongst Mussulmans, whence the term must come, there is, of course, strictly speaking, no caste in the Hindu sense, and the Anjuman came to be identified with representative committees of responsible elders and so forth. But it implies control by the whole body, when used as it is used in these inscriptions and documents. And in Western India, even Mussulman ideas have been deeply tinged by infusion from the customs and sentiments of the Hindu population. It is not therefore in the least surprising that the Zoroastrian Anjuman should have given birth to the Parsi Panchayet, the latter of course being essentially a caste institution and working the development of the caste sentiment. The question is how far—at the date of those

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foundations, say, 150 years ago—the caste had superseded the early religious sentiment? We are not now dealing with an antiquity so remote that all events and personages in it are obscured by the haze of vast lapses of time. The Community of 1750 could not have been so very different from the community of to-day. The sentiments which animated it are probably very much the same—substantially as the sentiments which animate the Parsi community to-day. If anything, we should ordinarily expect the latter to be more, not less, liberal. Of course, it is not safe to generalize too rashly on such points. All sorts of conflicting [601] interests may have come to the surface: changed conditions may have given birth to changed notions of policy. But if I am right in believing that, long before the foundation of these trusts, the Parsis had virtually become a caste, saturated with caste prejudices, then it is certain that natures reared in that atmosphere do not change rapidly. It takes long periods, and the continuous pressure of an altered environment, to eradicate the bigotry of caste. Two hundred years ago, the Indian Zoroastrians, though by no means as advanced in culture and wealth and status generally as they are to-day, were still a people, who might well be proud of themselves. They still retained, in all its purity, the religion of their fathers; they commanded universal respect as honest, law-abiding citizens; above all they prided themselves on the “theoretical,” at any rate, purity of their morals and the uniform thrift of their people. It has often been said that in no other Eastern community are so few beggars and prostitutes to be found. In a word, they had by that time very good reason to respect themselves as a community, to be jealous of themselves as a caste, and to dislike intensely the idea of contamination by too close social intercourse with the inferior classes of the Hindu population. Such I take to be an indisputably true picture of the Indian Zoroastrian community about one hundred fifty years ago. And the question is, whether leading men of that community, men of conspicuous piety, would have intended to open the doors of their churches and burial towers to any and every one who might choose, for whatever motives, to profess the Holy Zoroastrian faith, and had money enough to get some venal priest to formally admit him into the fold. It is not as though the admission of converts could have been effectively regulated by the sense of the community. It has become abundantly plain in the course of this enquiry that the priesthood have practically a free hand. And while, as a body, they probably do not compare unfavourably with the priesthood of any other great religion, it cannot be denied that there are many among them who would not hesitate to sell their priestly functions to any good bidder. My learned brother has dwelt forcibly on this aspect of the case. And no one—while we have little or nothing to do with [602] it as merely revealing a possible consequence of deciding in favour of converts—can deny it has a direct bearing upon the central question, what was in the minds of the founders of these trusts? Would they have been blind to such a vital consideration? Would they proud of their people, religious community, caste, call it what you will, have left it at the mercy of any unprincipled priest? How strongly the caste sentiment has entered into—how completely it has obliterated—the original religious sentiment in this important matter, has been made plain to me over and over again in the course of this suit. We learn with what fierce jealousy the Indian Zoroastrians observe the complicated rights of burial, or rather exposure of the dead on their Towers. We hear of priestly, and for that matter family, restrictions, which are virtually universal in many of the smaller details of life, as well



as at the celebration of its great events. And all these are clearly the growth of a highly developed caste spirit. Looked at from this and not from the purely religious point of view, it would be sacrilege—the worst kind of profanation—to allow any Juddin—that is, a person of another religion, literally but really born outside the caste—to participate in the most preliminary of the death ceremonies. It would undoubtedly horrify the orthodox Indian Zoroastrian to allow such an one in his Fire Temples. It would be idle to tell him that he had been formally admitted to the Holy Religion. That might appeal to his reason, but his caste instincts would at once rebel. To test this we have only to suppose that, instead of a well-bred cultured European lady, the proposed convert had been a Bhungi. No amount of religious conviction, no sincerity of belief, however profound, could, in the eyes of the Indian Zoroastrians—brought up as they have been for generations under the influence of caste prohibitions—purge such an one of the inherited taint of his foul caste, or make him an acceptable fellow worshipper in their Temples. Of that no one who has heard the evidence in this case, who is acquainted with the sentiments of even the most liberal and advanced sections of oriental society, could entertain the smallest doubt. It seems to be reserved for the Christian missionary alone, in this country, to invite into his communion the lowliest, the most [603] despised, the very scum of Eastern humanity. But, then, the Christian Church has never come under the dominance of caste. It developed in the West, among free peoples, and it has remained—in its proselytising enterprises, at any rate—truly Catholic. The same cannot, of course, be said for Zoroastrianism. And the Bombay Zoroastrians are the last people in the world, it would appear, to put forward any such claim. The furthest that the most liberal of them seem disposed to go is that, if undesirable converts of that kind must be made, they must be segregated, for purposes of worship and burial, from those who are born into the faith. In other words, while conversion, as a religious dogma, is not denied, it, as every other social and religious observance, must fall under the rigid regulation of caste. It may, of course, be said that these are the sentiments of to-day, while we are to ascertain the sentiments of one hundred fifty years ago. In the interval, the community has expended, has flourished, grown wealthy, and politically influential. There are many reasons to-day, which did not exist a century-and-a-half ago, why the Zoroastrians of Bombay should wish to keep themselves to themselves and sternly repel any external invasion. To some extent, that is of course true. The learned gentlemen who gave evidence for the plaintiffs afforded some examples of the lengths to which partially informed opinion will go in the direction of social precaution. We were told, amongst other things, that one reason why the conversion of aliens to the Holy Zoroastrian faith was no longer permissible in Bombay, if it ever had been was that unscrupulous European women would pretend to be converts, in order to marry eligible Parsi young men, and so there would not be enough husbands to go round. The Parsi maidens we were told would be deserted; and one high priest even assured us that, owing to this lamentable tendency, he knew of a Parsi virgin of forty still looking out in vain for a husband. This is the merest absurdity. No doubt, the point of view shifts with circumstances. What might have been thought desirable in a struggling and not too influential community, might be thought very undesirable after that community had progressed and stepped into the first rank. And I am quite sure that the good men who founded these Trusts, even if they had, when the matter [604] was fully laid

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before them, declared that they did not wish them to be available to converts, would never had recourse to such unsubstantial reasons in support of their decision. Let us now suppose that these men when they were founding the trusts had had the question fairly and squarely put to them: "Do you intend that these Towers of Silence and these Fire Temples shall be used by converts as well as members of the Holy Zoroastrian community? What would their answer have been? We have abundant evidence to show with what disapproval the better class—the class from whom these founders came—regarded the lax morals of the Mofussil Parsis. It was not only because that conduct was irreligious—though that, too, doubtless weighed with them—but because it was lowering to the status of the community. Keeping Dubri mistresses and having Dubri children, was not only shocking to the correct Zoroastrian, as a marital offence—an offence, too, against his religion—but because the Dubri woman belonged to a very low caste. It may be very well doubted whether at that time the same disapproval would have been extended to intermarriages—real marriages—with men of equal or superior rank. The early history of the Parsis, or rather the Zoroastrians, shows conclusively that such marriages often did occur, and that no one dreamed of stigmatizing them as religious sins. But that was before the community had become a caste, while still the Zoroastrians were a nation; and the alliances were with people of their own or higher rank. At the time, however, that these trusts were founded, it was hardly likely that any Parsi would intermarry with superior races, while there was a constant and growing danger that he might intermarry with inferior castes. Probably the founders of these trusts would at first have replied, as all the priests and doctors have consistently replied: "By all means let converts use our Endowments, if they are converts who will be a credit to us." But that would not have done. It would have had to be explained to them that they must admit all or none. And they would instantly have realized that for one Akbar who was ever likely to become a convert, there were a hundred Dubras or Bhungis. And with that terrible possibility before their eyes, no one can doubt—I am sure [605] that I do not doubt—that they would unhesitatingly have replied: "No converts, then, on any terms."

As helping us to a better understanding of the mental attitude of the men who used the expressions we are considering at the time they used them, we may turn with advantage once more to the undoubted fact that, whether Zoroastrian religion recommends making converts or not, the circumstances in which the Zoroastrian refugees found themselves on reaching India put all idea of giving practical effect to any such recommendation out of their heads, so that, as time went on, except as a theological dogma, and in a few cases, like those of the Pandits and Akbar, genuine conversion, as a religious duty, had fallen into such complete desuetude, and any variant of it that did come up for discussion had so invariably turned upon the moral expediency of the particular case, that moral expediency, again always resolving itself into ultimate caste considerations and the instances being almost invariably of extremely undesirable persons, whom the better sort wanted to exclude, that it may quite fairly be argued the use of very general language, which, by its terms, taken literally, would seem to include all converts, does not necessarily mean that any such notion was definitely before the minds, or much less intended, by those who used that language. When, 150 years ago, leading members of the Indian Zoroastrians talked about dedicating Temples and Towers to the Zoroas-



trian community, or for the benefit of all of the Holy Mazdiasni faith, we must reflect how those ideas presented themselves to the speakers. For many hundreds of years the Zoroastrian community in India had meant one thing—and one thing only to them—their own select people. And the Holy Mazdiasni faith, as far as they knew, was professed by that select body and by them alone. The religion—originally the principal, if not the only social and tribal bond—had long since been converted also into a distinctive caste badge. Being a member of the good religion was doubtless at that time synonymous with being a member of what we may now, I think, fairly call the Parsi caste. The subject of conversion was unquestionably, as a theoretical dogma, recurrently in the air, but it was growing constantly to be more and more imperatively conditioned by purely caste considerations. [606] As I have said, I think it likely that had these founders of the trusts been asked whether they were prepared to accept converts, they would have replied that they would not object duly-accredited and approved converts. And what they would have had in mind was a regular convocation of Elders on each case as it arose, to decide whether the person proposed was eligible and desirable, much as members are admitted into an exclusive club. Had they been further told that this would be impossible, that they must choose between accepting any convert or none—that accepting any meant accepting all converts indiscriminately; and had it been further pointed out to them that the probabilities were immensely in favour of hundreds of the most undesirable people, for every single desirable person, offering themselves for conversion; looking to the constitution of the society, its attitude towards Dubras, its attitude towards the surrounding inferior Hindu castes, I cannot doubt for a moment that they would have unhesitatingly said that, whatever might be the abstract religious dogma, they meant *their* benefactions for their own people, the members of the Indian Zoroastrian community, that is to say, those who, as in the case of every other close caste, were born into it. It is difficult for any Englishman—probably impossible for any English Churchman who has not been for years in close intimate contact with Orientals of all religions and castes—to put himself into the place of men situated as the founders of these trusts were situated. We must find it hard to realize or even faintly appreciate the sense of repulsion which orthodox Zoroastrians would feel at the bare idea of their places of communal worship, much worse their sacred Towers of Silence, being invaded by persons whose very proximity in the streets, or on the thresholds of private dwellings, had for generations been regarded as a contamination. No English Christian would think of regarding a place of worship desecrated, because a genuine believer happened to have come from a base trade; still less would he deny to such an one rites of Christian burial in a Christian cemetery. But in the Zoroastrian community, the conditions are widely different. There, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound [607] up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical; and there is only this difference, that a modern orthodox Parsi would shrink with infinitely greater loathing and horror from admitting to his Temples and Towers a person whose presence was a social contamination, than he would from admitting him to his table and the freedom of his family circle. No respectable Parsi would dream of eating with, say, a Bhungi. It would seem to him utterly impossible to do so; it would defile him in what is really as an essential caste sentiment. But that defilement would infinitely be worse—more

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irreparable and far reaching—if it touched the sacred sources of the whole communal and caste existence—the ancient places of pure religious worship.

Now, if we were to hold upon the strength of scattered phrases irrespective of the conditions of the community, leading members of which used them that the original Zoroastrian religion enjoined the making of converts, and therefore since these endowments were dedicated to the use of all of the pure and good faith, therefore they were open to all converts indiscriminately, we should undoubtedly profoundly shock the sentiments of the whole community. There might be a constant stream of the lowest and most despised persons pouring into it, and in the estimation of all good Zoroastrians polluting the Temples and Towers. We should be inviting the immediate disruption of the whole ecclesiastical establishment. Genuine Zoroastrians would feel that the venerated seats of their ancient religion were desecrated past redemption, and no longer fit to be used by those of the old faith. Their position in this matter seems to me quite simple, and, in view of the considerations I have been discussing, quite intelligible. They say, we do not object to proselytising fanatics—if there be any such among us—making converts to Zoroastrianism. But if they do, they must provide separate Temples and Towers for their use. These are our Temples and our Towers. Never since their foundation have they been desecrated by the admission, to our knowledge of a single person who was not one of us—that is, of our caste, born into it, and brought up in it. And it has grown to be an integral part of our religious and social organization that these Temples [608] and Towers shall for ever remain consecrated exclusively to the religious and ritual uses of such persons, and such persons only. Destroy that belief, and you sever all the bonds of our caste cohesion: we must cease to be what we have so long prided ourselves on being—a chosen and peculiar people.

That is what, in effect, we have been told over and over again in the progress of this case: and it does, I believe, fairly represent what the founders of these benefactions really felt, and would have unqualifiedly expressed, had they been called upon categorically to do so. They did not guard against the present peril, because it never occurred to them. This, shortly, is the ground upon which I have come to the conclusion that, while the Zoroastrian religion certainly did originally recommend making converts, it was not the intention of the founders of these Trusts to throw them open indiscriminately to any and every convert. And for the purposes of this case that is tantamount to holding that they did not intend to throw them open to any converts.

We have heard a great deal of the usages and tenets of the religion as practised at the time these trusts were created. What I have said—though by no means an exhaustive statement of all the case contains on this head—will, I think, suffice to show how I have considered and disposed in my own mind of that line of reasoning. I therefore concur with my learned brother in his conclusion on the second, as well as upon the first, part of the case. I concur with my brother Davar's formal findings on the issues, unless any modification in respect of any one of them may be clearly required by what I have said in the foregoing judgment, and with the exception of his finding upon the preliminary legal objection. Upon that, as I have stated at length, I have felt myself forced to an opposite conclusion. I hold that the suit lies as framed for the particular



relief, and that that relief could be granted to the plaintiffs in the suit—if to such relief or reliefs they were found entitled.

I entirely agree with the order which my learned brother proposes to make for costs, particularly that the plaintiffs should, under the circumstances of the case, have all their costs out of one or more of the trust Funds.

[609] I cannot close without expressing my deep sense of gratitude and obligation to my brother Davar for the immense amount of labour he has spared me. All the drudgery of the case fell on his shoulders. I was in the relatively favourable position of an undistracted listener. He has laboured unremittingly, not only to make the record a full and true record of every detail, down to the minutest that either party submitted to us, but afterwards to co-ordinate the unwieldy mass of materials thus collected, to shape every part of the case, and to bring every important point with all the materials relating to it, before my mind, often back to my recollection. In the consent, often long and arduous, discussions we have held orally and in writing over points upon which we doubted whether we agreed, my brother Davar has shown the most consistent and conspicuous courtesy, patience, and open-mindedness. And it is a source of the deepest gratification to me that, after all, I have found myself able to agree with him on every main point. My acknowledgments, too, like his, are due to the eminent counsel, who, with so much industry, brilliantly presented the opposing cases, as ably, as thoroughly, and as worthily as the great occasion demanded.

Attorneys for the plaintiffs: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Attorneys for the defendants: *Messrs. Craigie, Lynch & Owen.*

33 B. 610 (=10 Bom. L. R. 1146=4 I. C. 804).

[610] ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

ARDESIR BEJONJI SURTI, *Appellant and Plaintiff*, v. SYED SIRDAR ALI KHAN AND OTHERS, *Respondents and Defendants*.  
[13th October, 1908.]

*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), section 107—Lien—Charge—Assignment.*

Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms, whatever they were, or if a certain course of conduct has been pursued by either party which in point of fact constitutes the relation of landlord and tenant between them, and if in pursuance of that relation one party has paid certain moneys from time to time to another as a deposit to secure the performance by the former of the covenants and conditions of the lease, then a person suing to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

*Note.*—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in the judgment of Mr. Justice Davar, indicate that Mr. Justice Davar desired to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken.—Ed.

\* Suit No. 159 of 1907.

Appeal No. 29 of 1908.

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Such admission of the lease would not contravene the provisions of the Registration Act because it would in that case be put in evidence not for the purpose of affecting any immoveable property but for a collateral purpose, *i.e.*, for the purpose of proving a money debt arising from the conduct of the parties.

*Pullbrook v. Lawes* (1) referred to.

Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

*Cornish v. Abington* (2) referred to.

The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another.

[Fol. 36 Bom. 500; cf. 44 Mad. 55=89 M.L. J. 639 (F.B.) 34 Mad. 53; Ref. 35 Mad. 95.]

APPEAL from the decision of Russell, J.

[611] The appellant Ardesir Bejonji Surti brought a suit to recover from Syed Sirdar Ali Khan (respondent No. 1) moneys alleged to have been deposited with him by Ruttonji Sorabji Munshi (respondent No. 3) as security for the due performance of the covenants of a lease (dated 3rd October 1906) of certain premises executed by the former in favour of the latter for a period of ten years.

The appellant claimed the deposit money amounting to Rs. 25,554 under an assignment (dated 8th of January 1907) from (respondent No. 3) of which notice had been given to respondent No. 1, alleging that the lease had been determined by respondent No. 1 re-entering the premises on the 5th January 1907; that on such determination he, as assignee, was entitled to recover the deposit after deducting from it Rs. 5,000 in respect of municipal taxes and ground-rent which respondent No. 3 was bound to pay under the terms of the lease; and that respondent No. 1 was not entitled to forfeit the said deposit as he had no right of action or remedy except for breaches of covenant antecedent to his re-entry.

Respondent No. 1 denied appellant's right to recover the deposit. Mirza Abbas Ali Baig (respondent No. 2) in his written statement stated that respondent No. 3 was much pressed by a creditor named Haji Jakeria Ahmed Patel and requested him to assist him (respondent No. 3); that respondent No. 3 had given him to understand that Haji Jakeria had a lien on the deposit (Exhibit 14) and that if he advanced moneys to pay off Haji Jakeria he would be secured by a lien on the said deposit which respondent No. 3 would give him; that Haji Jakeria was paid off with the money advanced by him; that prior to Haji Jakeria being paid off he had a lien or charge on the said deposit for the moneys advanced by him subject to the lien of Haji Jakeria; that on Haji Jakeria being paid off he had the first lien or charge on the deposit; that the lien and charge of Haji Jakeria was transferred to him by a document (Exhibit 14A); that respondent No. 3 had passed a promissory note to him for the amount he had paid and that he had obtained a decree against respondent No. 3 for

(1) (1876) 1 Q. B. D. 284.

(2) (1859) 4 H. & N. 549.



the said amount ; that he claimed a lien and charge on the said deposit in priority to the appellant as he had [612] advanced money on the security of the said deposit ; and that the appellant was the managing clerk of respondent No. 3's solicitors and that as the appellant attended to respondent No. 3's affairs he believed that the appellant was well aware of all facts and took the assignment from respondent No. 3 with notice of his claim.

Exhibits 14 and 14A, referred to above, were in the following terms :—

Exhibit No. 14.

I hereby give you a lien on the amount of Rs. 18,666, deposited by me with Syed Sirdar Ali Khan, sole Executor of the estate of Nawab Sirdar Diler Jung Bahadur, C. I. E., as security for the due fulfilment of the agreement to lease dated the 3rd April 1906 and under the lease of the said Watson's Hotel Annexe to be executed hereafter in consideration of your renewing my Hundies to the extent of Rs. 15,000 (fifteen thousand) in the event of my failing to pay the said amount of such Hundies on their respective due dates.

Exhibit No. 14 A.

On the back of Exhibit 14.

At the request of Mr. R. S. Munshi, I have transferred the within charge or lien on the sum of Rs. 18,666 within mentioned to Mirza Abbas Ali Baig in consideration of Rs. 18,121-11-0 advanced by him to Mr. R. S. Munshi, the said R. S. Munshi has agreed to execute a formal deed of charge in favour of the said Mirza Abbas Ali Baig when prepared.

As regards the claim of respondent No. 2 the appellant admitted that respondent No. 3 had passed to Haji Jakeria a writing in which reference was made to the said deposit but did not admit that any charge was thereby created in favour of Haji Jakeria. Further he stated that even if a charge ever came into operation it ceased to be operative on respondent No. 3 duly paying off Haji Jakeria ; that respondent No. 2 had advanced money on the personal security of respondent No. 3 ; and that no lien or charge on the deposit was ever given to respondent No. 2.

The following are the two interlocutory judgments delivered by Russell, J., in the course of the hearing of the case.

RUSSELL, J.—The question that I have to determine in this case has arisen certainly in an unusual way. It is not necessary for me to go into details with regard to the plaintiff's claim as [613] framed. Suffice it to say for the present purpose, however, that the plaint starts by setting out the details of a certain lease dated the 3rd October 1906 between the first defendant and the third defendant and the claim of the plaintiff put very shortly is that he may be declared entitled to a prior lien or charge in respect of certain moneys as to which he became liable as a surety for the third defendant for the payment of the rent and performance of the lease. I am purposely putting this as concisely as possible because really the matter is or may be a good deal more complicated.

Now it appears that when the plaint was filed the plaintiff was under the impression that this lease was duly registered; but since then it has been discovered that the lease has not been registered. In consequence Mr. Lowndes very properly asked that the plaintiff's case might be opened so that, having regard to this altered state of circumstances caused by the non-registration of the lease, he might know what case he has to meet before he raised the issues, and accordingly Mr. Tarapurvala began to open the case. In the course of that opening the question has arisen

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whether or not the particular clause, which is 17 in the lease, is admissible without registration, and I have heard very lengthy arguments on the part of the plaintiff and also a concise one on the part of the defendants on the point. I apprehend that the lease must be looked at as a whole. It commences:—"In consideration of the rents, covenants and conditions hereinafter reserved and contained and on the part of the lessee to be paid, performed and observed, the lessor doth hereby demise unto the lessee" etc. Now clause 17 says:—"By way of deposit for the due performance by the lessee of the covenants hereinbefore contained the lessee shall deposit with the lessor the sum of Rupees thirty-three thousand three hundred and thirty-three, which amount shall remain with the lessor as security till the determination of the term hereby granted." Then it provides for the payment. Then clause 19 says:—"Provided always and these presents are upon this condition that if the said yearly and other rents hereby reserved or any of them or any part thereof shall at any time be in arrear or unpaid for the space of three calendar months [614] after the same shall have become due whether any formal or legal demand shall have been made or not or if the lessee at any time fail or neglect to perform and observe any of the covenants, conditions and agreements herein contained and on his part to be performed and observed, then in any such case it shall be lawful for the lessor, or any person or persons duly authorized by him in that behalf into or upon the said hereby demised premises or any part thereof in the name of the whole to re-enter."

The question that arises, therefore, is:—Can it be said that these clauses "evidence a transaction affecting a right to immoveable property?"

It appears to me that the right to rent is an interest in immoveable property. Therefore an instrument, which creates the right to rent, is an instrument, which creates a right or interest in immoveable property; and inasmuch as the payment of the rent is secured by clause 17, it appears to me that the transaction which secures that payment must necessarily be a transaction which affects this interest, namely, the rent, immoveable property. I cannot see how I can read the words in the Act "transaction affecting the immoveable property" in any other way.

Of the cases cited to me it appears that *Gurunath v. Chenbasappa* (1) is binding on me and is very similar to the present case: the judgment of Sir Charles Sargent being very applicable. In my opinion therefore the document in question does require registration.

The case will therefore continue to be opened so that Mr. Lowndes may know how the plaintiff intends to put it and then frame the issues.

RUSSELL, J.:—I have taken time to consider the question as to whether clause 23 of the agreement in this case requires registration. The material portion of that clause runs as follows:—

"The lessee agrees to pay Rs. 33,333 as deposit for the due performance of the lease. This amount to remain with the [615] lessor as security until the termination of the tenancy." The rest of the clause is immaterial.

Now it appears to me that my decision upon this point must follow that upon the question of the registration of the lease itself. I do not propose to go over the grounds of my judgment on that point but I should like to refer to the judgment of Sir Charles Sargent in the case of *Gurunath Shrinivas Desai v. Chenbasappa* (1), where he says: "The District

(1) (1893) 18 Bom. 745.



Judge was wrong in holding that the term in the lease on which the plaintiff sued could be looked at although the lease itself required registration. That term cannot be separated from the lease itself, as the lease must necessarily be looked at to determine whether the defendant had incurred liability under it." It appears to me that looking at clause 23 of this agreement the lease must necessarily be looked at to determine what would be liabilities of the lessee under it, and therefore the judgment is binding on me and governs the present case.

Mr. Lowndes, however, raised another point with regard to this matter, and that is, he relied upon the judgment of Lord Justice James in *Leggott v. Burrett* (1) and this raises, as far as I am able to discover, a novel point because with the exception of this case which Mr. Lowndes referred to me I have been unable to find any authority or statement in any of the text books exactly in point, or which marks so clearly the distinction between an agreement for a deed or executory contract and the actual deed itself. [His Lordship quoted the judgment of Lord Justice James, at pages 309-310 in full.] Now it certainly did seem to me a somewhat startling proposition that although the Court had held the actual lease itself to be inadmissible on the ground of registration it could go behind the lease and hold that the agreement for the lease which was afterwards carried out by the deed might be admitted under the Registration Act. To do so would be to give an effect to the agreement which James, L.J., says cannot be given, so it appears to me. His judgment as I read it prevents me from looking at or taking into consideration the agreement for the lease, because it was afterwards embodied in the lease itself, the governing document. If that cannot be [616] admitted in evidence, I fail to see how the document which it governs and supersedes can be admitted. I have not been able to find any case in India on the point. I may observe that it is only for the purpose of the Registration Act that the lease is not admissible. For all other purposes it is a deed and exists as a deed between the parties.

For these reasons, in my opinion clause 23 of this agreement of lease does require registration and I must therefore hold that it is not admissible as I held the lease not to be certified to be a true.

Russell, J., dismissed the plaintiff's suit. After stating the facts and discussing the evidence his Lordship proceeded as follows :—

It now becomes for me to consider the legal aspects of the case as put before me by Counsel respectively for plaintiff and defendants 1 and 2 and it will be desirable to deal first with the legal aspects of the case as between the plaintiff and defendant 1.

Mr. Lowndes' argument is that by reason of defendant 3rd's failing to carry out certain conditions the nature of which, owing to the lease and agreement for lease not being registered, I cannot discover, the deposit was wholly forfeited to defendant 1, and therefore, the plaintiff who stands in the shoes of Munshi, cannot recover it. In support of his argument he relied on the following cases :—

*Reynolds v. Bridge* (2), *Wallis v. Smith* (3), *Cooper v. London and Brighton Railway Co.* (4), *Howe v. Smith* (5). But in *Reynolds v. Bridge* (2) it was expressly provided that if the defendant should make default in the amount, he should pay to the plaintiff £2,000 as ascertained liquidated damages. So in *Wallis v. Smith* (2), the defendant was to pay £5,000

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(1) (1880) 15 Ch. D. 306. at p. 309.

(2) (1856) 6 El. & Bl. 528.

(3) (1882) 21 Ch. D. 243 at p. 257.

(4) (1879) 4 Ex. D. 88.

(5) (1884) 27 Ch. D. 89.



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if he committed a substantial breach of the contract. In *Cooper v. London and Brighton Railway Co.* (1) the deposit on the season-ticket being bought was expressly to be forfeited on the breach of any of the conditions. In *Howe v. Smith* (2) the deposit was a guarantee for [617] the performance of a contract. In this last case Bowen, L. J., cites (p. 97) *Palmer v. Temple* (3), where at p. 520 it was said that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intention of the parties to be collected from the whole instrument. Now in the case before me I am not entitled to look at the whole instrument, so I cannot gather the intention of the parties from it. In my opinion however the true principle to be applied to the present case according to English Law is to be found in *Lord Elphinstone v. Monkland Iron and Coal Company* (4) and *Wilson v. Love* (5).

The headnotes in these two cases are as follows:—

“When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees.”

“Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and provided that an additional rent of 3<sup>1</sup>/<sub>2</sub> per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was substantial difference between the manurial value of hay and that of straw:—Held that the sum so made payable was a penalty and not liquidated damages.”

The principles in *Lord Elphinstone v. Monkland Iron and Coal Company* (4), have been applied in *Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo Y. Castaneda* (6) and *Diestal v. Stevenson* (7). See also *Pye v. British Automobile Commercial Syndicate, Limited*, (8) where it was held that to ascertain whether the sum payable for compensation is a penalty or liquidated damages, the Court must take all the circumstances into consideration to ascertain the intention of the parties.

Suppose defendant 3 was suing defendant 1 for the return of the deposit, I should feel great difficulty in holding (as I would have to hold if Mr. Lowndes' argument is correct) that it would be a good defence for defendant 1 to say you have not performed [618] all the conditions of the lease and therefore all the deposit is forfeited and I am entitled to retain the whole of it.

But, in my opinion, the law is most clearly stated by Lord Maonaghten in the case of *Soper v. Arnold* (9):

There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered: the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything seemed ready for completion; but when the time came for paying the price the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was apparently closed. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit

(1) (1879) 4 Ex. D. 88.

(2) (1884) 27 Ch. D. 89.

(8) (1839) 9 Ad. & E. 508.

(4) (1886) 11 App. Cas. 382.

(5) [1896] 1 Q. B. 626.

(6) [1905] A. C. 6 at p. 15.

(7) [1906] 2 K. B. 845.

(8) [1906] 1 K. B. 425.

(9) (1889) 14 App. Cas. 429 at p. 435.



is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

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No doubt under the Transfer of Property Act, a lease is a transfer of property, as is a sale, but I do not think it follows from that, that the same principles apply to a deposit for the performance of the terms of a lease as to a deposit for the purchase of property. It is well known that a lease contains covenants of very various importance.

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The purchaser says I "mean business," that is to say, "I am going to buy"—one single act—"and I deposit so much to guarantee that one act." The lessee means business and says "I deposit so much as a guarantee that I will perform a number of acts of more or less importance." Of course, I am not at liberty in this case to look at the terms of the agreement of the lease. A deposit on account of purchase-money is a well known phrase but as far as I know, one has never heard of a deposit on account of a leasehold. I can quite understand a man saying "I deposit so much as a guarantee that I will buy your property" but I cannot understand him saying "I deposit so much as a guarantee that I will carry out all the terms of the lease and if I don't paint a wall or room my deposit is to be forfeited." In [619] the present instance, for instance, it would, I think, be going too far to say that if defendant 3 had failed to paint a part of the Annexe costing say Rs. 500, it could have been intended that he should forfeit the deposit amounting to Rs. 33,333. Upon this point I confess I agree with Mr. Strangman's argument when he relied upon section 74 of the Contract Act which, as Sir Frederick Pollock says, boldly cuts the most troublesome knot in the Common law doctrine of damages, and looking at the terms of that section, it appears to me that it would be impossible to hold that the deposit in the present case has wholly been forfeited. I read the section which is in a Code relating to contracts in India and which, *Bank of England v. Vagliano Brothers* (1) followed in *Norendra Nath v. Sircar Kamalbasini Dasi* (2) shows, I am bound to follow.

Defendant has sought to prove a number of items, e.g., damage to furniture and crockery, damage to good-will, servants' wages paid by him on third defendant's behalf Osler's bill of electrical fittings, but in the absence of a lease and agreement for lease, apart from any other consideration I fail to see how he can set up any liability of defendant 3 in respect of these sums. But no doubt in respect of the amounts due to the Port Trust for ground-rent and the Municipal taxes down to 5th January 1907 when defendant resumed possession of the premises, which are admitted by plaintiff, these amounts ought to be allowed to be deducted from the deposit which of course would leave a balance in favour of the plaintiff but for the circumstances I hereinafter set forth.

This leads me, therefore, to defendant 2's case. I have above fully set forth the reasons which have led me to the conclusions of fact upon it.

Mr. Strangman's main argument was upon the wording of the letter of lien, Exhibit No. 14 itself, namely, that the words at the end of Exhibit No. 14—"In the event of my failing to pay the said amount of such hundies on their respective due dates"—governed the whole document and that inasmuch as Jackeria had been paid off in October 1906, his agent Budha had nothing to transfer by [620] the endorsement Exhibit 14A, but to my mind the wordings of Exhibit No. 14 is perfectly clear

(1) [1891] A. C. 107.

(2) (1896) L. R. 23 I. A. 18.



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and the words at the end of it which I have above quoted must be held to refer to the prior words "In consideration of your renewing my hundies to the extent of Rs. 15,000" and not to the works at the beginning of it—"I hereby give you a lien on the amount of Rs. 18,666."

Again it appears to me that to hold that Jackeria through his agent had nothing to transfer when the endorsement Exhibit No. 14A was executed would be contrary to the effect of the whole transaction and upon this point the wording of 14A seems to me very material, particularly so if Budha's evidence is correct that it was sent to him typed by defendant 3. It does not say, "I having been paid off the amount hereby transfer the within charge of lien, etc., in consideration of such and such a sum paid to me" but it says "I have transferred the within charge or lien in consideration of rupees so much advanced by Baig to defendant 3," and therefore, upon the wording at the date of the transfer of charge or lien, it must I think be taken to be the living charge or lien and not a dead one. And if my view of the transaction is correct, the effect of it was that Jackeria having a valid and effectual lien or charge upon the deposit, in consideration of Baig's having paid to defendant 3 the amount that defendant 3 owed to Jackeria, Baig stood in the shoes of Jackeria and was entitled to the same rights as to the deposit as Jackeria himself was entitled to, and looking at the terms of Exhibit No. 19, Baig's letter to defendant 1 of the 28th September 1906, it must, in my opinion be taken that defendant 1 was aware of and agreed to the proposed transfer.

Therefore, in my opinion, the first paragraph of section 130 of the Transfer of Property Act has been complied with.

That section being in a Code, is the only law to be considered *Bank of England v. Vagliano Brothers* (1). It is perfectly clear and intelligible. It sweeps away all the difficult questions regarding privities between transferee dependent on notice being given to the debtor or to the person in whom the property was vested. The transfer, according to this section, is "complete and effectual [621] on the execution of the requisite instrument, and thereupon the transferee has vested in him all the rights of the transferor. The possibility of a second assignment to another assignee is thus excluded, for the assignee has nothing left to assign"—The Transfer of Property Act by Shepherd and Brown, 6th edition, page 571. And notice to the debtor is not requisite to complete the transfer, as between the transferor, his creditors or executors on the one hand and the transferee on the other (*ibid.*, p. 572).

Moreover, if the assignment to Baig was valid and effectual, the plaintiff's assignment was subject to the liabilities and equities to which defendant 3 was subject in respect thereof on the 8th January 1907. Section 132 of Transfer of Property Act.

Under the above circumstances, it is unnecessary to consider what are the legal and what the equitable rights as between the plaintiff and Baig. Nor is it necessary to decide the point raised by Mr. Strangman as to marshalling in favour of the plaintiff.

I therefore hold that upon the execution of Exhibit 14A, there was a valid transfer of Jackeria's claim to the deposit which became complete and effectual upon the execution of 14A, and thereupon all Jackeria's rights and remedies vested in Baig.

It is admitted by the plaintiff that if the transfer to Baig is a valid one, he can get nothing by this suit.

(1) [1891] A. C. 107.



The plaintiff appealed.

*Robertson* (with him *Padshah* and *Taraporwalla*) for the appellant.

We are entitled to recover under section 65 of the Contract Act and section 81 of the Trust Act.

Our suit is not based on the lease but is simply to recover the monies deposited by Munshi with Sirdar Ali Khan the lease being only the occasion and the reason for making the deposit. This is clearly shown by the issues raised on our behalf (Nos. 15-16). The fact that the lease was unregistered only deprived the plaintiff of the right to use it in evidence.

As to the admissibility of clause 17 of the lease which relates to the deposit it has been held that though a document cannot [622] be admitted in evidence for want of registration in so far as it affects immoveable property it can still be put in for a collateral purpose not affecting land and that even a portion of a document can be put in if it is divisible from the rest of the document. We submit this clause can be separated from the rest of the lease: see *Mitter, J. in Lachmipat Sing v. Mirza Khairat Ali* (1) followed in *Krishto Lall Ghose v. Bonomalee Roy* (2).

The same principle was laid down in *Ulfatunnissa Elahijan Bibi v. Hosain Khan* (3).

Section 65 of the Contract Act says that where an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under it is bound to restore it. The lease in this case has become void and therefore the Sirdar is bound to restore the advantage of the deposit which he received under it: see *Casson v. Roberts* (4).

*Setalvad* for Respondent No. 1.

*Bahadurji* (with him *Jardine*) for Respondent No. 2.

CHANDAVARKAR, J.:—This is an appeal from the decree passed by Russell, J., in Suit No. 159 of 1907 brought by the appellant Ardeshir Bejonji Surti, to recover from the first respondent, Syed Sirdar Ali Khan, moneys alleged to have been placed by the third respondent with the first respondent as deposit or security for the due performance of the covenants and conditions of a lease (dated the 3rd of October 1906) of certain premises known as Watson's Annexe, by the former to the latter for a period of ten years commencing from the 1st of April 1906. The appellant claimed the amount under an assignment dated the 8th of January 1907 from the third respondent, Ruttonji Sorabji Munshi. In the plaint he alleged that the lease had been determined by the first respondent re-entering the premises on the 5th of January 1907, and that on such determination the right accrued to him (the appellant) as the third respondent's assignee to recover the amount of the deposit less certain sums payable by the third respondent to the first respondent under the terms of the lease.

[623] The first respondent in his written statement admitted that there was a lease, that in accordance with it the third respondent had taken possession of the premises, and that he (the first-respondent) had re-entered on account of a breach of certain covenants in the lease: but he denied that the covenants and other terms of the lease were all the same as those set out in the plaint. He also denied appellant's right to recover

(1) (1869) 4 Ben. L. R. (F. B.) 18 at p. 22.

(2) (1879) 5 Cal. 611.

(3) (1883) 9 Cal. 520.

(4) (1862) 31 Beav. 613.

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the deposit on the ground that the third respondent had under the terms of the lease wholly forfeited it.

The second respondent opposed the claim on the ground that the third respondent had assigned to him on a date prior to the assignment in favour of the appellant the right to recover the amount of the deposit from the first respondent.

It was in this state of the pleadings that the parties went to trial before Russell, J. At the commencement of the trial it was discovered that the lease of the 3rd of October 1906, relied on both by the appellant and the first respondent, had not been registered, and that, therefore, neither it nor any oral evidence could be received in proof of its terms. Counsel for the appellant sought at the trial to prove those terms by tendering in evidence an agreement for a lease, but Russell, J. disallowed it also upon the ground that it could not be received for want of registration. Evidence was then led on other issues than those relating to the terms of the lease.

Russell, J., held, *inter alia*, that the plaintiff (appellant) had not proved the lease and the covenants and provisions referred to in his plaint, that the third defendant (respondent No. 3) had entered into possession of the premises under the terms of the lease and remained in possession thereof until its determination by the first defendant (respondent No. 1), and that the second-respondent had a charge on the deposit prior to that of the appellant. Accordingly the suit was dismissed with costs.

The learned Judge's finding that both the lease and the agreement for a lease referred to in the pleadings of the parties in the Court below required registration has not been impugned before us in appeal. But it is contended for the appellant that the learned Judge ought to have held that the lease having [624] become inadmissible in evidence for want of registration, the contract had become void, and that under section 65 of the Indian Contract Act the first respondent was bound to restore any advantage he had received under the contract or to make compensation for it to the third respondent. Under section 2, cl. (g) of the Act, an agreement is said to be "void" when "it is not enforceable by law" that is, when its terms being ascertained have no legal effect at all. That cannot be predicated of an agreement which the law declares has no existence because there is no evidence of its terms. "The mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter, because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money, to recover the same as on a failure of consideration; for in such a case the contract is not void, but there is merely a deficiency in the evidence thereof." (1) Further, there is this to be said that not only the Registration Act but also the Transfer of Property Act created a bar in the way of the appellant's suit as it was launched in the Court below. Section 107 of the latter Act provides that "a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument." And the law is that "if an Act of Parliament says that a contract shall be carried into effect in a given way, and such enactment is not by way of direction merely, then the additional words 'that shall not be of any effect either in law

(1) Chitty Junr. on Contracts, page 581, Sweet v. Lee, (1841) 3 M. & G. 452.  
8th Edition (12th Edition, p. 98), citing



or in equity ' are superfluous, because if the Act says that is the way all property shall be acquired, you must comply with those provisions in order to acquire the property—the property is to be given in that mode, and that mode only" (1). Accordingly, it has been held by this Court on the construction of the first paragraph of section 54 of the Transfer of Property Act, which relates to sales of immovable property and the language of which, so far as it is material for our present purpose, is similar to that of section 107, that there cannot be [625] a sale except by a registered instrument in the class of cases mentioned in the paragraph (2).

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It follows then that the appellant could not in support of his claim rely on the lease referred to in his plaint and prove any cause of action alleged to have arisen from it.

But although that was so, there was enough in the plaint and also in the written statement to show that, though the lease had not been registered, the parties to it had acted upon its terms, whatever they were, that a certain course of conduct had been pursued by either, which in point of fact constituted the relation of landlord and tenant between them, and that it was in pursuance of that relation that the third respondent had paid certain moneys from time to time to the first respondent as a deposit to secure the performance by the former of the covenants and conditions in the lease. The law applicable to this state of facts is summarized by the Editors of Smith's Leading Cases Volume I, 10th Edition\* (pp. 307 and 308), as follows on the authority of the cases there cited, of which the principal is *Pulbrook v. Lawes* (3):—

"Although a plaintiff be prevented by the statute from availing himself of his special contract, he may nevertheless be able to recover upon one of the money counts anything in the nature of a debt which has accrued to him by reason of his acting upon the contract."

From this point of view it would be open to the plaintiff to give the lease in evidence for the purpose of proving his right to recover the moneys lodged by the third respondent with the first respondent as a debt due from the latter. Such admission of the lease would not contravene the provisions of the Registration Act, because it would in that case be put in evidence, not for the purpose of affecting any immovable property, but, to borrow the language of Blackburn, J., in *Pulbrook v. Lawes*, for "a collateral purpose," i.e., for the purpose of proving a money debt arising from the conduct [626] of the parties (4). Nor would that view contravene the provisions of section 107 of the Transfer of Property Act. All that that section enacts is that if parties enter into a transaction by way of a lease of immovable property, it shall have no operation as a lease and shall not constitute the relation of landlord and tenant between the parties in certain cases unless the transaction is embodied in a registered instrument. But the section does not say that if the parties without any such instrument conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of

\* 11th Edition, p. 321.

(1) Per Wood V. C. in, *Liverpool Borough Bank v. Turner*, (1860) 29 L. J. Ch 827, 830.

(2) (1904) 28 Bom. 466; see also a Full Bench ruling of the Madras High Court to the same effect approving of 28 Bom. 466 in (1904) 29 Mad. 836.

(3) (1876) 1 Q. B. D. 284.

(4) See also *Thakore Fatesingji v. Bamanji A. Dalal*, (1903) 27 Bom. 515, at pp. 540 and 541, whether Batty, J., has adopted this view of the law, relying upon the case of *Lalla Gopee chand v. Shaikh Liakut Hossein* (1876) 25 W. R. 211.



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that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel in section 115 of the Indian Evidence Act. As was said in *Cornish v. Abington* (1):—"If any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

This view of the case was not presented at the trial in the Court below, where both Judge and Counsel thought that the appellant's case had an insuperable difficulty to meet on account of the non-registration of the lease and that there was the authority of no decided case in point which could be invoked in order to establish his right to recover the moneys in dispute. Having regard to the law which we have stated at some length above, it would become necessary to allow the appellant to amend his plaint and prove the case so stated unless the decree of the Court below should be confirmed upon the ground that he has no right to recover the moneys in dispute from the first [627] respondent, because, as held by Russell, J., the second respondent has a prior and superior right to them.

The second respondent claims the right to those moneys under a transfer to him by one Jakeria of an assignment from the third respondent. The facts in that connection are that, in consideration of Jakeria agreeing to renew *hundis* drawn by the third respondent in the event of non-payment thereof by the latter on their due dates, the third respondent gave on the 23rd of July 1906 "a lien or charge" to Jakeria on the moneys that might be recoverable from the first respondent by the third respondent out of the amount of the deposit now in dispute (see Exhibit 14). Jakeria at the instance of the third respondent assigned that lien to the second respondent by means of an endorsement (Exhibit 14A) made on Exhibit 14. The endorsement bears no date, but Russell, J. has found on the evidence that it was made on the 26th of October 1906. The correctness of that finding has not been challenged before us; indeed Mr. Robertson for the appellant candidly admitted that he could not question it. On these facts then it is quite clear that the second respondent has a prior and superior right to the moneys in dispute which are in the hands of the first respondent.

But it is contended for the appellant that what the second respondent relies upon as the basis of his claim is not an assignment of the third respondent's right to recover the moneys from the first respondent but merely a lien or charge of those moneys, subject to a contingency which never occurred.

Now, it is true that by Exhibit No. 14 the third respondent gave to Jakeria what he calls a lien on the amount of Rs. 18,666 deposited by him to the first respondent and that by Exhibit No. 14A Jakeria or rather his authorised agent, Elias Buddha, purported to transfer that "charge" or "lien" to the second respondent. But the mere fact that the parties have described the transaction in each case as "a lien" or "charge" cannot deprive it of its real nature, if in substance the transaction was in the

(1) (1859) 4 H. & N. 549.



first instance an assignment by the third respondent to Jakeria of the former to recover his moneys in the hands of the first respondent, and, in the second instance, a trans-[628]fer of that assignment by Jakeria to the second respondent. The English cases cited before us as making a distinction between a charge and an assignment have no bearing on the question here which must be decided solely with reference to the intention and conduct of the parties disclosed in the evidence and the provisions of the Transfer of Property Act. The transactions evidenced by Exhibit 14 and Exhibit 14A are substantially transfers of "an actionable claim" dealt with in Chapter VIII of that Act. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person, the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another. And that is what the evidence in this case establishes to have been the intention of the parties to Exhibits 14 and 14A.

But it was said that, even assuming that Exhibit 14 was in substance an assignment of the third respondent's right to recover the moneys in the hands of the first respondent, its operation as such depended upon the former renewing the *hundis* of the latter to the extent of Rs. 15,000 and that only in the event of failure by the latter to pay the amount of such *hundis* on their respective due dates; that the *hundis* in question having been satisfied by the third respondent on their due dates, the contingency, on the happening of which alone the assignment was to take effect, having never occurred, the assignment had no operation. This argument assumes a state of things which is not supported by the evidence in the case. According to the third respondent, three *hundis* (Exhibit T.) having become due in July 1906, he requested Jakeria's authorised agent Elias (also called Buddha) to renew them, because the third respondent was unable then to satisfy the *hundis* by payment in cash. Elias Buddha wanted some security besides the endorsements on the *hundis* before he could agree to renew. And it was on that account that the third respondent executed the document, Exhibit 14, with the result that Elias Buddha on its execution renewed the *hundis*. This version of the transaction finds substantial corroboration from the evidence of the appellant [629] himself. He says that he knew that letter (that is Exhibit 14) had been given by the third respondent to Jakeria on the 23rd of July 1906; that he himself might have prepared the draft of it; and that Jakeria renewed the *hundis* after he had got his letter of assignment.

It only remains to notice one further argument of appellant's Counsel. It is argued that when Jakeria was paid off, his assignment came to an end and that there was no right existing in virtue of Exhibit 14 which he could transfer to the second respondent. There, again, we must look into the evidence to see what really happened. The moneys which went to satisfy the third respondent's liability to Jakeria came from the pockets of the second respondent. The second respondent supplied the third respondent with those moneys on the distinct understanding that he was to step into the shoes of Jakeria. Accordingly Jakeria through his agent Elias Buddha transferred his right under Exhibit 14 by Exhibit 14A to the second respondent. These are the facts found by Russell, J., and the evidence which he has rightly believed, supports them.

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33 B. 610=10  
Bom. L. R.  
1148=4 I. C.  
804.

On the ground, therefore, that the second respondent's assignment, being prior in point of time to the appellant's, defeats the latter, we must confirm the decree of Russell, J., with costs. It was not suggested in the Court below nor has it been suggested in appeal that, after satisfying the second respondent's claim, there would be a balance of the deposit left in the hands of the first respondent to which the appellant would be entitled in virtue of his assignment. Before us, as it had been before Russell, J., the appellant's case was fought out on the footing that if the second respondent's assignment was found to be prior in point of time to the appellants, the latter must fail in the suit.

After the delivery of this judgment Mr. Robertson urges with reference to the last sentence that there would be a balance left, that on that ground his client had asked Russell, J. for an order for an account to be taken and to marshal the securities in the hands of the second respondent. Nothing was said about this during the hearing of the appeal before us. In Russell, [630] J.'s judgment it is distinctly stated that it was admitted before him that if the second respondent's claim was prior he (the appellant) would get nothing. The correctness of that statement in the judgment was not at all assailed before us. And the appellant's deposition (page 82 of the paper book in appeal) confirms Russell, J.'s remark as to the admission. We cannot in this state of the pleadings allow the case to be reopened, because that would be encouraging parties to argue their cases piecemeal and shift their grounds of claim so as to prolong litigation. Respondents to have separate sets of costs.

*Decree confirmed.*

Attorneys for appellant: Messrs. *Wadia, Ghandy & Co.*

Attorneys for defendant Messrs. *Captain & Vaidya.*

33 B. 630 [=2 I. C. 435=11 Bom L. R. 360]

ORIGINAL CIVIL.

*Before Mr. Justice Russell.*

BAI MOOLBAI v. CHUNILAL PITAMBER.\*

[23rd March, 1909.]

*Contempt of Court—Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.*

Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

*Gordon v. Gordon* (1) followed.

NOTICE of motion.

The defendant's attorneys were served with a notice of motion in the following terms:—

"Please take notice that on Monday next the 22nd instant or as soon thereafter as Counsel can be heard Counsel will move on behalf of the plaintiff before [631]

\* O. C. J. Suit No. 31 of 1909.

(1) [1904] P. 163.



the Hon'ble Mr. Justice Russell on the grounds of the affidavit of Shivshankar Dalsukram copy whereof is sent herewith for an order committing your client to jail for contempt of the Court he having failed to hand over to R. D. Sethna, Esquire, the Receiver appointed herein, the property in his possession of the estate of the late Ambaram Motichand in the plaint herein mentioned and for such other order as the Court may think proper to make and for costs. The affidavit in support of notice of motion is sent herewith."

This notice was served upon the defendant's attorneys on March 20th at 4 p. m.

*J. D. Davar* for defendant:—We submit that this notice cannot be heard because it has not been served upon the defendant personally. There are no Indian cases on the point, but the Court will follow the English practice which is laid down in *Mander v. Falcke* (1); see also *Re Cunningham* (2) and *Oswald on contempt* (1892 Edition), pp. 106—110.

We also submit that this notice cannot be heard because we have not had four clear days' notice as provided for in the Rules and no leave has been obtained from the Court for service on short notice.

*Lowndes* for plaintiff:—The case of *Mander v. Falcke* (1) cited by the defendant is in our favour. That case lays down distinction between proceeding in attachment and in committal. Attachment proceedings are taken when the person sought to be attached neglects to do what he has been ordered to do; and committal proceedings are taken against a person who has done what he has been ordered not to do. In the former case personal service is not necessary. There is no such distinction made in the practice prevailing in India as obtains in England between these two kinds of proceedings. No authority has been quoted to contradict this by the other side.

We submit (1) If English law or practice on the point has been adopted out here our motion can be heard as it would correspond to attachment proceedings at England. (2) If the English law or practice does not apply then our motion is equally good, for, the authority quoted above can show no reason for differentiating between the two proceedings with regard to service of notice.

[632] As to point of short notice we have not as yet brought on the notice of motion. Counsel for the defendants has merely raised points by way of demurrer, but we now ask for leave to have this notice of motion set down for hearing to-morrow.

[RUSSELL, J.:—I will deliver judgment on this question to-morrow and the defendant must be present in person.].

RUSSELL, J.:—The plaint in this suit was filed on the 18th January 1909 and the plaintiff is the daughter of one Ambaram Motichand, who left property of a very considerable value, and the defendant is the executor of his will. He is described in the plaint as a law-tout; but whether or not he is so I do not know. The suit is for the construction of the will in various particulars and also for an account.

On the 1st of March 1909, Mr. Sethna was appointed Receiver, which I apprehend implies with it that it would be the duty of the executor to hand over all the property of the deceased in his hands to the Receiver; and also an order was made restraining the defendant from dealing with the property of the deceased. It appears from the proceedings, which I have gone through, that the order for Receiver could not be served upon the defendant until the 19th of March 1909 and on the 20th of March the

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(1) [1891] 3 Ch. 488.

(2) (1886) 55 L. T. 766.



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following notice was written by the plaintiff's attorneys to the defendant's attorneys:—

[His Lordship then read the notice as set out above and proceeded :—]

That notice is dated the 20th of March 1909 and it was served on the defendant's attorneys only and not upon the defendant; and on the 22nd March the notice came on for argument before me, when Mr. Davar for the defendant raised two objections to this notice. The last objection I will deal with first as it is the less important one. This objection is that four clear days at least had not elapsed between the service of the notice of motion and the day named for showing cause as directed by Rule 377 "unless the Court or a Judge gives special leave to the contrary." The way I read those words is that it is open to the Court or a Judge to give special leave to the contrary at any time. In any emergent matter where a notice of motion has been given for [633] less than four days, the Court, if it thinks fit, can give special leave under the Rule after such notice has been given; and, therefore, I do not think I ought to hold this objection of Mr. Davar to prevail. In my opinion this is a case in which the Court will be fully justified in not adhering to the strictness of that rule.

With regard to the other objection, however, it appears to me that different considerations must apply. A number of cases have been decided in the Bombay and Calcutta High Courts with reference to what the contempt of Court really is and with regard to its jurisdiction. Thus in one case, *Martin v. Lawrence* (1), it has been held that the jurisdiction of the High Court to imprison for contempt is a jurisdiction which it has inherited from the old Supreme Court and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code. To a similar effect is the case of *Navivahoo v. Narotamdas Candias* (2), and also the leading case of *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court* (3); and as mentioned in Mr. Mulla's Civil Procedure Code (3rd Edition) the power to commit is "amongst the inherent powers" of the Court, a list of which is to be found at page 275 of that work.

It was held by the Privy Council, in *In re Pollard* (4) (which is referred to with approval in *Kashinath Vithal v. Daji Govind* (5)), that in their Lordship's judgment, "no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed." Therefore, it appears that the proceeding for contempt of Court is in the nature of a criminal offence; and to the same effect, as I read [634] it, is the case of *In re Vallabhdas* (6)—which is an Insolvency case but the principle seems to be the same—where it was held (following *Ex parte Van Sandau* (7)) that in all criminal cases it is necessary that there should be a charge, a finding and

(1) (1879) 4 Cal. 655.

(2) (1882) 7 Bom. 5.

(3) (1883) 10 Cal. 109.

(4) (1868) L. R. 2, P. O. 106.

(5) (1870) 7 Bom. H. O. R. A. O. J. 102.

(6) (1903) 27 Bom. 894.

(7) (1844) 1 Phillips 445 at p. 457.



a conviction, as a foundation, for the sentence and that as there was no charge, the order for imprisonment was wrongly made.

While I am on this point, I may also refer to the case of *Balwantrao v. Ramchandra* (1), where the Court say :—"It is admitted that the injunction of this Court was personally served on Ramchandra on the 28th April last," I refer to that for showing that evidently the Court was of opinion that in that case personal service on Ramachandra was necessary.

Now Mr. Lowndes for the plaintiff raised a very ingenious argument upon the case Mr. Davar referred to—the case of *Mander v. Falcke* (2). Mr. Lowndes said that that case showed that in England there was a distinction between "attachment" and "committal." That, no doubt, was so before the Judicature Act, and in *Callow v. Young* (3), it was held that attachment was the proper application in cases of omission and committal in cases of commission; that is to say, if a person did that which he was not entitled to do he ought to be committed, and if he did not do that which he was ordered to do ought to be attached. In India I find no distinction has ever been drawn between "attachment" and "committal"; and committal being to my mind a serious matter, seeing that committal is in the nature of a criminal proceeding, it is of the greatest possible importance that all applications to commit a person for contempt of this Court's order should be served personally. *Mander v. Falcke* (2), it seems to me, is an authority to that effect and does not admit of the distinction upon the ground that Mr. Lowndes endeavoured to distinguish it and knowing what the practice is in this country, it seems to me, it is impossible to lay too great a stress upon the importance of the matters of this sort, because the power of committal is one of the most effectual powers—a power which the Court can exercise *brevi manu* and is the most powerful [685] engine at its disposal. I can conceive no greater danger than if I were to hold that service of notice for committal of a person to jail was sufficient if it was served upon his attorneys alone. Further, another danger one has to bear in mind in this country is, that it is inconceivable that this Court would sanction notices being served upon attorneys of persons in a language which would probably not be understood by the latter; and I would be extremely sorry to commit a person for not obeying a notice of motion which was served upon his attorneys in a language which he did not understand and *non constat* that it was ever explained to him. And I think I am justified in holding that where an application is made it is necessary not only that the order should be served upon the defaulting party, but the notice to commit for disobedience thereof should also be served upon him. That has been the practice ever since the days of Lord Eldon and before that time.

It may, however, be said in the present case that the defendant ought to have protested at once and certainly it does not appear in his affidavit that he did protest; but Mr. Davar did raise the preliminary protest at once and said that he protested against this notice on the ground that it had not been duly served. Upon this point it must be remembered that it has been held over and over again that appearance is not a waiver of the objection on the ground of irregularity in a case affecting the liberty of the subject and to the same effect will be found the rulings as to waiver in the *Encyclopædia of the Laws of England*. A man appearing

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(1) (1892) Unrep. Cri. Ca., 615.

(2) [1891] 3 Ch. 488.

(3) [1887] 56 L. J. Ch. 690.



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cannot be held to waive a question which relates to the validity of an order.

On being informed that the defendant had appealed from my original order appointing Mr. Sethna Receiver, I was considerably impressed with that fact and thought that I ought not to make an order in this present matter but should wait until the appeal had been decided; but following the case of *Gordon v. Gordon* (1), in my opinion the fact of this appeal pending does not oblige me to stay further proceedings in the present matter. In that case Vaughan Williams, L. J., says:—

[636] "If an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the kind until he has purged his contempt. *Garstin v. Garstin* (2) is an instance of that kind."

Then he goes on:—

"But when you come to the case of an order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the ground of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt."

That, therefore, draws the difference between an order made in the discretion of the Court and the case where the objection is that it is made without jurisdiction.\*

\* Note:—At this stage Counsel informed the Court that an arrangement had been arrived at between the parties. [Ed.]

33 B. 636 (=3 I. C. 749=11 Bom. L. R. 748.)

APPELLATE CIVIL.

*Before the Honourable Mr. Chandavarkar, Acting Chief Justice,  
and Mr. Justice Heaton.*

ISMALJI YUSUFALLI (Original Defendant 1), Appellant, v.  
RAGHUNATH LACHIRAM MARWADI (Original  
Plaintiff), Respondent.\*

[21st June, 1909.]

*Salt Act (Bom. Act II of 1890), sections 11 and 47 (†)—Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.*

Y obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector. [63.] Without any such permission, however, Y sublet the pans to R who, as a security for the performance of the conditions of the sub lease, deposited a sum of Rs. 1,000 with Y. The sub-lease was acted upon and on the expiration

\* Second Appeal No. 538 of 1907.

(1) [1904] P. 163.

(2) (1865) 4 Sw. Tr. 73.

(†) Sections 11 and 47 of the Salt Act (Bom. Act II of 1890) are as follows:—

11. No salt shall be manufactured and no natural salt and, except under the provisions of section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a license



of its term R brought a suit for the recovery of the deposit from the representative of Y, the latter denied R's right to recover the deposit on the ground that it formed a consideration for an agreement which, having been forbidden by law, was illegal.

*Held*, dismissing the suit, that the defendant's plea should prevail. The real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license.

[Fol: 66 I. C. 398=24 Bom. L. R. 111 ; 46 Bom. 651; Dist: 3 Lah. 92]

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana, with appellate powers, confirming the decrees passed by J. H. Betigiri, Subordinate Judge of Bassein.

The plaintiff sued to recover Rs. 1,096 under the following circumstances :—

Yusufalli Tajbhoy, a resident of Bombay and father of defendant 1, obtained from Government, represented by the Collector of Salt Revenue for the Presidency of Bombay, a license for the manufacture of salt in four salt pans in the Thana District for a period of five years from the 1st October 1899. The license was taken in partnership with Lukmanji Sulemanji, defendant 2. Clause 9 of the license was as follows :—

[638] 9. I shall not sublet the Agars or salt beds without permission from the Meherban Collector Sahab of Salt Revenue for the Presidency of Bombay; on breach of this condition, the lease should be cancelled and Agars should be taken over in their possession by the Government.

Afterwards Yusufalli Tajbhoy sublet two out of the four salt pans, without the permission of the Collector, to the plaintiff Raghunath Lachiram under an agreement dated the 10th September 1900. One of the conditions of the sub-lease was that the sub-lessee should keep a sum of Rs. 1,000 in deposit with the lessor.

Yusufalli died in October 1900, and his son defendant 1 got a fresh license from the Collector on the 13th January 1902. The term of the fresh license was three years commencing from the 1st October 1901 to the 30th September 1904. After the grant of the fresh license to defendant 1 the plaintiff obtained a fresh sub-lease from him on payment of Rs. 1,000 as deposit under the terms of the agreement dated the 10th September 1900. Defendant 1 passed a receipt to the plaintiff for the amount. After the expiration of the term of the license the defendants having refused to restore the amount of the deposit to the plaintiff, he, on the 20th October 1904, brought the present suit for the recovery of the amount, namely Rs. 1,000, together with interest, Rs. 96, alleging that it was obtained from him through coercion and praying in the alternative, that if the refund of the amount could not be ordered for any

to be granted by the Collector in this behalf : Provided that no such license shall be necessary for any process of manufacture of salt on which duty has been paid.

47. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act—

(a) manufactures, removes or transports salt ; or

(b) excavates, collects or removes natural salt, or salt-earth ;  
and whoever :

(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force, receives or, without lawful excuse, retains contraband salt knowing or having reason to believe the same to be contraband salt ;

shall for every such offence be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

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reason, he should be awarded damages of Rs. 1,000 on account of the defendants having infringed the terms of the agreement, dated the 10th September 1900.

Defendant 1 urged *inter alia* that the Court had no jurisdiction to try the suit, that the sub-lease to the plaintiff dated the 10th September 1900, was forbidden by the terms of the license granted to his father by the Collector, that the same was therefore illegal and plaintiff could not claim any relief under it, that the plaintiff voluntarily and for his benefit took a fresh sub-lease and paid Rs. 1,000 by way of compromise, that there was no coercion practised as alleged in the plaint and that the claim was time-barred as the defendant's father died on the 11th October 1900 and as the license granted to the deceased by the Collector [639] and the sub-lease to the plaintiff terminated on that day, while the suit was filed on the 20th October 1904.

Defendant 2 contended, in addition to the defences raised by defendant 1, that he was not a partner of defendant 1's father and that he had nothing to do with the plaintiff's sub-lease and the deposit of Rs. 1,000.

The Subordinate Judge found that the Court had jurisdiction to entertain the suit, that the plaintiff's sub-lease of the 10th September 1900 was contrary to the terms of Yusufalli's license, that the plaintiff paid Rs. 1,000 to defendant 1 on the 23rd September 1903 through coercion, that the suit was not time-barred and that defendant 2 was partner with the deceased father of defendant 1. He, therefore, awarded the claim as against both the defendants on the following among other grounds:—

On the strength of sections 12 and 47 of the Bombay Salt Act (II of 1890), it was contended before me that the sub-lease in Exhibit 42 was wholly illegal, inasmuch as under it, plaintiff was given the right to manufacture, remove, etc., salt, which were acts which a licensee alone could do and which, if done, by a stranger would entail on him the penalties in section 47 above. I cannot accede to this agreement as it is not a fair one and as it does not state the whole truth. For a man may do all or any of the acts penalised in section 47 above and without incurring the penalties, so long as he does so under the shelter of some license and under its protecting wings. The case would certainly have been otherwise if the licensee and he alone bodily were permitted under the license to do the things mentioned in section 12 above. But facts and every day experience are otherwise and point clearly to the contrary. Clause 19 itself of the leases in Exhibits 51 and 71 clearly lays down that other persons purporting to act on behalf of the licensee would be allowed to make vahivat in the salt beds and their acts would be treated as the acts of the licensee himself by the authorities of the Customs and Salt Department. It follows therefore that the said authorities would not recognize persons who claimed rights independent of the licensee or adversely to him or who were objectionable on any other grounds. In this very case it is admitted by defendants that plaintiff acting on behalf of defendant 1 and his father has successfully carried out the terms of the four years' agreement in Exhibit 43 and without in any way coming into conflict with the authorities of the Salt Department. Further clause 16 in Exhibits 51 and 71 expressly authorizes the executants in them to appoint their agents with powers-of-attorney, with a view to facilitate the sale and removal of salt, in cases where the licensee himself is unable to be personally present. As regards the law applicable to the case I follow I. L. R. 24 Bom. 622. It is not shown [640] that the Salt Act of 1890 forbids subletting or that it attaches any penalty to such transaction. Section 13 of the said Act gives power, no doubt, to the Commissioner, subject to the directions of Government, to impose certain conditions in the license to be issued. Under one of the conditions so imposed in Exhibits 51 and 71, the executants in them were only liable to forfeit their leases for subletting them, in case the authorities thought fit to do so for administrative purposes. The Salt Act (1890), I need hardly say, is passed for the benefit of the revenue, as is the Act imposing tolls considered in the decision above quoted. A reference to sections 7 and 10 of the Tolls Act will bring into relief the analogy this case bears to the one quoted. I, therefore, find that the contract in exhibit 42 is not illegal and that the present suit is maintainable.



On appeal by defendant 1 the decree was confirmed. With respect to clause 9 of the license the Judge in appeal made the following observations :—

The contract to sublet was certainly prohibited by the terms of the license or lease in favour of Yusufally Exhibit 71, clause 9, and again by similar paragraph in Exhibit 51 which was executed in 1902 by defendant in renewal of his deceased father's agreement. The prohibition, however, is not absolute and may be removed by the Collector of Salt Revenue for Bombay. The only penalty imposed was that if any pans were sublet to a third person without the Collector's permission the license was liable to be recalled and the lands to be resumed. Though the plaintiff manufactured and sold the salt in the two salt pans of Baati and Juna for four years without the contract under Exhibit 42 having been sanctioned by the Collector no objection was raised by the authorities concerned.

I am not convinced that the combined effect of sections 11, 12 and 47 of Bombay Act II of 1890 is to render the contract contained in Exhibit 42 illegal, the prohibition against subletting and alienations in other ways contained in clause 5 of the parwanas 90 to 93 without the Collector's permission appears to be re-affirmation of the term in clause 9 of Exhibits 71 and 51 and does not appear to render the contract to sublet illegal or criminally punishable, and this case is rightly held by the lower Court as falling within the rule enunciated in the decision on page 622, I. L. R. 24 Bom.

Defendant 1 preferred a second appeal.

*H. C. Coyaji* with *G. K. Dandekar* for the appellant (defendant 1):—We submit that the view taken by the lower Courts as regards the sub-lease is not correct. The plaintiff undertook to manufacture salt under the sub-lease on his own account. He was to pay us the sum of Rs. 14,000 and odd per year and to manufacture salt at his own expense. He admitted in his deposition that he was the owner of profit or loss. Thus the [641] plaintiff's act of manufacturing or selling salt without a license from the Collector was contrary to section 11 of the Salt Act. The object of both the parties in granting and accepting the sub-lease was to enable the plaintiff to manufacture and sell salt in contravention of the Salt Act. Such manufacture or sale is made punishable by section 47 of the Act.

The object of the sub-lease was illegal under section 23 of the Contract Act as being forbidden by the Salt Act. It was of such a nature that it defeated the provisions of the Salt Act. There is no case decided under the Salt Act, but we rely on the principle of the rulings in *Hor-masji Motabhai v. Pestanji Dhanjibhai* (1), *Raghunath Lalman v. Nathu Hirji Bhate* (2) and *Gopalrao v. Kallappa* (3).

*V. B. Pradhan* for the respondent (plaintiff):—We contend that our sub-lease was not in contravention of the original lease within the terms of section 47 of the Salt Act. We got authority to manage two salt pans under the original lease and all our acts were protected by that lease. Besides such a sub-lease is recognized by the Salt Department itself as observed by the lower Court. The rulings quoted have no bearing on the present case as they were cases under the Abkari and Opium Acts. The Salt Act is an Act for fiscal purposes and there is no personal element involved in granting a license under that Act as in the other two. The present case is governed by the principle laid down in *Gauri Shankar v. Mumiaz Ali Khan* (4) and *Bhikanbhai v. Hiralal* (5). The latter case is stronger on facts than the present. The condition against subletting is for the benefit of Government, but the licensee is bound by the sub-lease. The subletting can at the most be treated as a breach of the condition attached to the

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(1) (1887) 12 Bom. 422.

(2) (1894) 19 Bom. 626.

(3) (1901) 3 Bom. L. R. 164.

(4) (1879) 2 All. 411.

(5) (1900) 24 Bom. 622.



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license. Whenever the Legislature want to penalize such a breach of condition, they explicitly say so.

Compare the wording of section 45, clause (c), of the Abkari Act (V of 1878). A similar provision is not made in the Salt Act which merely prescribes the penalty of the forfeiture of the [642] license. Government did not forfeit the defendant's license though they were aware of the management by us.

Granting that no one but the original licensee or his manager can manage the salt pans under the Salt Act, then we say that our management was on behalf of the original licensee because our agreement with the original licensee, Exhibit 42, contains a clause that we were to hold a power-of-attorney from him and that shows that we were to be his *vahivatdars* under the Act.

CHANDAVARKAR, Ag. C. J.:—The facts in this second appeal are shortly these:—One Yusufalli, father of the appellant, obtained from Government a lease of certain salt pans under a certain license, one condition of which was that the lessee shall not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Yusufalli sublet to the respondent, who, as security for the performance of the conditions binding on him under the sub-lease, deposited a sum of Rs. 1,000 with Yusufalli. The respondent accordingly entered on possession of the salt pans under his sub-lease. Some time after that, Yusufalli having died, the appellant, his son, obtained a fresh lease with a fresh license from Government and the respondent obtained a sub-lease from the appellant on the same terms as those contained in the sub-lease obtained from Yusufalli. For this sub-lease the appellant had obtained no permission from the Collector as required by the license. The respondent deposited a sum of Rs. 1,000 with the appellant to secure the performance by him of the conditions of the new sub-lease; the sub-lease was acted upon; its term expired; and the respondent paid all that was due under it to the appellant. The suit out of which the second appeal arises has been brought by the respondent to recover the deposit of Rs. 1,000, because the appellant denied the respondent's right to that amount on the ground that the amount in question formed a consideration for an agreement, which, having been forbidden by law, was illegal. This was the defence to the action raised in both the Courts below and it has failed there.

The ground on which both those Courts have proceeded in overruling the plea of illegality is that the contract to sublet is not [643] absolutely prohibited by the license granted by the Collector to the appellant. But that view of the dealing between the parties ignores the real nature and object of the deposit to recover which the present suit was brought.

Under section 11 of the Salt Act (Bombay Act II of 1890) the manufacture of salt without a license is prohibited subject to a proviso which is not material to our purpose here. Section 47 of the Act makes such manufacture an offence and renders any person committing it liable to punishment.

The real object and necessary effect of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a license in the guise of a sub-lease, although that was forbidden by law and by the terms of the license.



These facts support the application to this case of the principle of law enunciated by this Court in *Hormasji Motabhai v. Pestanji Dhanjibhai* (1) and *Raghunath Lalman v. Nathu Hirji Bhate* (2).

But a point is raised for the first time in the second appeal by the learned pleader for the respondent. He states that his client manufactured salt not only under a sub-lease but also as manager under a power-of-attorney from the appellant. This case was not made in the Court below; and there is no evidence in support of it. Even if there had been, it is difficult to see how the power-of-attorney could have helped the respondent's case as *ex concessio* it existed side by side with the sub-lease. The illegal object of the transaction being clear upon the facts, the power-of-attorney could only have proved that by means of it the parties intended to disguise the real object of the agreement and defraud the Government.

The decree must be reversed and the claim rejected. Each party to bear his own costs throughout.

HEATON, J. :—I agree that the decree must be reversed and the claim rejected.

[644] It was assumed by the lower Court that the agreement was an agreement to sublet certain salt-pans, which was prohibited by the license which Yusufalli obtained, and we must take it that that is so. In the lower Court it was contended otherwise, but now it has been sought to establish that the plaintiff acted on behalf of defendant No. 1 and not on his own account. That, however, is a question of fact. It was not made good in the lower Court and we cannot go into it here. The question, therefore, is whether the object of the agreement is forbidden by law within the meaning of section 25 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector.

*Decree reversed.*

33 Bom. 644 (=11 Bom. L. R. 1042=4 I. C. 726.)

APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Beaman.*

KISANDAS RUPCHAND AND ANOTHER (*Original Defendants*) *Appellants v.*  
RACHAPPA VITHOBA SHILWANT AND OTHERS (*Original Plaintiffs*),  
*Respondents.\**

[2nd July, 1909.]

*Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Defence of the bar of limitation—Practice as to amendment of plaint.*

The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership, and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs. 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted

\*Second Appeal No. 23 of 1908.

(1) (1887) 12 Bom. 422.

(2) (1894) 19 Bom. 626.

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33 B. 636=8  
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that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation. [645] The lower appellate Court being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their Pleader, allowed the amendment to be made and ultimately allowed the plaintiffs' claim. The defendants in appeal to the High Court contended that the amendment was wrongly allowed.

*Held*, that the amendment was rightly allowed. The defence of limitation was a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received.

*Per BATCHELOR, J.*—Under the Civil Procedure Code, 1908, O VI, r. 17, all amendments ought to be allowed, at any stage of the proceedings, which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit has become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

[*Ref*: (1911) 2 M. W. N. 257=22 M. L. J. 136=12 I. C. 173; 36 Mad. 378; 64 I. C. 29; *Rel*: 78 I. C. 905; 79 I. C. 287=50 Cal. 878; *Fol*: 1914 M. W. N. 98=22 I. C. 39.]

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge, A. P., at Sholapur, reversing the decree passed by Naginlal Venilal Desai, Subordinate Judge at Karmala.

Rachappa and another sued for dissolution of partnership and accounts.

On the 30th April 1897, the plaintiffs agreed with the defendants to start a partnership named "Yeshwant Kisandas" from the 26th October 1897. The agreement provided that the defendants were to be solely responsible for the firm and the plaintiffs had to supply a capital of Rs. 4,001 to defendants and to receive Rs. 351 a year in lieu of interest and profits. This arrangement was to last for five years, that is, till the 1st of November 1902. The defendants had then to return Rs. 3,001 in cloth and cash, and the remaining Rs. 1,000 were to be returned on the 8th November 1904.

[646] The defendants having failed to carry out their obligations under the above agreement, the plaintiffs filed this suit for dissolution and accounts of the partnership on the 28th March 1905.

The defendants in their written statement denied the agreement and contended that even if the agreement had been executed, plaintiffs were only to get under its terms a fixed sum and hence there was no need to ask for dissolution and accounts.

The Subordinate Judge found that there was an agreement between the parties to start business in the name of Yeshwant Kisandas, but the agreement did not amount to partnership in the legal sense of the term. He also found that plaintiffs had delivered Rs. 4,001 worth of cloth to defendants as agreed. The plaintiffs' suit was therefore dismissed.

The plaintiffs appealed contending that partnership was established and that he was entitled to maintain his suit.



When, however, the appeal came on for hearing, the appellants' pleader admitted that the facts stated in the plaint did not constitute a partnership between the parties, and said the only relief which the plaintiffs were legally entitled to obtain was a decree for Rs. 4,001 advanced by them with interest. He applied to amend the plaint accordingly.

The learned Judge of the appeal Court allowed the amendment on the 7th October 1907, on the following grounds :—

"The proposed amendment does not necessitate a change in the nature of the suit, or addition of anything to facts stated in the plaint as constituting the cause of action, but the mere addition of an alternative relief only. This relief, there seems no doubt, could very well have been claimed in the plaint as originally framed. The application and affidavit make it clear that plaintiffs wished to sue for their money only and had no desire to evade payment of proper stamp duty, but that they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils. I therefore decide to allow the plaint to be amended in the manner proposed more especially as limitation is likely to come in the plaintiffs' way if they now bring a fresh suit on the cause of action stated by them in the plaint."

The appeal was then heard on its merits: and the decree passed by the lower Court was revised and the plaintiff's claim as amended was allowed.

[647] The defendants appealed to the High Court.

H. C. Coyaji (with J. R. Gharpure) for the appellant:—We submit the lower appellate Court ought not to have allowed the amendment, because it would deprive us of our right to plead limitation as a bar to the plaintiffs' suit as now changed. See *Weldon v. Neal* (1); *Malikarjuna v. Pullayya* (2); *Alagappa Chetti v. Vellian Chetti* (3) and *Damodar Madhowji v. Purmanandas Jeewandas* (4).

There was no *bona fide* mistake in the form of the suit in which it was originally brought. But it was so brought, first to avoid payment of full Court-fees and, secondly, to avoid the bar of limitation, for the cause of action accrued on the 26th October 1897.

The objection as to the form of the suit was first taken in our written statement. Still the plaintiff elected to carry on the suit as originally framed in the first Court and it was at a very late stage in the lower appellate Court that he applied for amendment. The amendment should, therefore, have been refused; see *Narayana v. Shankunni* (5).

Further the amendment should not have been allowed, because (1) it changes the character of the suit: see *Malikarjuna v. Pullayya* (2) and *Weldon v. Neal* (1); and (2) it changes jurisdiction: see *Bai Shri Majirajba v. Maganlal Bhaishankar* (6); *Hari Sadashiv v. Shaik Ajmudin* (7); at any event, we should have been allowed to adduce fresh evidence: see *Hari Sadashiv v. Shaik Ajmudin* (7).

Setalvad (with G. K. Dandekar) for the respondents:—It is discretionary with the Court to allow an amendment of the plaint: that discretion is limited by the rule that the amendment should not convert a suit of one character into a suit of another and inconsistent character: see section 53 of the Civil Procedure Code (Act XIV of 1882), and *Balkrishna v. Gangabai* (8).

[648] Upon facts, the amendment was properly allowed in this case. The plaint as originally framed clearly set forth the agreement and based the cause of action upon it. The purpose of the suit was the enforcement

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(1) (1887) 19 Q. B. D. 394.

(2) (1892) 16 Mad. 319.

(3) (1894) 18 Mad. 33 at pp. 37, 38.

(4) (1889) 7 Bom. 155 at p. 160.

(5) (1891) 15 Mad. 225 at pp. 257, 258.

(6) (1894) 19 Bom. 303.

(7) (1886) 11 Bom. 295.

(8) (1896) P. J. 617.



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of the terms of the agreement. And this purpose has been quite kept in view by the amendment which involves no change of venue.

BATCHELOR, J.:—On 28th March 1905 the suit out of which this appeal arises was instituted, the plaintiffs claiming an order for the dissolution of an alleged partnership and accounts. It was stated in the plaint that, in pursuance of the partnership agreement, the plaintiffs had brought in Rs. 4,001, as capital which was repayable, as to Rs. 3,001, on 1st November 1902, and as to the remaining Rs. 1,000, on 8th November 1904.

The substantial defences were that the alleged partnership was never agreed to or undertaken, and that the plaintiffs never contributed Rs. 4,001 or any other sum as capital.

The Court of first instance raised several issues, and dismissed the suit on the grounds that no partnership was created and that the suit as framed would not lie. The learned Subordinate Judge found as a fact that the plaintiffs did deliver to the defendants Rs. 4,001 worth of cloth; "but," he says, "that is no reason why plaintiff should get relief in this suit. He made an experiment about his being a partner probably to avoid the payment of larger Court-fees, as is suggested by the defendant in his written statement; he has failed to prove his case as brought, and did not ask to amend it, and I have no alternative but to dismiss it with all costs." From this determination the plaintiffs appealed, grounding their appeal on the contention that the partnership had been created and that the suit was in order. But this contention was abandoned when the appeal came on for hearing, and the plaintiffs, then represented by a new pleader, admitted that the facts stated in their plaint did not constitute a partnership, and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. The learned Subordinate Judge of the lower appellate Court, being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their pleader, allowed the amend-[649]ment to be made and ultimately decreed the plaintiffs' claim for the Rs. 4,001 and a portion of the interest. His judgment allowing the amendment is dated 7th October 1907 and at his date the claim for the Rs. 4,001, or at least for the greater part of it, was barred by the law of limitation.

From this decision the defendants have preferred the present appeal, and the only question involved is whether the lower Court's order allowing the amendment of plaint should be disturbed. For the appellants it is urged that the amendment should have been refused because the effect of allowing it was to deprive the defendants of their defence of limitation, the debt, as I have said, being barred at the date of the amendment. But in order to pronounce upon the validity of this contention, it is, I think, necessary to examine a little more closely the particular facts of this case in the light of the accepted principles which govern the admissibility of amendments.

As to the principles I think there is no room for doubt: they are contained in O. VI, r. 17 of the Code, which is substantially identical with O. XXVIII, r. 1 of the English Rules of the Supreme Court. From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Upon the record before us



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there can be no doubt that this second condition is satisfied here, nor was this point challenged for the appellants. It remains to consider whether the allowance of the amendment worked injustice to the defendants. Upon this question *Weldon v. Neal* (1) was cited for the appellants. Reference may also be made to *Tildesley v. Harper* (2); *Clarapade & Co. v. Commercial Union Association* (3), and *Steward v. North Metropolitan Tramways Co.* (4); but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused [650] only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not? And this becomes clearer if the cases are examined. For the reason already given I shall notice only two. In *Weldon v. Neal* (1) the original action was simply for slander, and the plaintiff was non-suited. Later she sought to amend her claim by setting up, in addition to the claim for slander, fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by limitation though not barred at the date of the writ. Here, then, the amendment sought to set up fresh claims, claims which had never been heard of until they had become barred; yet even in so strong a case as this Lord Esher M. R. in refusing leave to amend, intimated that the decision might have been the other way if there had existed special circumstances to justify it. *Steward v. North Metropolitan Tramways Co.* (4) seems to me to proceed on the same principle: there the defendants sought to amend their written statement, as we should call it in India, by pleading that the liability for the plaintiff's injuries rested, not with them, but with a third party, the vestry, against whom the plaintiff's right of action was by that time barred. Leave was refused because the application was too late: no such plea had even been brought to the plaintiff's notice until his action against the vestry was barred, and Lord Esher observes that "If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given [651] notice of action and brought an action against the vestry." Lindley, L. J., uses language to the same effect. The principle is the same as in *Weldon's* case; leave is refused because the plea sought to be added is not heard of until rights have accrued under the law of limitation.

If this is a right view of the cases, they have, in my opinion, no bearing on the present facts; or, rather, they bear against the appeal. In order that these decisions should serve the appellants' turn it would be requisite that the allowance of the amendment should prejudice them by barring the defence of limitation otherwise fairly open to them; but how can that

(1) (1887) 19 Q. B. D. 394.

(2) (1878) 10 Ch. D. 393 at p. 396.

(3) (1883) 92 W. R. 263.

(4) (1885) 16 Q. B. D. 178: C. A. p. 556.



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be said of a claim which, before the bar of limitation had arisen, had been regularly pleaded to by them, had been formally put in issue, and had been decided against them after consideration of all the evidence which they had offered in defence? If at the time of the amendment the appellants had any show of argument based on the law of limitation, that seems to me to have been occasioned less by the incompleteness of the plaint than by the excessive technicality of the trying Court. In other words the defence of limitation was a defence to which the appellants were never fairly entitled, and the allowance of the amendment only withdraws from them an advantage which they ought never to have received.

If that is so, the cases quoted do not assist the appellants in the particular facts of this appeal, but rather tend the other way. Falling back, then, upon the words of the Rule, I cannot follow the argument that there would be any injustice to the appellants in allowing the amendment, for the only effect of it is to enforce their liability for a debt which was claimed, disputed, and found to be due long before the defence of limitation was available. It is true that, though the Subordinate Judge found the sum to be due, he refused to decree it, because, in his opinion, the suit was wrongly framed and the plaintiffs had not then asked to amend; but I cannot regard this circumstance as of sufficient weight to displace the other considerations to which I have referred. In my opinion the Subordinate Judge would have exercised a sounder discretion if he had awarded the sum found due, notwithstanding the inexpertness of the pleadings, [682] and sufficient warranty for that procedure might have been found in the principal plaintiff's own statement, which, as cited by the Subordinate Judge himself, was as follows: "I had nothing whatever to do with the dealings of the shop. All I was to have was Rs. 351 yearly in lieu of good will and interest on my Rs. 4,001. . . . If my Rs. 4,001 are returned, and if I am paid Rs. 351 as agreed, I have no dispute." It is difficult to imagine how the plaintiff could have more clearly professed that, whatever may have been the attitude of his obstinately unskilful pleader, he for his part had no concern with the alleged partnership, but was suing simply to recover his debt. I think, therefore, that the Subordinate Judge would have been well advised if he had paid more attention to the substance of the suit before him, and taken command of it himself rather than handed over the conduct of the suit to a manifestly inexperienced pleader; had he taken this view of his duty as presiding Judge the slight technical difficulty which stood in his way would have been easily removed. Be that as it may, it was open to the lower appellate Court to allow the amendment; and that has been done in England whether leave to amend was asked for in the Court below or not, and even where the Court below offered leave to amend, and the offer was declined: See *Ecklin v. Little* (1). In this context it is important to observe that the lower appellate Court which is the ultimate Court of fact, did not adopt the Subordinate Judge's view as to the plaintiffs' desire to sue cheaply at whatever risk; on the contrary it found "it clear that the plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty, but they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils." I do not use this finding as essential to my decision, though it is at least arguable that facts of this sort would suffice to constitute the "peculiar circumstances" which Lord Esher excepted in his judgment in *Weldon v. Neal* (2); for, in my opinion,

(1) (1890) 6 T. L. R. 366.

(2) (1887) 19 Q. B. D. 394.



the Court below in allowing the amendment was perfectly right in the strictest view of the principles and practice of the Courts. In [653] my opinion not only was there no injustice to the defendants in allowing the amendment, but there would have been injustice to the plaintiffs in refusing it.

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I must add that the case appears to me to afford an instance of that undue technicality, that excessive attention to form and deficient attention to "the real questions in controversy between the parties," which occasionally besets our Subordinate Courts, and, hampers the success of their work in a country where competent legal advice is not always readily obtainable. I do not for a moment suggest that forms should be disregarded, and I admit that no hard and fast line can be drawn for all cases, but it does seem to me that the importance of forms is sometimes set in very incorrect perspective so that on occasions the trial of a suit is apt to wear too much the appearance of a game of skill in points of procedure and too little the appearance of a resolute attempt by the presiding Judge to come at justice on "the real questions in controversy between the parties." There must of course be no over-reaching or surprise of one party by the other and it is very important that parties should be kept to their pleadings, and not allowed to alter their case according to their shifting interest in Courts of appeal: but this is pre-eminently a reason why the trying Court should spare no pains to ascertain precisely the real character of the dispute and of the case made by each party. Nothing, I think, is more calculated to imperil the justice of a case than negligence or carelessness in these essential preliminaries, as nothing conduces more to a right decision than to have these points firmly determined at the outset.

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Subject to these and similar considerations, the mofussil Courts would, I think, do well to bear in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. On this subject the following words of Lord Penzance in *Kendall v. Hamilton* (1) should have perennial interest for Subordinate Judges trying original suits: "Procedure", said his Lordship "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of [654] facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve." Directions not less emphatic and of even closer application to the subject under notice were conveyed by the Judicial Committee in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (2), where their Lordships lay down "that it is of the utmost importance to the right administration of justice in these Courts," that is, the Courts in India, "that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute." It seems to me that in this case, as occasionally in other cases, these imperative directions have been somewhat lost sight of; and I have thought it well again to call attention to their importance.

(1) (1879) 4 App. Cas. 504 at p. 525.

(2) (1856) 6 Moo. I. A. 393 at pp. 410-411.



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I am of opinion that this appeal fails and should be dismissed with costs.

BEAMAN, J.—I will state shortly what I conceive to be the true principle which has governed English Judges in exercising the discretion reposed in them by the Orders and Rules of the Supreme Court corresponding with our O. VI, r. 17.

The question was recently fully and ably argued before me on the Original Side of this Court, and examined and answered, to the best of my ability in an exhaustive critical judgment. See *Nandlal Thakersey v. The Bank of Bombay* (1).

After carefully reconsidering the whole question for the purposes of this case I have found no sufficient reason for departing from or modifying any part of the conclusions I then reached.

[655] A careful analysis of the leading English cases seem to me to yield this result. Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs. That is a rule of practice, or as one of the great English Judges prefers to call it, a rule of conduct, not of positive law. And while usually adhering to it, the English Courts have been careful to distinguish its essential character, from a rule of positive law, which must be obeyed in all cases. Thus it has been observed that notwithstanding the salutariness and general correctness of the rule, it is always open to exception where the circumstances of a particular case are very peculiar.

In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed. I prefer to state the principle and the tests by which its application can be ascertained, in the simplest and widest terms. Because the dicta of the most eminent Judges in some of the leading cases appear to me to refer to the particular facts, and when wrested from their appropriate context, and sought to be used as universal propositions, rather to obscure the true principle. Thus I question whether the introduction of such a factor as the claim being a fresh claim can logically be made to express the principle in its completeness, as applicable to all cases. Great prominence was given to this factor, in *Weldon v. Neal* (2), as was natural in the facts of that case. But I cannot escape the feeling that in a sense, every amendment which Courts are asked to allow, must [656] introduce a "fresh," that is to say a changed, or different, if not an additional claim or defence. Put at the lowest, every such amendment seems to me to bring forward an old claim in a new form. If this were not so, it would not be necessary to amend at all. If then the "freshness" of the claim introduced by the amendment is to be sought as a determinant of the Courts' discretion, in granting or refusing it, and not the disadvantage or injury it inflicts on the other party I should feel a real difficulty in reconciling the practice with the

(1) (1909) 11 Bom. L. R. 926.

(2) (1887) 19 Q. B. D. 94.



principle. For the practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs. The words of O. VI, r. 17 are very wide. They authorize Courts to allow amendments whenever, in the opinion of the Judges, it is just that this should be done. So that we are thrown back on some consistent criterion of justice, in the average circumstances of such applications. And in order to systematize the practice and not allow too much latitude to individual Judges' notions of justice, the English Rule appears to me to have been founded on the broad principle, tested by the two simple uniform tests, I have stated.

If I am so far correct, it would follow that *prima facie* this case is within the rule. But I agree with my learned brother that its circumstances are so peculiar that it may properly be excepted. I therefore concur in the decree which he has proposed.

*Appeal dismissed.*

33 Bom. 657 (=3 I. C. 772=11 Bom. L. R. 735).

[657] APPELLATE CIVIL.

*Before the Honourable Mr. Chandavarkar, Acting Chief Justice, and Batchelor and Heaton, JJ.*

KRISHNAJI NARAYAN HARDIKAR (*Applicant*) v. BALKRISHNA VENKATESH PHADKE (*Opponent*).  
[2nd July, 1909.]

*Relinquishment of claim by reversioner—Release—Stamp.*

The relinquishment of his claim by a reversioner is a release and must be stamped accordingly.

Reference by W. T. Morison, Commissioner, Central Division, under section 57 of the Stamp Act (II of 1899).

The circumstances which gave rise to the reference were as under—

On the 3rd December 1908 one Balkrishna Venkatesh Phadke passed a "consent paper" in favour of Krishnaji Narayan Hardikar as follows:—

I pass this consent paper for a reason as follows:—Chiranjiv Gangabhirathi Bhagirathibai, widow of Kashinath Lakshman Phadke, who was my cousin, did, at the request of her father-in-law, pass to you as gift the undermentioned house of the value of Rs. 400 at the time of his exequial ceremonies, i.e., on the 25th of April 1906. The particulars of that house are as follows:—

The house thus described above and enclosed within the aforesaid boundaries, together with the things appertaining thereto, has been given to you as a gift. The same is agreed to and approved of by me. I duly pass this consent paper to you.

The above consent paper is passed by me without taking any consideration for it. Now, excepting yourself, neither myself nor my heirs and representatives have any manner of right or claim left over or to the same.

A question having arisen as to what was the proper stamp duty to the said document, the Sub-Registrar of Sholapur was of opinion that it did not fall under section 4 of the Stamp Act, as that section applies to sales, mortgages or settlements. He was [658] further of opinion that

\* Civil Reference No. 3 of 1909.



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the deed was either a gift of reversionary interest or a release of that interest. Being thus doubtful on the question, he referred it to the Commissioner, Central Division, through the Collector of Sholapur under section 56 of the Stamp Act. In forwarding the reference to the Commissioner under section 40 of the Stamp Act, the Collector agreed with the view of the Sub-Registrar that section 4 of the Stamp Act was not applicable but he was doubtful whether the document was a deed of gift or a deed of release of reversionary interest.

The Commissioner, thereupon, made a reference under section 57 of the Stamp Act in the following terms :—

The chief question is whether the deed of consent in question is a gift or a release. In my opinion the document cannot be a gift, as Balkrishna has no existing interest in the property in question. (*Vide* definition of gift on page 251 of Desai's Stamp Act.) The document appears to be a release on the analogy of the case at I. L. R. 24 Allaha-bad 372, and the Madras Board's Proceedings No. 340 of 25th February 1881, printed on page 301 of Desai's Stamp Act.

G. S. Rao, Acting Government Pleader, appeared for the Government of Bombay.

PER CURIAM.—The Court agrees with the Commissioner and holds that the relinquishment of his claim by the reversioner is a release and must be stamped accordingly.

*Order accordingly.*

33 Bom. 658 (11=Bom. L. R. 1074=4 I. C. 243).

APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Beaman.*

DADGU VALAD SAKHARAM KUNBI (*Original Plaintiff*), *Appellant*,  
v. TOTARAM VALAD NARAYAN KUNBI AND OTHERS  
(*Original Defendants*), *Respondents*.  
[5th July, 1909.]

*Court Fees Act (VII of 1870), section 7, clause (iv) (b), section 7, clause (v),—Suits Valuation Act (VII of 1887), section 8—Suit for partition and separate possession of joint family property—Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction.*

[659] The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in the lands at five times the assessment (i. e., at Rs. 489-6-0) for Court fee purposes and in the moveables at Rs. 1,455-8-0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of First Class Subordinate Judge, as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under section 7, clause (iv) (b) of the Court Fees Act, 1870 and section 8 of the Suits Valuation Act 1887 and returned the plaint for presentation in the Court of Second Class Subordinate Judge.

*Held*, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

*Held*, further, that the suit fell not within section 7 (iv) (b) but under section 7 (v) of the Court Fees Act 1870 and section 8 of the Suits Valuation Act 1887 did not apply. That, therefore, it was the market value of the lands, houses, &c., that determined the jurisdiction of the Subordinate Judge.

*Motibhai v. Haridas* (1) commented on.

\* Appeal No. 8 of 1909, from order.

(1) (1896) 22 Bom. 315.



APPEAL from order passed by N. R. Majmudar, First Class Subordinate Judge at Dhulia.

Suit for partition.

The plaintiff sued to recover by partition a moiety of certain moveables, houses, house-sites and lands. The value of the plaintiff's share in moveables, houses and house-sites was put at Rs. 1,455-8-0 for Court fee purposes; and in lands at Rs. 489-6-0 at five times the assessment. The market value of plaintiff's share in the fields was about Rs. 5,600.

The plaint was presented originally in the Court of the Second Class Subordinate Judge at Jalgaon. The defendant contended that the market value of the field was undervalued in the plaint. The question was therefore referred to a Commissioner, who found the market value of the plaintiff's share in the fields to be Rs. 7,055-8-0.

The Second Class Subordinate Judge of Jalgaon thereupon returned the plaint to be presented in the proper Court, as the market value of the subject matter in suit was more than Rs. 5,000.

[660] The plaint was next presented to the Court of the Subordinate Judge at Dhulia: but the learned Judge held that as the value for Court fee purposes of plaintiff's share did not exceed Rs. 5,000, the plaint should be re-presented in the Jalgaon Court. His reasons were as follows:

It has been held in I. L. R., 22 Bom. 315 that the valuation placed by the plaintiff for the purposes of computing Court fees also determines jurisdiction (see also 2 Bom. 219, 17 Bom. 56) and section 8 of the Suits Valuation Act also lays down that "where in suits other than those referred to in Court Fees Act 1870, section 7, paragraphs v, vi and ix and paragraph x, clause (d), Court fees are payable *ad valorem* under the Court Fees Act, 1870, the value determinable for the computation of Court fees and value for purposes of jurisdiction shall be the same."

The present suit is a suit for partition and separate possession, and so it is governed by section 7, paragraph 4, clause (b) of the Court Fees Act 1870.

The valuation for computing Court fees and that for purposes of jurisdiction are the same, namely, Rs. 1,944-14-0. This Court has, therefore, no jurisdiction; and the proper Court to hear the suit is the Court of the Second Class Subordinate Judge at Jalgaon.

Assuming that it is the Court's province to determine valuation for the purposes of Court fees and jurisdiction, still I think that the principle adopted by the plaintiff of valuing the fields at five times the assessment is correct. Under paragraph v, clause (d), proviso I of section 7 of the Court Fees Act this principle of valuation is laid down, when the claim is for the possession of the revenue paying land; and there seems no reason why a plaintiff who asks for possession after partition should be compelled to pay a higher Court fee. It has been held that for purposes of jurisdiction, the value of a suit for a declaratory decree must be taken to be what it would be if it were for the possession of the property in respect of which the declaration is prayed for. See I. L. R. 12 Mad. 223. And the same rule, I think, should apply to a suit for partition if it is considered that the plaintiff is not at liberty to value the claim according to his pleasure.

The plaintiff appealed against this order.

G. K. Dandekar for the appellant:—In a suit to recover possession of property by partition, the value of the subject matter is the market value and not the value fixed for court fee purposes, and it is the market value which determines jurisdiction. See *Kalu bin Bhiwaji v. Vishram Mawaji* (1) [661] *Dayachand v. Hemchand Dharamchand* (2). Here, the market value has been found to exceed Rs. 5,000 in value.

Further, a suit like the present should be treated as a suit for possession falling under section 7, paragraph (v) and not under section 7, paragraph (iv) (b), of the Court Fees Act 1870. It is always easy to

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83 B. 658 = 11  
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1074 = 4 I. C.  
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(1) (1877) 1 Bom. 543.

(2) (1880) 4 Bom. 515.



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33 B. 653=11  
Bom. L. R.  
1074=4 I. C.  
243.

determine the market value of the plaintiff's share in partition suits. Paragraph (iv) of section 7 contemplates suits where it is not practicable to determine the value of the relief claimed. If I am so far right, then the suit fails under the exceptions to section 8 of the Suits Valuation Act 1887.

Conceding for argument's sake that the suit is one falling under section 7, paragraph iv, clause (b) of the Court Fees Act, section 8 of the Suits Valuation Act has no application inasmuch as the present suit relates to lands paying revenue to Government. Section 8 is to be read subject to section 3 and 4 of the Act, which prescribe a special mode of valuation in case of suits relating to lands paying revenue to Government. The effect of sections 3, 4 and 8 taken together is that in any suit relating to land whether it be for possession or from injunction or for a mere declaration, the value of the subject matter is not the value which is put for Court fee purposes but a different value which is the market value.

I submit that section 8 of the Suits Valuation Act has no application to a suit relating to land although the suit may be to obtain a declaration in respect of land or a suit for partition of land.

A. G. Desai (*amicus curiæ*) for the respondents:—I submit this suit falls under section 7, clause (iv) of the Court Fees Act 1870, as it is the part of his share which is sought for by the plaintiff and partition is ancillary to such a relief. Otherwise, the clause (iv) (a) would be superfluous. The claim in question expressly contemplates a claim for partition; once partition is decreed, separate possession of the share follows as a matter of course. Suits for partition have been held to fall under section 7, clause (iv) (b). See *Motibhai v. Haridas* (1).

[662] Once it is conceded that the suit falls under clause (iv) (b) of section 7 of the Court Fees Act, it is clear that under section 8 of the Suits Valuation Act, the value for the Court fee purposes and jurisdiction is the same, and section 4 of the latter Act does not modify the general principle laid down in section 8.

BATCHELOR, J.:—We are obliged to Mr. A. G. Desai for his assistance in this appeal. It arises out of a suit which is described by the learned Subordinate Judge as a suit for the partition and separate possession of joint family property, consisting of lands, houses and moveables.

The question before us is as to the Court which is properly vested with jurisdiction to try this suit. That depends upon the value of the subject matter of the suit. The market value of the share claimed by the plaintiff has been ascertained to be Rs. 5,600 and that sum is not now objected to on behalf of the defendants.

The First Class Subordinate Judge has returned the plaint for presentation to the Second Class Subordinate Judge, being of opinion, that the suit falls within the jurisdiction of this latter official. Mr. Dandekar on behalf of the appellant urges that that is wrong, and that the suit properly belongs to the jurisdiction of the First Class Subordinate Judge himself.

The question really turns upon the section of the Court Fees Act which governs this particular class of suits. The Lower Court assigned it to sub-clause (b) of paragraph (iv) of section 7 which refers to "a suit to enforce the right to share in any property on the ground that it is joint family property." Upon the Best consideration that I can give to the point, it appears to me that the suit is not properly referable to this clause. Paragraph (iv) comprises six different classes of suits, and omitting the

(1) (1896) 22 Bom. 315.



momentarily ambiguous class under clause (b) it is to be observed that all the suits in the paragraph are claims for a relief which is not properly assessable in money. *Prima facie* therefore, no suit to obtain possession of land, which has an easily ascertained market value, can logically be brought under paragraph (iv); in fact, so to treat a suit referring to land would, it seems to me, throw the whole paragraph into confusion. Next, [663] clause (b), it should be observed, refers to a suit to enforce the right to "share" in any property, not the right to "a share" in property. The words themselves, therefore, suggest that the suit is for the enforcement of what one may call an abstract claim or right, and that would bring the clause (b) into proper logical neighbourhood with the other clauses of the paragraph. I am of opinion, therefore, that this suit more properly falls under paragraph (v) of section 7 as being a suit for the possession of land. This view receives some support from the provisions of the Suits Valuation Act, because if the suit is referred to paragraph 4 (b), it will apparently be governed by section 8 of that Act, and will, there again, be bracketed with other suits of a totally different character, suits from which it appears to have been the object of the Legislature to discriminate a suit for the possession of land. Mr. Dasai has called our attention to the decision of this Bench in *Motibhai v. Haridas* (1), but I think that that case can be distinguished from the suit before us, for there, as I read the report, it was admitted that the value of the subject matter of the plaintiff's suit was Rs. 250 and the only point really in dispute was whether that value or the total value of the entire property to be divided should form the test for the purposes of jurisdiction. If that is so, then the observations of Mr. Justice Parsons, which seem to be in conflict with the opinion which I have above expressed, were not necessary for the decision. For the reasons stated I am of opinion that the decree of the Court below must be set aside and the suit remanded for trial to the First Class Subordinate Judge.

Costs, costs in the cause.

BEAMAN, J.:—I am of the same opinion. A suit to obtain by means of partition a slice of land, the approximate value of which can easily be stated in terms of money, appears to me to be plainly a suit for the possession of land. Such a suit cannot, in my opinion, be brought within the meaning of section 7 (iv) (b) of the Court Fees Act (VII of 1870), which appears as clearly to be intended merely for suits to enforce what my learned brother has properly called an abstract right "to share in any joint [664] property." That being the case and the suit being a suit for possession of land, most of the difficulties which would otherwise have beset our decision disappear. And I have no reason to doubt, notwithstanding some apparent conflict in what was described as *obiter dicta* in at least one previous case, that once this point has been raised and all that has been implied in it definitely stated, the decision which we have come to is the right decision and correctly interprets the statute.

*Decree set aside.*

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33 B. 658=11  
Bom. L. R.  
1074=4 L. C.  
243.

(1) (1896) 22 Bom. 315.



33 B. 664 (=11 Bom. L. R. 817=3 I. O. 816).

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heatan.*

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APPELLATE  
CIVIL.  
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33 B. 664=11  
Bom. L. R.  
817=3 I. O.  
816.

NARAYAN RAVJI RANADE (*original Plaintiff*), Applicant v. GANGARAM RATANCHAND MARWADI AND ANOTHER (*original Defendants*), Opponents.\*  
[12th July, 1909.]

*Small cause suit*—Suit brought in the Court of First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause—Appeal—Jurisdiction.

A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause,

*Held*, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause.

[Ref: 51 I. O. 967.]

APPLICATION under extraordinary jurisdiction under section 115 of the Civil Procedure Code (Act V of 1908).

The plaintiff filed a suit to recover Rs. 287 on a promissory note from the defendants. The suit was instituted in the Court [665] of the First Class Subordinate Judge of Nasik (Mr. G. L. Nanavati) who had small cause Court powers. He was on privilege leave when the suit was lodged, and the charge of the Court was with the Joint Second Class Subordinate Judge who had no small cause Court powers. The suit was therefore registered as a regular suit. On his return from leave, the First Class Subordinate Judge tried it as a regular suit; and decreed the plaintiff's claim with costs.

The defendants appealed to the District Judge of Nasik (Mr. B. C. Kennedy) who reversed the decree and dismissed the suit.

The plaintiff applied to the High Court.

*D. R. Patwardhan* for the applicant:—We submit that the nature of a suit is not changed by the manner in which it is tried. Here the suit was filed in the Court of the Judge who had small cause Court powers; but as he was away on leave on the day it was filed, the Second Class Subordinate Judge who held charge of his Court had it registered as a regular suit, for he had no small cause Court powers. The suit was, as a matter of fact, tried by the Judge who had the powers, but as a regular suit. Still, the nature of the suit cannot be changed by the procedure adopted. See *Pitamber Vajirshet v. Dhondu Navlapa* (1).

*P. D. Bhide* for the opponent:—The case referred to does not apply: first, because though the suit was there filed properly it was tried as a regular suit; and secondly, it was decided under the old Act which differed in this respect from the present Act. The small cause powers must

\* Civil Application No. 67 of 1909.

(1) (1887) 12 Bom. 486.



exist at the very inception in the Judge who takes cognizance of a case. See *Venkatrao v. Mahableshwar* (1); *Hari Kamayya v. Hari Venkayya* (2); *Soundaram Ayyar v. Sennia Naickan* (3); *Kannan Nambiar v. Anantan Nambiar* (4); *Akshay Kumar Shaha v. Hira Ram Dosad* (5).

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[666] Further, the point of jurisdiction, not having been raised in the District Judge's Court, cannot be raised here. See *Kulada Kinkar Roy v. Danesh Mir* (6); *Sri Raja Simhadri Appa Rao v. Chelasane Bhadrappa* (7); *Parameshwaran Nambudiri v. Vishnu Embrandri* (8); *Suresh Chunder Maitra v. Kristo Rangini Dasi* (9); *Ram Lal v. Kabul Singh* (10) and *Muthusami Mudaliar v. Nallakulantha Mudaliar* (11).

33 B. 664=11  
Bom. L. R.  
817=8 I. C.  
816.

CHANDAVARKAR, J. :—It is admitted, and indeed the record shows, that the suit was instituted in the Court of the First Class Subordinate Judge and that at the time of institution the Subordinate Judge had conferred on him the powers of a Small Cause Judge. The present suit was of the nature of a small cause and fell within that jurisdiction. But it is argued that the suit is not a small cause because it was not tried as such. It is true it was tried by the Subordinate Judge, First Class, not under his small cause but under his ordinary jurisdiction. The reason is that at the time of its institution, the Subordinate Judge, First Class, having gone on privilege leave for twenty-one days, the Joint Subordinate Judge, Second Class, who was in charge of the Court, had the suit registered in the file of regular suits and not in the file of small causes. But, on that account, the Subordinate Judge, First Class, had not ceased to be a Judge of the Court with small cause powers; his absence was merely temporary; he had gone on privilege leave and no *locum tenens* had been appointed. Hence no re-investment of his powers as a Small Cause Judge became necessary when he resumed charge of his office. He continued to be a Judge with those powers during his absence and the entering of the suit in the file of regular suits could not take it away from the category of small causes. Nor could the fact that subsequently the Subordinate Judge, First Class, tried the suit under his ordinary jurisdiction deprive it of its character as a small cause: *Pitamber Vajirshet v. Dhondu Navlapa* (12). Against his decree no appeal lay to the District Court and that Court's appellate decree was passed [667] without jurisdiction. It is true no objection on the ground of want of jurisdiction was raised before the District Court but the petitioner before us is not precluded from urging that ground. Consent cannot give jurisdiction where the law does not confer it on a Court. The result is that the rule must be made absolute and the Subordinate Judge's decree restored but without costs here and in the District Court, as the petitioner allowed the appeal to be heard without objection.

*Rule made absolute.*

- (1) (1901) 26 Bom. 241.
- (2) (1903) 26 Mad. 212.
- (3) (1900) 23 Mad. 547, at p. 563.
- (4) (1905) 29 Mad. 124.
- (5) (1908) 35 Cal. 677.
- (6) (1905) 33 Cal. 88.

- (7) (1906) 30 Mad. 41.
- (8) (1904) 27 Mad. 478.
- (9) (1898) 21 Cal. 249.
- (10) (1902) 25 All. 135.
- (11) (1894) 18 Mad. 418.
- (12) (1887) 12 Bom. 486.



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ORIGINAL  
CIVIL.

33 B. 667=1  
I. C. 201=11  
Bom L. R.  
83.

33 B. 667 (=1 I. C. 201=11 Bom. L. R. 83).

ORIGINAL CIVIL.

Before Mr. Justice Russell.

*In re* MADHAVJI, KAMDAR AND CHHOTUBHAI AND  
DADA MAHOMED AND OTHERS.

[11th December, 1908.]

*Petition—Taxing Master—High Court Rules, Rule 544\*—Solicitors' retainer denied—Taxation of costs.*

An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.

*In re Jones* (1) followed.

The facts of this case appear sufficiently in the Judgment.  
*Raikes*, for the applicants.

Our application is made under the amended rule 544 of the High Court Rules, the latter part of which is in point. Our application is merely for an order to tax our bills and the order asked for, when made, will not affect the question of liability of the clients. When the bills are taxed and the amount of costs ascertained we shall have to proceed under Rule 866 of the High Court Rules and take out a summons against the clients and at the hearing of such summons the clients will have an opportunity to be heard on the question of their liability. They have no [668] right to oppose this application and the order asked for should be made as of course. See *In re Jones* (1), *Re Flower* (2) and notes on the subject in Volume, II Annual Practice 1909.

*Strangman*, for the opponents.

RUSSELL, J. :—This was a petition *in re* certain costs of Madhavji & Co.

Messrs. Madhavji, Kamdar and Chhotubhai presented a petition for an order that the Taxing Master do tax bills of costs of petitioners with reference to the matters referred to in the petition.

The opponents *inter alia* deny their retainer of the petitioners.

The petition is presented under the new Rule 544 which was passed to give effect to the decision of Davar, J., in *Bai Dossibai v. Crawford, Brown & Co.* (3). The rule runs as follows :—

" 544. The Taxing Officer shall tax the bills of costs on every side of the Court (except the appellate side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

It will be observed that this rule is imperative, and it has been held that an attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill: *In re Jones* (1).

Where the retainer is disputed, it appears clear that payment of the amount due to the attorney can be enforced by an action only: see Solicitors' Act, 1843, s. 43, and *In re Debenham & Walker*, (4) and *Re Harcourt* (5).

\* High Court Rules (2nd Edition) Rule 544 runs as follows :—

" 544. The Taxing Officer shall tax the bills of costs on every side of the Court (except the appellate side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

(1) (1887) 36 Ch. D. 105.

(2) (1872) 19 W. R. 578.

(3) (1908) 32 Bom. 428.

(4) [1885] 2 Ch. 480.

(5) (1887) 32 Sol. J. 92.



Now it is obvious that before an attorney files his suit, it is essential that the amount he claims be ascertained, and it appears to me desirable both from the point of view of the attorney and the client that that should be done. Until taxation, the sum certain cannot be known.

Again it is competent for the client to dispute the retainer before the Taxing Master with reference to each and every item [669] of the bill: *In re Jones* (1). Assuming that the clients do so in this case, it may be they will be satisfied with the result of the taxation, in which case it is possible that a suit by the attorney will not be necessary.

I, therefore, make an order in the terms of the prayer of the petition. But it is to be hoped that the Taxing Master will scrutinize with great care the correspondence that has been produced before me in this matter, the greater bulk of which, in my opinion, is wholly unnecessary.

The costs of this application are reserved and will abide the result of the taxation or the subsequent suit.

Attorneys for the applicants: Messrs. *Madhavji, Kamdar and Chhotubhai*.

Attorneys for opponents: Messrs. *Dinsha and Dharamsey*.

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ORIGINAL  
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33 B. 667=1  
I. C. 201=11  
Bom. L. R.  
83.

33 B. 669 (=3 I. C. 809=11 Bom. L. R. 797).

APPELLATE CIVIL.

*Before the Honourable Mr. Justice Chandavakar, Acting Chief Justice, and Mr. Justice Heaton.*

KALGAVDA TAVANAPPA PATIL (*original Defendant 1*), Appellant,  
v. SOMAPPA TAMANGAVDA PATIL AND ANOTHER (*original Plaintiffs*), Respondents.\*  
[15th June, 1909.]

*Hindu law—Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.*

When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

[Fol : 49 Bom. 520.]

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original Suit No. 379 of 1906.

Suit to recover possession of vatan property.

The property in suit belonged to one Annappagavda. He had a son Tavnappa, defendant 2, and two step-brothers, Somappa- [670] gavda and Devendragavda, plaintiffs 1 and 2. Tavnappa had a son Kalgavda, defendant 1. Annappa gave his son Tavnappa in adoption to one Apaya after the birth of Kalgavda, defendant 1. Annappa died in the year 1904 after making a will, whereby he bequeathed all his property to his grandson Kalgavda. In the year 1906 Annappa's two step-brothers, plaintiffs 1 and 2, brought the present suit against defendants 1 and 2 to recover possession of the property in suit, alleging that as defendant 1 was already born

\* First Appeal No. 41 of 1908.

(1) (1887) 36 Ch. D. 105.



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CIVIL.

33 B. 669=3  
I. C. 809=11  
Bom. L. R.  
797.

at the time of the adoption of his father, defendant 2, he went along with his father into the adoptive family and the defendants had no right to Annappa's property to which the plaintiffs were entitled to succeed as Annappa's heirs. They further urged that Annappa had no authority to will away his property in favour of defendant 1.

Defendant 1 contended *inter alia* that though his father was given in adoption, still as he was born before the adoption, his rights in the family of his birth were not affected by his father's adoption and that he was the heir to deceased Annappa's estate. He also set up his right to the property under Annappa's will.

Defendant 2 did not file a written statement.

The Subordinate Judge found that the plaintiffs were entitled to succeed to the estate of Annappa in preference to the defendants and that defendant 1 was not entitled to succeed on the strength of the alleged will in his favour and he had no right of inheritance in the family of his birth. The plaintiff's claim was therefore allowed for the following reasons:—

With the exception of a single case noted at page 1148 of West and Buhler's Hindu law, there is no direct authority on the point. Neither has the case been provided for by any of the text-writers. The analogy of the Roman Law on the point may be taken for a guide under such circumstances. According to that law, a son born before adoption of the father, passes with the father into the adoptive family (Justinian's Institutes, pages 46 and 47).

It is admitted that by adoption of a man his wife passes with him into the adoptive family. Why then should not a son pass as well? As to this it is said that a wife by her marriage becomes the life companion of her husband and must pass with him. The relationship of father and son is equally sacred. It cannot be done away with, except when the son is given away in adoption.

I think we should accept the common sense view of the matter. The question is, whose son the boy is after adoption of his father? There can, I [671] think, be no two answers to this question and everybody would be bound to admit that he remains the son of the adopted man. If that is so, he must look for his birth rights in the family of adoption. The case in West and Buhler noted above appears to have been decided on this principle.

It is, however, contended for defendants that the son of the man given in adoption might remain his son, but that no body can divest him of the interest which he has acquired by birth in the natural family. That argument is a weighty one and must be carefully considered. I attempt to consider it below.

A grandson acquires by birth a vested interest in the ancestral property. That is true enough. But that interest is not one fixed once for all, but is liable to be varied or done away with altogether. Suppose there is a family consisting of a man, his son and grandson. The property is ancestral of the man. The interest of the grandson extends to a fourth share in the property and it was acquired by him as soon as he was born. But subsequently to his birth other sons are born to the man or to his son or both, the interest of the first son is diminished thereby. He cannot be allowed to say that since he was at his birth entitled to a fourth share that share must be allotted to him notwithstanding births of other sons. This is an instance of diminution of the vested interest. Under a different state of facts the vested interest would be increased. These are of course cases in which neither the man himself nor his son have any control.

But the man or his son may for proper necessary purpose alienate the property and in that case the vested interest of the son is altogether destroyed. Likewise the vested interest of the grandson is done away with if he is given away in adoption by his father.

Thus it will appear that the vested interest of the grandson is liable to decrease or increase or to be done away with altogether. If his father can do away with the vested interest of the grandson by giving him away in adoption why should he not have the power of destroying that interest by severing all connection with the natural family by himself being given into adoption in another family? All these considerations lead me to conclude that the grandson passes by adoption of his father into another family and cannot succeed as an heir in the natural family in preference to other



nearer heirs. Hence I hold that defendant 1 in this case cannot succeed in preference to plaintiffs.

Defendant 1 appealed.

*M. B. Chaubal* (Government Pleader) and *C. A. Rele* appeared for the appellant (defendant 1):—In spite of our father's adoption into another family we retained our right and status in the family of our birth. The parties are Jains and they do not perform *shraddhas* (annual obsequial ceremonies). Amongst them adoption is not made for spiritual purposes. It is made for secular purposes only. The theories of Hindu law based on [672] spiritual notions and *shraddha* do not affect them: Mayne's Hindu Law, page 168, 7th Ed.; West and Buhler, p. 1148, 3rd Ed.

The Subordinate Judge has attempted to romanize the Hindu Law and has wrongly decided the case against us on the analogy of Roman Law. The case ought to have been decided according to the recognized principles of Hindu Law.

Secondly, the Subordinate Judge has held that a son born before his father's adoption goes with his father into the adoptive family in the same way as the wife goes with her husband when he is adopted. This is a wrong view. The case of a wife is different from that of a son. The wife takes through her husband while the son acquires a right by birth and takes along with the father. Besides according to the texts a wife is part and parcel of her husband.

The third ground on which the case is decided against us is that although a Hindu acquires an interest by birth that interest is not a fixed one and is liable to be varied. But his interest as joint owner does not cease. Circumstances may increase or diminish the *quantum* of that interest. This interest acquired by birth can be taken away only in particular cases and under particular circumstances. It is a right created by a text and it can only be taken away by a text. The adopted person loses his right on account of a text: Mandlik's Translation of the Vyavahar Mayukh, p. 59. The text applies only to the person adopted. There is no text which takes away the right of a grandson, that is, a son born before adoption.

The effect of adoption is personal. It only passes the person given in adoption into the adoptive family. The forms of the ceremony of adoption do not speak of a vicarious effect on the son of the person adopted. Adoption is the civil death of a person in the family of his birth and is his re-birth in the adoptive family: Sarkar's Hindu Law, p. 150, 3rd Ed.

The opinion of the Shastri given at p. 1148 of West and Buhler should not be accepted. It is neither supported by any reason nor by any text. Even if the son's son passes out, he will not lose his interest in the family of birth. It is vested and indefeasible interest. He does not cease to be a grandson [673] because his father has ceased to be a son. The capacity of the adopted person's son to inherit in the family into which his father is adopted, even if allowed, will not destroy his capacity to inherit in the family of his birth, since such capacity is based on blood relationship and the rights by birth remain in tact in spite of the father's adoption.

The will made by our grandfather and the other evidence in the case show that the intention of both, the grandfather and father, was that we should remain in the natural family.

*Jayakar* with *S. S. Patkar* appeared for the respondents (plaintiffs):—According to Hindu law the son of a person given in adoption passes with his father in the adoptive family by implication. There is no direct

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authority on the point either in the Text Books or British Indian Works, except one case in West and Buhler, p. 1148, which supports our contention. We submit that the rules laying the age-limit of the son to be adopted are of later growth and that the practice of giving away sons, having sons, in adoption, must have been rare: Dattak Chandrika II, 33; Sarkar's Hindu Law, p. 152, 3rd Ed.; Sarkar on Adoption, p. 359, 3rd Ed.; *Sree Brijbhokunjee Mukharaj v. Sree Gokoolotsaojee Mukharaj* (1), *Nathaji Krishnaji v. Hari Jagoji* (2). The original texts which we rely on will have to be interpreted on this footing.

In the absence of direct authority except as aforesaid, the question will have to be determined with reference to, *first*, the principles and analogies known to Hindu law, and, *secondly*, the broad equities of the case. That the parties are Jains is immaterial for no contrary custom is pleaded in this case and the general Hindu law will, therefore, apply: Mayne's Hindu law, p. 134, 7th Ed.: *Shagwan Koer v. Bose* (3); *Sundarji Damji v. Dahibai* (4); *Manohar Lal v. Banarsi Das* (5); *Amava v. Mahadgauda* (6).

I. If we consider the question by the principles and analogies known to Hindu law, we find,—

[674] (a) That the father, wife and son constitute a unity of Hindu family, the main idea being that the wife is the other half of the husband, and the son is the soul of the father re-incarnated. The wife and the son are both the body of the father as it were; so complete is their identification: Manu IV, 184; Mandlik's Manava Dharmshastra, p. 554; Bapu Shastri Moghe's Mitakshara, p. 15, 3rd Ed., interpretation of the term *jaya* (wife). This identification is more complete in the case of the son than the wife: *Gangu v. Chandrabhagabai* (7). If therefore the wife passes with the husband, as is conceded, *a fortiori* should the son pass with the father on the adoption of the latter. The grandfather has nowhere been given the power of sending his son out of his line by adoption so as to encroach on this essential unity of the father, mother and son in Hindu law.

(b) There is also another feature of similarity between a wife and son in Hindu law, *viz.*, that the father enjoys a *patria potestas* or qualified ownership over them both. Bapu Shastri Moghe's Mitakshara, p. 225, 3rd Ed.; Yajnyavalkya Smriti II, 175 and following. If the father, therefore, is given away in adoption by the grandfather, he must pass out along with those who are recognized by Hindu law, for the purposes of developing and perfecting the domestic life, to be within the pale of the father's influence and *patria potestas* and to whose society and up-bringing he is entitled according to law. The grandfather, by the act of giving away his son, cannot deprive him of the objects over which the son enjoys such ownership. To allow the grandfather the double power (1) of tearing his son out of his natural environment, and (2) of depriving him of the right of taking his wife and sons with him, would be against the conception of Hindu law and an unjustifiable widening of the texts allowing the gift of a son in adoption, to say nothing about such a power being harsh and inequitable.

There is a passage in the Vyavahar Mayukh, Chapter IV, section 1, pl. 11, which at first sight seems to be against our contention but if

(1) (1818) 1 Borr. 202 at p. 216.

(2) (1871) 8 Bom. H. O. R. A. C. J. 67  
at p. 72.

(3) (1903) 31 Cal. 11.

(4) (1904) 29 Bom. 316.

(5) (1907) 29 All. 495.

(6) (1898) 22 Bom. 416 at p. 422.

(7) (1907) 32 Bom. 275.



rightly construed it is in our favour, [675] for it only denies that the father has over his wife and son the same kind of physical ownership as over his cow. The passage, however, admits that the father does enjoy a qualified or secondary (*gauna*) ownership over them. Medhatithi supports the same view: Manava Dharmashastra, Vol. I, p. 296. Instances of qualified ownership over the son are also to be found in the rule of Hindu law that father's dominion over the son extends to the power of giving away the son in adoption: Vyavahar Mayukh, IV, pl. 15; West and Buhler, 1146, 3rd Ed.; Sarkar's Hindu law, pp. 117, 119, 3rd Ed. If therefore the father can transfer the son into another family by his voluntary act of giving away, there is nothing opposed to Hindu notions in holding that such a transfer takes place by implication in Hindu law by the father himself going out of his family under the gift in adoption made by the grandfather.

(c) The texts declaring the effect which adoption has on the severance of connection between parties are also in our favour. Adoption cuts away the *gotra* (line), *riktha* (inheritance) and *pinda* (funeral oblations) of the son and the father: Manu IX, 242; *Rachava v. Kalingapa* (1).

Adoption, therefore, has the effect not merely of destroying the individual relationship of the father giving and the son given; its effects extend to a disconnection of the lines of the father and son, meaning thereby that the son given away and his own issue become disconnected from the father and his relations in the ascending and the descending line.

This view is confirmed by the interpretation put on the above text of Manu (IX, 242) by the Vyavahar Mayukha, Chapter IV, section 5, pl. 22, where the author after pointing out that words *gotra*, *riktha* and *pinda* have to be understood in a wide and liberal sense as inclusive of all acts, connected therewith, proceeds to state that adoption brings about the extinction of all such acts, and by way of illustration mentions that "from this also follows, as a matter of course, the cessation of family connection with the uterine brother and the father's brother and [676] the rest." The author thereby illustrates the principle that the disconnecting effects of adoption are extended beyond the two individuals concerned.

The Vyavahar Mayukha, Chapter IV, section 5, pl. 37, 38 develops the same idea. The giver and taker of the boy both intend, by the adoption, to affect not only the single relationship of father and son, but the various other relations dependent on that relationship: Dattak Mimansa, VI, 8; Dattak Chandrika, II, 18 and 19. Sarkar's view (Sarkar's Hindu Law, pp. 156, 158, 3rd Ed.) that adoption is only a civil death of the person given, is not quite accurate and has not been accepted to be so: *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (2).

It thus follows that the two lines having been disconnected as aforesaid by the adoption and the son being identified with the father and being also under his dominion, on the father passing out by adoption, the son also goes out with him.

(d) The relationship between the father and the son is sacred and inviolable in Hindu law; nothing can destroy it, not even the grandfather's act of giving away the father in adoption. The son, as the offspring of his father, has the *duty*, and the father, as his progenitor, the *right* of giving and receiving *shraddhas* and other obsequial rights. This nexus is indissoluble and even in cases where it is replaced by another tie based on

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(1) (1892) 16 Bom. 716, at p. 719.

(1) (1905) 29 Mad 437 at p. 438.



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legal fictions, as for example, the son by adoption becoming the son of the adoptive father, or the damsel's son (*kanin*) becoming in certain cases the son of his mother's father, the same is allowed as an exception in consequence of special texts: Mitakshara, I, pl. 7. Even in such exceptional cases, if by some chance the artificial tie happens to snap, the natural relationship revives and the son comes back to his genitive father as an heir or sharer: Manu, IX, 162, 181 and Madhatithi's comments thereon at pp. 1189, 1198 and 1207 of Manava Dharmshastra, Vol. II.

It was argued that the single ceremony of adoption can only affect the son who is the object of the ceremony, it cannot affect [677] the son's son. To this our answer is twofold—(1) The son's son passes not in consequence of any vicarious effect of the said ceremonies, but by implication of Hindu law, and (2) even the doctrine of ceremonial identification between the father and son, in the sense that ceremonies performed by the one or on the one have their effect on the other, is not unknown to Hindu law: Manu II, 27, 37; Manav Dharmshastra, Vol. I, pp. 119, 129, 130; Yajnavalkya I, 56; Bapu Shastri Moghe's Mitakshara, p. 15.

It was further argued that the son takes by birth a vested and indefeasible interest in his paternal property which would be defeated if our contention be allowed. But adoption is an exception to this rule assuming the so-called rule is as binding and definite as alleged; as for example, if a son gives his own son in adoption can the grandfather raise this doctrine as a bar? In Hindu law the grandson's relationship to the grandfather is through the father as the word *pautra* (son's son) itself indicates. If, therefore, the sonship ceases, *ipso facto*, the grandsonship must come to an end. Besides adoption wipes out all relationship traceable through the father, like that of uncle, brother and the rest: Vyavahar Mayukh, IV, pl. 23. The grandfather being the father's father must cease to be so the moment the father ceases to be his son. All vested rights of property being based on this relationship, as was conceded, will also end: Mitakshara, I, pl. 2; *Gangu v. Chandrabhagabai* (1); *Ananta Balacharya v. Damodhar Makund* (2); *Kandasami v. Doraisami Ayyar* (3); *Baldeo Das v. Sham Lal* (4). Colebrooke's Digest, Vol. II, p. 562. The doctrine of the grandson's taking a vested interest by birth is qualified by another doctrine of Hindu law that the said vested interest works itself out through the father, as for example, for purposes of partition. The rule of Hindu law that on the father becoming disqualified, the disqualification of the son would necessarily follow unless saved by special texts, also illustrates the principle that the son's interest, though vested by birth, is traceable and works out through the father: Mitakshara, II, pl. 9; *prapta* in the sense of "necessarily implied."

[678] If we test the question by applying the theory of *shraddhas*, the texts prescribing the *shraddhas* which the son of the adopted son has to perform support our contention: Vyavahar Mayukha, IV, pl. 23; Dattak Chandrika, III, 20, 21. The opposite contention, if allowed, will lead to a double anomaly, *first*, the son's son remaining in the old family would have no father for whom to perform the *shraddhas* and *second*, the grandfather in the old family would have no *shraddha* after his death, except for a year during which his grandson would perform it, but at the

(1) (1907) 83 Bom. 275.

(2) (1898) 18 Bom. 25.

(3) (1880) 2 Mad. 817.

(4) (1875) 1 All. 77.



end of that period his grandson could offer the *shraddha* to him only as *parvan* rite through his own father which is impossible *ex hypothesi*.

II. Even the broad equities of the case are in our favour for holding that the son should pass out with his father on the latter's adoption. The main tests will be—(1) What is for the welfare of the son, and (2) What would be fair and equitable from the stand point of the father going out by adoption.

(1) It is obvious that the son's welfare would be better promoted by allowing him to go out with his father for the following reasons:—(a) Pecuniarily his position would certainly be better, for generally it is only the poor or the comparatively poor who give their sons in adoption into a richer family, (b) his genitive father and mother would certainly take better care of him than the decrepit old grandfather, or the rival co-parcener uncles in the family of his birth and (c) if he is a minor of tender age who would be his guardian? Unless our contention is allowed, his genitive mother and father would not be his guardians, for having gone out of the family by adoption, they would be strangers.

(2) It is unfair that the grandfather should have the power of sending the father out of the family without allowing him to take with him his sons to whose company and upbringing he has an indefeasible right. Why is his wife allowed to go with him? In order that there may be no void in his domestic existence in his new environment, a doctrine expressed in Hindu spiritual conception of the identity of the husband and wife. Is there not a similar, if not a greater, identity [679] with his sons, who in the strict conception of Hindu law, are his own soul re-born and his saviours in the next world by reason of the *shraddhas* they would offer him? Why should the grandfather's act of giving him away in adoption, over which in strict theory, he has no control, be allowed to deprive him of the society of his children, any more than his wife. There is no authority for the proposition that a father cannot give his adult son in adoption except with the consent of such son.

*Chaubal* in reply:—The motive for adoption among the Jains being purely secular, the argument based upon the theory of performing *shraddhas* and offering of *pindas* can have no application. The cases relied on are cases of succession and special custom.

The term *gotra* as used in the texts cannot mean anything else than family.

CHANDAVARKAR, Ag. C. J.:—This appeal raises an important question of Hindu law, which may be stated as follows:—When a married Hindu, having a son, is given in adoption by his natural father, does the Hindu's son also, like his father, lose the *gotra* and rights of inheritance in the family of his birth and acquire the *gotra* and a right of succession to the property of the family, into which the Hindu is adopted?

The parties to this first appeal are Jains, but, in the absence of any special custom, Jains are governed by the ordinary Hindu law: *Bhagvandas Tejmal v. Rajmal* (1); *Sheo Singh Rai v. Mussumut Dakho* (2).

No special custom, departing from the ordinary Hindu law of adoption, has been set up in the present case, and the question above stated must be determined with reference to that law.

The Subordinate Judge (Mr. V. V. Phadke), who tried the suit out of which this appeal arises, has decided the question in the affirmative,

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(1) (1873) 10 Bom. H. C. R. 241.

(2) (1878) L. R. 5 I A 87 at p. 103.



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mainly on the strength of a *vyavastha* (rule) quoted as from a manuscript at page 1148 of West and Buhler's Digest of the Hindu law, 3rd Ed. and on the analogy of the Roman law. The *vyavastha* apparently represents the view of a shastri, [680] and is one of the opinions collected on different points of Hindu law by the learned authors of the Digest. The *vyavastha* is as follows:—

"A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family."

"This is so, though another son is born (to the adopted) after the adoption."

"The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father."

No reason is given, no text cited in support of this opinion. We cannot, therefore, accept it, unless a close and careful consideration of the principles of Hindu law, bearing on the question under consideration, satisfies us that it is correct.

The Subordinate Judge has also adopted for a basis of his decision "the analogy of the Roman law on the point," as "a guide under such circumstances", as if the Hindu law were barren of light on the subject. That law is a jurisprudence by itself and contains within its limits all the principles necessary for application to any given case. It is doing scant justice to Hindu law as a science to suppose that, because there is no express text providing for a concrete point arising for adjudication, therefore there is nothing in it to guide a Judge in deciding that point and he must import analogies from foreign laws to help him. The Hindu law-givers have not indeed laid down a rule in express terms on every conceivable point. But having provided texts for such cases as had arisen before or in their time, they left others to be determined either with reference to certain general principles laid down by them in clear terms or by the analogy of similar cases governed by express texts. Had the Subordinate Judge (a Hindu) gone into the question in this case a little deeper and considered the authorities on Hindu law a little more carefully than he seems to have done, he would have found that there was no need of romanising the Hindu law for the purposes of his decision.

In determining the question before us, we must bear in mind the exact position which the son, born to an adopted Hindu before the adoption, occupied at that time. By birth he acquired the *gotra* or [681] family of his birth; and, if that family was joint and owned ancestral property (as was the case with the parties before us), he acquired by the very fact of birth, joint ownership over that property with his father. "Grandsons," says the Mitakshara, (Ch. I, Sec. V, pl. 2), "have by birth a right in the grandfather's estate equally with sons." "The grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather," (pl. 9). It is true that this right of ownership by birth, which grandsons acquire, is subject to the qualification that at partition "the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves," (pl. 2); but that qualification merely fixes the measure of their share. It does not destroy the vested right of equal ownership with the father, which exists all the same in the grandsons. As explained in the *Viramitrodaya*:—"Thus the competency being equal, and the right by birth also being equal, equal participation would have followed but is prevented by the text: 'Among grandsons by different fathers, the allotment of shares is



according to the fathers' " (*Vir. Mit.*, Mr. Golapchandra Sarcar's Translation, p. 90).

The Subordinate Judge admits all this in his judgment, but he gets over it by observing that the interest acquired by a grandson " is not fixed once for all but is liable to be varied or done away with altogether," because his share may be increased or decreased according as his father or grandfather has more or less sons and because the father has power to alienate the property. This is a fanciful mode of explaining away the grandson's interest acquired by birth. A man's interest in property as joint owner does not cease because circumstances may increase or diminish the quantum of that interest. As for alienation, it is allowed only in special cases. But that does not affect the question of the grandson's vested right. To quote the *Viramitrodaya* again :—" It has been established that in the grandfather's property the grandsons also acquire ownership by birth ; hence the equality of the grandson's share (with a son's share) in the grandfather's property is based upon the authority of the texts and not founded upon any equitable principle." (Page 91.)

[682] The son, then, begotten by an adopted Hindu before adoption, has vested rights in the ancestral property of the family of his birth. Rights of property once vested cannot be taken away except in the mode or modes prescribed by Hindu law. They cease either by death, sale, gift, degradation, disqualification or by adoption. In the case of a son, whose father has been given in adoption after his birth, if none of these modes for the extinction of his vested rights of property applies, there must be the clear authority of some text for holding that the rights in question are extinguished because the father of the owner of those rights, having been given in adoption, has his rights in his natural family extinguished by the act of adoption.

So also as to the *gotra*. That is determined by birth and it adheres to a Hindu male throughout, unless it is changed by *his* adoption into another family.

It is urged by Mr. Jayakar, who has argued the case for the respondent with his usual ability and learning, that clear authority for the extinction of the rights and *gotra* is to be found, first of all, in the text of Manu which says :—

"A given son shall never claim the family and estate of his natural father ; the *pinda* (the obsequial oblation) which follows the family and heritage, and the *shrad-dha* and other funeral ceremonies of the giver cease." (Manu Ch. IX, Verse 242 : see Mandlik's Hindu Law, p. 59, lines 10 to 13.)

The original word for " family " in this text of Manu is *gotra*. Mr. Jayakar argues that *gotra* means *santana*, literally, continuation, as observed by Telang, J., in *Rachava v. Kalingapa* (1) ; or *santati*, literally, a line of descendants, as explained in the *Dattaka Mimansa* (p. 25, Shiromani's Edition), and the *Samskara Kaustubha*.

These words are not always used of *descendants* only. They are often used as meaning " family," the whole group of ascendants and descendants. Medhatithi says that, according to some, *gotra* means *vamsha*, which applies both to the line of ascendants and of descendants. The author of the *Samskara Kaustubha* cites a *smriti* of Trikandi, which says, that *santati*, *gotra*, *janana* and *kula* are synonymous terms. *Kula* means, literally, family.

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[683] For the purposes of his argument, to make it logical, Mr. Jayakar must contend that the word *gotra* is used in Manu's text as applying only to the descendants of the man giving his son in adoption. The argument is that when the son is given, his son too ceases to belong to the family of his birth; and that because Manu's text says that the man given in adoption is cut off by the adoption from the *gotra*, meaning, the descending line of the giver. If that is the meaning of the word, what becomes of the adopted man's connection with the ascending line of his natural father? Does that continue? Mr. Jayakar is forced to admit it does not.

Vijñāneshvara in the Mitakshara gives us the meaning of *gotra* (Mit. Sec. V, pl. 6) on the authority of Vrihat Manu. "It reaches as far as the memory of birth and name extends." If *gotra* means both the ascending and the descending line of the natural father of the man given in adoption, the latter, according to Manu's text, ceases, after adoption, to have connection with both the lines. That includes his own sons born before the adoption.

The text of Manu, which we are now discussing, in terms relates to the personal *status* of the man given in adoption. It predicates certain things of him, and him only, as the result of adoption. They are the extinction in his case of the *gotra* (family) of his natural father and the right of succession to his property. And according to Hindu logicians (*Naiyayikas*), where in a text certain qualities are predicated of a person, they apply to him only and the rule in the text should not be extended to others (1). Manu's text, therefore, must be confined in its application to the person of whom it speaks, that is, the man given in adoption, and not extended to his son born before the adoption.

But Mr. Jayakar contends that the explanation of the text given by Nilakantha in the *Vyavhara Mayukha* brings that son within its operation. That explanation is as follows:—

"Therefore the son begotten by the simple adopted son should likewise perform his father's *sapindikarana*, *paravana*, *shraddha*, and the like cere- [684] monies in conjunction even with the (original) adopter." (Mandlik's Hindu Law, p. 69, lines 32 to 35.)

"The son begotten by the simple adopted son" means, according to Mr. Jayakar, a son begotten whether before or after adoption. But the original words used for that expression do not support that construction. The words are *kevala dattaka janyah putrah*, that is, a son begotten by the simple adopted son. The begetter is specified as one endowed with a particular status—that of adoption. The special reference to the *status* shows that the son begotten by such a person is one begotten after that person has acquired the *status*. That is the natural and grammatical construction of the words. Take, for instance, the word *vibhaktaja* (a son begotten by a separated co-parcener), used in a *smriti* quoted in the Mitakshara (Ch. I, Sec. VI, pl. 4). It means, "one begotten after partition." So also the word *patitastajjah* used in the text relating to exclusion from inheritance. It means "the offspring of an outcaste" that is, as explained by all the commentators, not one begotten by the person outcasted before excommunication, but one begotten while the begetter was under that disability. Similarly "a son begotten by a simple adopted son" must mean one begotten after, not before, adoption.

The declarations, which have to be made at the ceremony of adoption by the person giving and the person taking respectively, are relied upon

(1) The rule is—उद्देश्य विधेय भावस्थले उद्देशावच्छेदकत्वापत्तव्यम् विधेये भासते ।



by Mr. Jayakar as supporting his case. The declaration made by the natural father of the boy is as follows :—

"I am going to give my son in adoption in order to create (between my son and his adopter) those various reciprocal obligations which arise from the various relations, such as that of father and son (at present) existing between me and the like on the one hand, and this (my) son on the other" (Mandlik's Hindu Law, p. 64, lines 6 to 10.)

This declaration refers to extinction of the "reciprocal relations" which exist at the time of the adoption ceremony between the boy and his natural father. They do not in terms refer to the reciprocal relations existing then between that father and his grandson, that is, a son begotten already by the son who is being given in adoption. A grandson stands in the place of a son to his grandfather; there are reciprocal relations between them just [685] as there are between the father and the grandfather. They arise no doubt through the father, but nevertheless they become, after they have arisen, independent of the relations between the father and the grandfather. And there is nothing in the language of the declaration above cited to show that these reciprocal relations between the grandfather and the grandson are affected by the gift of the father in adoption.

But Mr. Jayakar maintains that the reciprocal relations of grandfather and grandson are not independent of those between the former and the father. The grandson, he argues, is related to his grandfather through the father; the father is the principal link which binds the grandson to the grandfather, and he asks, if the link is cut off, what is left to bind the grandson to his grandfather?

This ingenious argument would seem to derive some support from the doctrine of Jimuta Vahana on the subject of a grandson's right of ownership acquired by birth in his grandfather's property while the father is alive. According to him "the grandsons and the great-grandsons whose fathers are alive cannot confer oblations on the *parva* occasions; they are not, therefore, entitled to the estate of their grandfather and great-grandfather respectively. . . Their interest in the grandfather's wealth is founded on their relation by birth to their own father; consequently they have a right to just so much as should have been their father's share."

This is not, however, the doctrine of the Mitakshara school. The author of the *Viramitrodaya*, who is substantially a follower of that school, quotes the abovementioned remarks of Jimuta Vahana and combats his view. He says "that view is not acceptable" (see the *Viramitrodaya*, translated by Mr. Golapchandra Sarkar, pp. 90 and 91. Sec. 23a, paras. 2 and 3). The reason he gives is that "in the grandfather's property the grandsons also acquire ownership by birth. That is the cardinal principle of the Mitakshara school, which divides it from the school of Jimuta Vahana. It is not correct to say that the father is the link so binding the grandson to the grandfather that, if it breaks, it carries with it the grandson too. The father is a link [686] so far that through him *sapinda* relationship between grandfather and grandson is brought about. This is pointed out by Vijnaneshwara in the chapter on *Achara* (ceremonies) in the Mitakshara, while explaining the term *sapindata* as "connection by particles of one body" (see the passage cited in translation in *Lallubhai Bapubhai v. Mankuvarbai*) (1). But when the relation has once been brought about by birth, the grandson becomes an entity by himself, and

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(1) (1876) 2 Bom. 388 at p. 423.



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the continuance of that relation does not depend on the continuance of the father's relation to the grandfather. Even if the father die or become an ascetic, or outcaste, and thereby cease to have any right to the grandfather's property, the rights of the grandson, born before any of those events, do not cease but continue.

One of the obligations, which the *Shastras* impose upon every Hindu as arising from his relation to his paternal ancestors, is to beget a son and thereby discharge a debt called *pitrū runa* or paternal debt due to those ancestors. This reciprocal obligation, it is urged, is extinguished when the Hindu is given in adoption by his father, and the extinction means the wiping out of the line of son, grandson, etc., represented by the son given in adoption, so far as the giver and other members of his family are concerned. The answer to that is that, when the Hindu has begotten a son before he is given in adoption the paternal obligation has been discharged; the debt has been paid off; and that particular "reciprocal obligation" has as obligation ceased to exist. "Immediately on the birth of his first-born a man is called the father of a son and is freed from the debt to the manes." [Manu IX, 106]. The son born to the Hindu has taken the place of the debt; as grandson born in the family he has acquired certain rights; and there is no question of reciprocal obligation with reference to him between the Hindu and his father giving him in adoption. A debt discharged in the mode prescribed by the *Shastras* ceases to be a debt and with it the obligation as to it dies, so far as the father is concerned. The grandson becomes charged with a similar obligation, he becomes a continuer of the line himself (1) being both [687] for religious and secular purposes of as much value to the grandfather as the father. The obligation and the line represented by the grandson must continue unless it is extinguished altogether in the mode or modes prescribed by the *Shastras*, that is, by death or excommunication or by the giving of the grandson himself in adoption by his father. Nowhere do the *Shastras* say that they are extinguished by the mere fact of the father having been given in adoption.

The declaration made by the person taking the Hindu in adoption at the adoption ceremony, runs as follows:—

"In order to create between this person on the one hand, and me and the like on the other hand, various reciprocal obligations consequent on the various mutual relations, such as those of father and son; I am going to adopt (this person as) a son." (Maddik's Hindu Law, p. 64, lines 19 to 23).

Here again, "the reciprocal obligations" spoken of are those to arise in future, that is, after the adoption, as a consequence of it. One of those obligations is for the adopted son to beget a son and thereby discharge the *pitrū runa* or paternal debt. That cannot mean discharging a debt by means of a son born before the adoption, who has already served to discharge another debt, due to the ancestors in the natural family of the adopted son.

So far, then, as the texts and commentaries bearing directly on the question of adoption are concerned, they do not support the case for the respondent. They deal merely with the personal *status* of the man or boy given in adoption; and do not purport to affect the *status* of his son, begotten before adoption.

(1) See on this point section 28a of the *Vizmitrodaya*, p. 90 of Mr. Golapchandra Barcar's translation.



But it is argued that when a married man is given in adoption, his wife passes with him into the adoptive family—she, like him, acquires the new *gotra*; that what applies to the wife of the man adopted must apply to his son also, begotten before the adoption, because, both according to the Smriti writers and their commentators, a man's wife and sons go together. In support of this argument reliance is placed on a text of Narada cited by Vijnaneshvara in his chapter on "Resumption of Gifts" in the Mitakshara (p. 225, Moghe's 3rd Ed.).

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That text says that a man shall not make a gift or sale of his sons and wife. The reason for that rule, as given by Nilakantha [688] in the *Vyavahara Mayukha*, is that "there being no ownership over a wife as there is in a cow, &c., there cannot be any property in the children begotten on her." (Mandlik's Hindu Law, p. 35, lines 32 and 33). This merely propounds the law so far as a man's power to make a gift or sale of his wife and children is concerned. It does not follow from it that the man's relations to the children are the same in every respect as his relations to his wife. When he is given in adoption, his wife passes with him into the adoptive family, because, according to the *Shastras*, husband and wife form one body. A woman can be given in marriage but once. (Mandlik's Hindu Law, p. 169, para. 65.) For the purposes of *dharma* (religion), *artha* (wealth), and *kama* (desires), she and her husband are inseparably united; as long as her husband is alive, the wife is dependent on him; with her he has to worship the domestic fire; she is necessary to him for family sacrifices; in short, as a commentator puts it, "the relation of husband and wife is one of close proximity." If the husband becomes contaminated by one of the deadly sins (*maha pataka*), the wife has to wait till he is purified. On her death, her funeral ceremonies have to be performed by the family (*gotra*) of her husband, if her marriage has been according to one of the approved forms. That is, by the *gotra* to which the husband belonged at her death. This intimate relation between husband and wife makes it necessary and natural that when the husband is given in adoption, his wife should pass too, because the lot of the one is cast with that of the other. But that kind of intimate relation does not exist as between a father and his son. It is true that, according to the *shastras*, there is a certain kind of identity between them. "The father," it is said, "is reproduced in the son." The meaning and import of that is explained in the judgment of this Court in *Gangu v. Chandrabhagabai* (1) which deals with the question of the exclusion of persons under disability from inheritance.

The theory of identity between a father and his son recognised by the *shastras* does not mean that they are one body as husband and wife are. It means that they are to some extent co-equals. Adoption does not disqualify a man for inheritance or a share [689] at a partition in the same way as disqualifying causes such as impotence, excommunication from caste, blindness, lunacy, and the like. The latter deprive a man absolutely of the right to inherit and the right to partition. Adoption, on the other hand, substitutes those rights in the family of adoption for those acquired in the family of birth. No complete analogy can, therefore, be drawn for the purposes of the question we are now discussing from the texts on the subject of exclusion from inheritance or partition of persons disqualified.

(1) (1907) 32 Bom. 275 at p. 284.



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But, assuming that an analogy can properly be drawn, it is rather against than in favour of the respondent's case. The leading text on the subject of disinherison mentions the persons disqualified, but does not mention their sons except in the case of the outcaste. Even in that case, it is only the son born after the father's excommunication who is included among disqualified heirs. The next text refers to the *aurasa* and *kshetraja* sons of the persons disqualified. In the case of these sons, that text says, no disqualification can exist, if they are personally free from the disabilities mentioned in the preceding text. This second text, says Vijnaneshvara in his gloss in the *Mitakshara*, became necessary because of the preceding text "implying" that the father's disqualification leads also to the son's disqualification. Not that it necessarily implies, but that the second text is intended to remove a doubt which might arise in consequence of the mutual relations of father and son.

Now, in dealing with the question of exclusion from inheritance, the *smriti* writers and the commentators have taken care to point out expressly that certain kinds of sons do not but other kinds of sons do share their father's disqualification. But they have not done that in dealing with the subject of adoption.

If it be argued that the reason for providing a special text, exempting the *aurasa* and *kshetraja* sons from sharing their father's disqualification for inheritance, could only be that, but for that special text, those sons with the other kinds of sons would have been included in the father on the ground of the *Shastric* identity, the answer is furnished by the language of the leading text on the subject of disinherison. If, because of that identity, what disqualifies the father must disqualify the son also in all [690] matters and especially in those relating to property, where was the necessity of specially referring in that text to the son begotten by an outcaste after the latter's excommunication and not mentioning at the same time the sons of the other disqualified persons? If a father and his son are identical so that what happens to the one must happen to the other, then it must follow that, if a father becomes an outcaste, or contract some other impurity, the son must also necessarily contract it. And yet every Hindu knows that is not the law or *shastra*.

But then, argues Mr. Jayakar, if it be held that the son of a Hindu, begotten before the latter's adoption, does not pass with the Hindu into his adoptive family but remains a member of the family of his birth, this result must follow that the son in question cannot, on the Hindu's death, perform the different obsequial ceremonies, due from every son to his deceased father, and that because the father in such a case has ceased to be his father by going into another *gotra* or family. The son can perform the *shraddha* and other death ceremonies of his grandfather, but the *Shastras* prescribe that in all these ceremonies the oblations must be offered to the soul of the father first, where the father has died. Here there is no father, he having gone into another family, and, if there is no father, the oblations to the grandfather and other ancestors cannot be given. This argument involves the assumption that, when a married man having a son is given in adoption, one result of the adoption is that it destroys the natural relation of father and son between them for the purposes of obsequial ceremonies. All that *Manu's* text, to which reference has been made in the foregoing part of this judgment, lays down is that *the man given in adoption* loses his natural *gotra* or family and the right to inherit the property of his natural father, and with them his right to offer *pinda* or funeral



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oblations to his natural father. But the text does not say that the son of that man, born before his adoption, ceases to be his son and loses the right to offer funeral oblations to his soul, in case of his death. For one thing, according to the Hindu Shastras, "by no means can you make your father cease to be" (Jaimini, Bibliotheca Indica Series, Vol. I, p. 742). The mere fact that the father has gone into another family by adoption and ceased to be of his son's *gotra* or family cannot unmake what he naturally is--the son's [691] father. The *gotras* of the two may differ in consequence of the adoption, but it is not always necessary for funeral ceremonies that the person performing them should be of the same *gotra* as the deceased. A sister's son and a son-in-law can perform those ceremonies and yet they are not of the same *gotra*. So a son begotten before the adoption of his father would be entitled to perform the latter's funeral ceremonies. All the *Smriti* says is that such ceremonies "shall be performed by a son." It does not make the obligation dependent upon the continuance of the father in the same *gotra* as the son.

In that case, argues Mr. Jayakar, the son must be also entitled to the father's property in his adoptive family. That is a *non sequiter*. According to Apararka, a son must perform the funeral ceremonies of his father even where the father has left no property for the son to inherit. (Apararka, Anandashrama series, p. 463.)

Manu's text says that the funeral oblation follows the inheritance, not the inheritance the funeral oblations. Nilakantha in the Vyavahara Mayukha makes this clearer. "The funeral rites of the deceased, as far as the 10th day inclusive, should be performed by whoever takes his wealth, including the king himself. And Vishnu says the same: 'He who takes the wealth is declared (to be) the giver of the *pinda* or funeral oblations'." (Mandlik's Hindu Law, p. 84, lines 15 to 20.) And Balam-bhatta explains in his commentary on the Mitakshara that "the right to offer funeral oblations and the right to take the deceased's property by right of heirship are not always co-extensive but they may be opposed"(1) So also the Viramitrodaya:—

"The capacity for presenting funeral oblations is not alone the criterion of the right to heritage, since the younger brothers are entitled to the heritage although they are not competent to offer oblations while there is the eldest brother." (The Viramitrodaya, translated by Mr. Golapchandra Sarkar, p. 91.)

But, Mr. Jayakar asks, what if the man giving his son in adoption dies after the adoption, leaving him surviving that son and his son begotten before adoption? The man's son cannot [692] perform his funeral ceremonies, because Manu's text ordains that to be a necessary result of the adoption. Nor can that son's son perform it, because it is laid down (2) that no one who has his father alive shall perform any *shraddha*.

The answer is, that is the general rule, but to it there are several exceptions. It is unnecessary to specify the latter here. They are given in detail by Nilakantha in his *Shraddha Mayukha* (3). Among the exceptions is a case where the father has become an ascetic (*sanyasta*) or an outcaste (*patita*). In such a case, says Nilakantha, the grandson has the right to perform all the ten *Shraddhas* (4). The general rule in fact

(1) पिण्डदत्तं न रिक्थहारित्वं व्याप्यमापितु विपरीत् ।

(2) जीवे पितरि वै पुत्रः श्राद्धकालं विवर्जयेत् ।

(Shraddha Mayukha).

(3) नैव पौत्रेण कर्त्तव्यं पुत्रवांश्चेत् पितामहः ।

(4) The reference is to pages 22, 23 and 24 of the edition published by Mahadeo Gopal Sastri Amrapurkar, Jnana Durpana Press.



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applies only where the grandfather has left a son qualified to perform the ceremonies. This is clear from a *Smriti* of Katyayana quoted by Madhavacharya in his *Parashara Samhita* (Bombay Oriental series, Vol. I, Part II, p. 462), which says:—

"A grandson should not perform the funeral ceremonies of the grandfather if the grandfather has (died leaving) a son."

If the grandfather dies after having given his son in adoption, he must be regarded as having died sonless for the purposes of his funeral ceremonies, and of succession to his property. The grandson in that case takes the son's place. It is not correct, therefore, to say that a grandson has no power in any case to present oblations so long as the father is alive. As is pointed out by Mitra Misra in the *Viramitrodaya* "the fitness for presenting oblations.....is not wanting in grandsons too (while their father is alive)" (Translation by Mr. Golapchandra Sarkar, p. 91).

For these reasons the question argued in this appeal and stated at the commencement of this judgment must be answered in the negative. The result is that the appeal must be allowed, the decree of the Subordinate Judge reversed, and the claim of the appellant awarded with costs throughout on the respondents.

*Decree reversed.*

33 Bom. 693 (= 3 I. C. 962=11 Bom. L. R. 822).

[693] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

MAHANTAWA KOM IRAPPA (Original Defendant 4,) Appellant v.  
GANGAWA KOM MALAPPA AND OTHERS (Original Plaintiff and  
Defendants 1 and 3). Respondents.\*

[15th July, 1909].

*Hindu Law—Panchals—Kurbars—Sub-divisions of Shudra tribe—Intermarriage valid—Custom as to illegality—Burden of proof.*

A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom.

*Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1) and *Fakir-gauda v. Gangi* (2), followed.

SECOND APPEAL from the decision of T. D. Fry, District Judge of Dharwar, confirming the decree of V. V. Kalyanpurkar, Subordinate Judge of Haveri.

The plaintiff sued to recover from the defendants the property in suit alleging that the property belonged to her deceased father Udoha, that it was in the possession of her step-mother Savakka, and that Savakka having remarried the inheritance devolved on the plaintiff. Savakka was joined in the suit as defendant 3 and defendants 1, 2 and 4 were alienees from Savakka.

Defendants 1, 2 and 4 set up their title as vendees from Savakka. Defendant 3 did not put in appearance.

\* Second Appeal No. 785 of 1909.

(1) (1869) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.



The Subordinate Judge, V. V. Kalyanpurkar, found that the re-marriage of defendant 3 was proved, but he found in the negative as to the necessity for the alienations by her. He, therefore, allowed the plaintiff's claim.

On appeal by defendant 4 the District Judge found that, though the re-marriage of defendant 3 was proved, still the question as to validity of the re-marriage should have been [694] raised and considered by the Subordinate Judge inasmuch as defendant 3's husband, Basappa, belonged to the Panchal (artificer) caste and defendant 3 belonged to the Kurbar (shepherd) caste, both castes being sub-divisions of the Shudra tribe. The case was therefore remanded for a finding upon the issue, "Was Savakka's re-marriage with Basappa a valid marriage?"

On the said issue the finding of the Subordinate Judge, V. G. Kaduskar, was in the negative.

The respondents, that is, the plaintiff and defendants 1 and 3, raised objections to the finding.

The District Judge, however, found in appeal that Savakka's re-marriage was valid and that the alienations by her were not binding on the plaintiff. He, therefore, confirmed the decree. With respect to the validity of the re-marriage the Judge made the following observations:—

In disposing, after remand, of the second issue, Mr. Kaduskar has found himself unable to accept the ruling in *Upoma Kuchain v. Bholaram Dhubi* (15 Cal. 708). I take it however that Mr. Kaduskar's attention was not drawn to the fact that the judgment to which he takes exception was quoted with approval by the Bombay High Court in *Fakirgowda v. Ganji* (22 Bom. 277) and that both these decisions are founded on the judgment of the Privy Council in *Inderun v. Ramasawmy* (Moore, Vol. XIII, p. 141).

The concluding words of the judgment of the Privy Council may be quoted. Those words are: "On the whole seeing that those parties are both of the Sudra caste and that the utmost that has been alleged really is, that the Lomindar was one part of the Shudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced."

I follow these rulings as a matter of course \* \* \*

All that the Courts decide is that Sudras of different parts of the caste can contract a marriage which the Courts will regard as valid in law. Whether the members of the different divisions will regard such marriages with disapproval and will take action accordingly is a question into which the Courts have not entered and are not likely to enter.

In the case now before me the parties to the marriage were admittedly Sudras—a Kurbar and a Panchal. Under the rulings quoted the marriage which, as I have held, was contracted between them was valid unless it is [695] proved that the marriage was prohibited by immemorial custom (see the Bombay ruling cited above).

The evidence in this case certainly does not establish any prohibition by immemorial custom and it seems impossible to attach much importance to the necessity for what has been referred to as "conversion". On that point I am impressed with Mr. Kalyanpurkar's remark: "I feel tolerably sure that considering the superiority of the Panchal caste i.e., Basappa's caste) over the Kurbar (i.e., Savakka's caste) there can be no objection to the validity of such a marriage."

This would be in accordance with the old rule cited by Mayne on page 106 of his 7th edition. "Originally marriages between men of one class and women of a lower were recognized."

The further treatment in this work of such marriages as obsolete cannot be accepted here in view of the remark on that point in 15 Cal. 711. I hold that the marriage was valid.

Defendant 4 preferred a second appeal.

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*M. B. Chaubal* (Government Pleader) and *G. S. Mulgaumkar* appeared for the appellant (defendent 4) :—The sole question is about the validity of Savakka's marriage with Basappa. They belong to entirely different castes. Under this circumstance it cannot be said that Savakka has gone into another family by her re-marriage and thus lost all her interest in her deceased husband's property. Basappa's caste is Panchal, while Savakka's is Kurbar. The validity of the marriage must depend upon the custom of the caste with regard to such marriage. Panchal is a caste akin to Brahmin : (Steele on Hindu Customs, pp. 352 and 356). A Panchal like a Brahmin has to perform Thread Ceremony (investiture of sacred thread). In other respects their rights are taken from the Kamla-kar Sutra or the Sacred Ordinances of the Shudra caste. It is the custom of the caste that can validate such a marriage. The lower Court has relied upon the decision of the Privy Council in *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1). We submit that that case is distinguishable. There the marriage was between a Shudra male and an illegitimate female. An illegitimate person, whether a male or female, has no caste at all and such a marriage does not come within the pale of Hindu Law. We rely upon [696] the remarks on p. 71 of Tagore Law Lectures, Hindu Marriage and Stridhan. The ruling in *Fakirganda v. Gangi* (2) lays down that the marriage between members of two sub-divisions of the Lingait caste is not invalid. But in the present case the very fact that Basappa and Savakka are excommunicated shows that the custom of the caste does not recognize such a marriage. The decision in *Upoma Kuchain v. Bholaram Dhubi* (3) is against our contention. That case originated in Assam and perhaps the sub-divisions there were in the same caste.

*G. S. Mulgaumkar* :—We further rely upon *Narain Dhara v. Rakhal Gain* (4) and *Lakshmi v. Kaliansing* (5).

[BACHELOR, J. :—In the last case the marriage was between a Brahmin girl and a Rajput husband. They were not members of the same class or tribe.]

*N. A. Shiveshvarkar* appeared for respondent 1 (plaintiff) :—The texts in support of a marriage like the one involved in the present case are Manu, Ch. III, cl. 12 *et seq* ; Mitakshara, Ch. I, sec. 2, cl. 2 and note ; Strange's Hindu Law, Vol. 1, p. 41, relying upon 3 Colebrook's Digest, 329 : see also Golap Chandra Sarkar's Treatise on Hindu Law (3rd Edn.) pp. 102, 104. Originally a marriage between a man of a superior caste and a woman of an inferior caste was permitted. It is only the later commentators that introduced the prohibition against inter-marriages. But the prohibition applies only to the three regenerate classes and not to the Shudra class. In *Narain Dhara v. Rakhal Gain* (4) the question as to the validity or otherwise of the marriage was not decided. There the question was whether from the fact that a man of the Kaivartta (fisherman) caste and a woman of the Tanti (weaver) caste lived as husband and wife for a period of twenty years, marriage in fact could be presumed to have taken place between them, and it was held that it could not be presumed inasmuch as the basis for such presumption was wanting in the case, the parties being members of two sub-divisions of the Shudra tribe between whom there was in practice no inter-marriage. That ruling

(1) (1889) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.

(3) (1888) 15 Cal. 709.

(4) (1875) 1 Cal. 1.

(5) (1900) 2 Bom. L. R. 128.



does not lay [697] down that an inter-marriage between such sub-divisions is legally invalid.

SCOTT, C. J.:—The question which has been argued before us on behalf of the appellant is, whether a marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

It has been held by the Judicial Committee in *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1) that when the factum of a marriage is proved the presumption is that it is valid in law and in that case there was nothing illegal in the inter-marriage of members of different sub-divisions of a Shudra tribe. The onus would, therefore, appear to lie upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom. That was the view taken by this Court in the case of *Fakirganda v. Gangi* (2).

The learned District Judge in the case now before us has correctly applied the law as to onus. He says "the evidence in this case certainly does not establish any prohibition of immemorial custom." We must therefore hold that the marriage of Savakka with Basappa was a valid marriage and the appellant's case for that reason must fail.

We dismiss the appeal with costs.

*Appeal dismissed.*

23 B. 698 (=4 I. C. 253=11 Bom. L. R. 1113).

[698] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

HARIHAR KANTA BHATTA (*original Purchaser*), Appellant, v. RAMA PANDU SHETTI AND ANOTHER (*original Judgment-Debtor and Decree holder*), Respondents.\*

[16th July, 1909.]

*Civil Procedure Code (Act XIV of 1882), sections 244, 310A, 311—Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under section 244, Civil Procedure Code, 1882.*

Within a month of the sale at a Court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable: and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code.

*Held* (1) that the order passed by the Subordinate Judge was appealable.

*Pita v. Chunilal* (3) followed.

(2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded

\* Second Appeal No. 841 of 1908.

(1) (1869) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.

(3) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

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33 B. 693=3  
I. C. 962=11  
Bom. L. R.  
822.



1909

JULY 16.

APPELLATE  
CIVIL.33 B. 698=4  
I. C. 253=11  
Bom. L. R.  
1113.

as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882.

Decree of the District Judge confirmed.

*Gulam Ahad Chowdhry v. Judhister Chundra Shaha* (1) followed.

SECOND appeal from the decision of P. J. Talyarkhan, Acting District Judge of Kanara, reversing the decree passed by K. R. Natu, Subordinate Judge at Kumta.

Proceedings in execution.

[699] One Vireshwar obtained a decree against Rama Pandu Shetti. In execution of that decree property belonging to the latter was sold at a Court auction and purchased by Harihar Kanta Bhatta on the 17th January 1908.

The judgment-debtor Rama Pandu applied to the Court on the 8th February 1908 for setting aside the sale on the ground that the property was sold at undervalue owing to conspiracy among the villagers who included the decree-holder. That application was rejected.

On the 15th February 1908, he again applied to the Court under section 310A of the Civil Procedure Code, 1882, and deposited the amount required.

The Subordinate Judge rejected the application on the following grounds:—

This application is opposed by both the decree-holder and the Court purchaser (*vide* exhibits 20 and 21). They say that this application is not tenable under the proviso to section 310A, Civil Procedure Code, as the applicant had formerly made an application under section 311, Civil Procedure Code. Such an application under section 311, Civil Procedure Code, was made by this judgment-debtor on 8th February 1908 (*vide* exhibit 16). The sale took place on 17th January 1908. It was rejected. This application under section 310A is not hence tenable under the proviso to section 310A.

From this order there was an appeal to the District Judge, who reversed the order passed by the Subordinate Judge. The reasons for his decision were expressed as follows:—

According to the latest rulings of the Calcutta, Madras and Allahabad High Courts an order under section 310A of the Civil Procedure Code is one under section 244, clause (c) of that Code, and is consequently appealable (*vide* I. L. R. 28 Cal. 78; 30 Mad. 507 and 29 All. 275). The Bombay High Court has, without going so far, recently held that a question under section 310 may be one relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof under section 244 (c), and, where that is the case, an appeal will lie from an order passed under section 310A (*vide* I. L. R. 91 Bom. 207). I am bound to follow this last ruling and so proceed to consider whether in the present case there was any question between the decree-holder and the judgment-debtor relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof. On the facts I find that there was. The judgment-debtor's application was opposed by the decree-holder on the grounds (1) that the judgment-debtor had previously applied under section 311; (2) that he had not deposited a sum sufficient to satisfy the other decree-holders (who had applied [700] for rateable distribution); and (3) that the sum deposited did not appear to be sufficient to satisfy even his decree. The last two grounds clearly raised questions falling under section 244 (c). In the Bombay case above referred to the second of the above three grounds was held to bring the case under section 244 (c). I therefore hold that the order of the lower Court is appealable.

The lower Court had refused to set aside the sale on the ground that the judgment-debtor had previously applied under section 311, Civil Procedure Code. Exhibit 16 is the previous application. That application does not at all show that it was made under section 311. That section is confined to applications made for setting aside a sale on the ground of an alleged irregularity in publishing

(1) (1902) 30 Cal. 142.



or conducting it. No such irregularity was, however, alleged in the application in question. What the applicant had alleged was that his enemies had combined with the village people and told them not to bid at the sale. It was not alleged that any intending purchasers were dissuaded from bidding while the sale was taking place, though even if this had been done, I do not think that it could be called an irregularity in conducting the sale. It is thus clear that the sale was sought to be set aside on the ground of fraud and not on the ground that any irregularity in publishing or conducting the sale had been committed. That the Subordinate Judge himself had not treated the application as one falling under section 311 at the time it was presented is clear from the fact that he had summarily rejected it on the very day it was presented. For these reasons, I hold that lower Court was wrong in refusing to set aside the sale on the ground that the judgment-debtor had previously applied under section 311. I hold that there was no such application.

The auction-purchaser appealed to the High Court.

*Nilkanth Atmaram*, for the appellant:—We submit, first, that the order passed by the Subordinate Judge is not appealable. The auction-purchaser here is a stranger: he is not the decree-holder. In such a case no appeal is provided for by section 88 of the Civil Procedure Code of 1882. See *Chundi Charan Mandal v. Banke Behary Lal Mandal* (1); *Jogodanund Singh v. Amrita Lal Sircar* (2); *Bungshidhar Haldar v. Kedar Nath Mondal* (3); *Kedar Nath Sen v. Uma Charan* (4).

The decision in *Pita v. Chunilal* (5) turned upon the particular facts of the case.

Secondly, the judgment-debtor having once applied to the Court under section 311 of the Civil Procedure Code of 1882 for [701] setting aside the sale, no subsequent application under section 310A of the Code could be entertained. The very terms of section 310 forbid it. Where a sale has taken place, it can only be set aside under section 311 of the Civil Procedure Code of 1882. See *Malkarjun v. Narhari* (6),

*K. H. Kelkar*, for the judgment-debtor:—The case of *Pita v. Chunilal* (5) applies, and therefore an appeal lay to the District Court. The first application was not an application under section 311 at all. The District Judge was also of that opinion. The second application under section 310A was therefore competent: and under the mandatory provisions of section 310A the Court was bound to entertain it.

**CHANDAVARKAR, J.**:—Two points of law have been urged in support of this second appeal. The facts, stated shortly, are these:—The property had been sold by the Court on the 17th of January 1908, in execution of a decree against the respondent. On the 8th of February 1908, he applied to the Court to set aside the sale. That application was made upon the ground that the people of the village, where he resided and where the property was situate, had so conspired as to bring about the sale for under-value. The application (exhibit 16) was rejected. On the 15th of February 1908, the respondent applied to the Court under section 310A and deposited the amount required by that section. The appellant objected upon the ground that the application could not be entertained, because the judgment-debtor, (respondent) having made an application under section 311, was debarred by the provisions of section 310A from claiming any relief under the latter section.

The Subordinate Judge allowed the objection and rejected the respondent's application under section 310A. The District Court, on appeal

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(1) (1899) 26 Cal. 449.

(2) (1895) 22 Cal. 767.

(3) (1896) 1 C. W. N. 114.

(4) (1900) 6 C. W. N. 57.

(5) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

(6) (1900) 25 Bom. 337 at p. 352.



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88 B. 698=4  
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by the respondent, has reversed the order of the Subordinate Judge. It was argued before the District Judge that no appeal lay against the order of the Subordinate Judge. The District Judge, relying upon the decision of this Court in *Pita v. Chunilal* (1), held an appeal lay.

[702] Before us it has been argued that the District Judge was wrong in holding that an appeal lay to his Court against the Subordinate Judge's order under section 310A. We agree with the District Judge. The case is similar to that of *Pita v. Chunilal* (1).

Then it is argued that the judgment-debtor's application under section 310A could not be granted, because he had applied to set aside the sale under section 311. But was it an application under that section? It may be that, when the respondent presented the application, he presented it as one falling under that section, but the question is, not what he thought or what section he had mentioned in his application, assuming that as a matter of fact he had mentioned section 311 and none else. The substance of the grounds upon which he had made the application to set aside the sale must be looked to. If the allegations on the strength of which the respondent asked the Court to set aside the sale, did not bring it within the grounds specified in section 311, the mere mention of the section could not in law make it an application under it. So looked at, it did not fall within the provisions of section 311, but it must be regarded as an application under section 244. The allegation was that the sale had been brought about by the fraud of the residents of the village where the lands were situate. It is admitted that the decree-holder and the judgment-debtor were residents of the same village, so that the fraud was one imputed to them as it was to other villagers. If that is so, the application was not under section 311 but in reality was one to set aside the sale for fraud under section 244. That such an application could be made so as to attract to it the provisions of section 244 was decided by the High Court of Calcutta in *Golam Ahad Chowdhry v. Judhister Chandra Shaha* (2), with the principle of which we concur. Therefore this ground argued before us must fail. We confirm the decree with costs.

HEATON, J.:—I agree with the order proposed. I wish to add a few words about one argument. It is contended that every application to set aside a sale must be an application under section 311 of the Code; in other words whatever its nature and [703] whatever the grounds on which it proceeds it must come under that section. The argument so stated I think refutes itself; but if further refutation is needed, it will be found in two specific cases which dealt with applications to set aside sales which were held not to be made under section 311. These are *Golam Ahad Chowdhry v. Judhister Chandra Shaha* (2) and *Parashram v. Balmukund* (2). I wish only to add that I consider that the District Judge has given ample reasons for the conclusion at which he has arrived and his decree should be confirmed.

*Decree confirmed.*

(1) (1906) 31 Bom. 207; 9 Bom. L.R. 15.  
(2) (1902) 80 Cal. 142.

(3) (1908) 32 Bom. 572; 10 Bom. L. R. 752.



33 B. 703 (=11 Bom. L. R. 827=3 I. C. 964).

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

PUNDALIK UDAJI JADHAV, Plaintiff, v. THE AGENT, S. M. RAILWAY COMPANY.\*

[22nd July, 1909.]

*The Indian Railways Act (IX of 1890), section 75, Schedule II, clause (1)—Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package.*

Plaintiff's agent at Poona consigned a parcel to plaintiff at Dharwar. The parcel contained goods which, according to section 75 and Schedule II of the Indian Railways Act (IX of 1890), were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Maratha Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.

Held that the Railway Company was not liable. The words of section 75 of the Railway Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

[Ref : 51 I. C. 967.]

[704] REFERENCE by R. G. Bhadbhade, First Class Subordinate Judge of Dharwar in his Small Cause jurisdiction under Order 46, Rule 1 of the Civil Procedure Code (Act V of 1908).

The facts which gave rise to the reference were as under :—

The plaintiff's agent at Poona consigned a parcel to the plaintiff at Dharwar. The parcel contained silk and lace goods worth Rs. 145-4-0 and cotton fabrics worth Rs. 101-4-0. The parcel was lost in transit on the Southern Maratha Railway Line owing to the negligence of the Railway Company. The plaintiff therefore brought a suit in the Court of the First Class Subordinate Judge of Dharwar in its Small Cause jurisdiction to recover damages, namely, Rs. 114-13-0 for the loss of the cotton fabrics. He claimed no damages for the loss of the silk fabrics because his agent at Poona had failed to insure the parcel under section 75 of the Indian Railways Act (IX of 1890).

The defendant Company admitted the loss of the parcel in transit and contended that they were not liable for the loss of the parcel as the plaintiff had not declared the contents of the parcel and had not insured it on payment of a higher charge as required by section 75 of the Indian Railways Act and the rules of the Company.

On the said pleadings the Subordinate Judge raised the following point for decision :—

"Whether the plaintiff's *Dalal's* failure to declare the contents of the mixed parcel and insure the same absolves the defendant Railway Company for loss of the cotton fabrics which were not required by the Railway Act or rules framed thereunder to be insured?"

The opinion of the Subordinate Judge on the point was in the negative.

\* Civil Reference No. 4 of 1909.

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He was, however, doubtful as to the correctness of his opinion and as his decree in the case was not appealable he referred the said point for an authoritative decision under Order 46, Rule 1 of the Civil Procedure Code (Act V of 1908). In making the reference the Subordinate Judge made the following observations :—

[705] It is admitted by the defendants' pleader that under the repealed Railway Act of 1879 section 11 the defendants would have been liable for loss of the uninsurable fabrics. The view now pressed on the Court is that stated in the Commentary on the Railway Act by Messrs. Russell and Bayley, 2nd Ed., p. 199. It is stated therein that under the present section 75 protection extends to the entire parcel or package, including the articles which should, and those which need not have been declared. The words "of the parcel or package" in this section form an alteration of the law, and under section 11 of the repealed Act of 1879 and section 10 of the Act of 1854 protection was only extended to the contents of the parcel which should have been declared under those Acts. The above propositions appear from the foot note (b) of the Commentary to have been stated on the authority of two cases one decided by the Chief Court of Punjab (1) *Mohamed Abdul v. The Secretary of State for India in Council* (2) and a case decided in 1895 by the Court of the Small Causes at Bombay.

Defendants' pleader has been able to procure for my perusal Mr. Tiruvenkatacharya's Railway cases in which the first case has been reported at p. 23. I have not been able to procure the copy of the *Times of India* in which the second case is said to be reported.

With due deference to the Judges of the Punjab Court, I must say that I do not share in their view and that of the learned Judge who referred the question for their opinion as to the construction of section 75 of the Railway Act of 1891.

In section 11 of the Act IV of 1839 the words (material for this case) are "the carrier by Railway shall not be liable for loss, &c, to such property unless the value, &c., are declared." In the new Act the words "loss, &c., of the parcel and package" are substituted for loss of such property.

A mere cursory reading might lead one to suppose that the Railway Company being exempted for loss of an uninsurable parcel the exemption extends to a mixed parcel containing goods not required to be insured. The Legislature has not made it a criminal offence on the part of a consignor to send a parcel without insurance if he so pleases.

It is admitted that under the English Carriers Act and the old Railway Acts the defendants' Company would have been liable for loss of the cotton fabrics.

Section 75 of the present Act appears under Ch. 7 about the responsibility of Railway Administration as common carriers. That chapter after stating the general liability of the Railway Company under section 72 makes further provisions in certain specified cases by section 73 as regards animals and by section 75 as regards articles of special value.

Under the usual canons of construction section 75 must be confined to the article of special value mentioned in the second schedule of the Railway Act as to which insurance may be said to be in a way compulsory if the owner wishes to hold the Company liable for loss of his parcel on any account.

[706] In Maxwell on the Interpretation of Statutes, 4th Ed., p. 89, it is stated..... In the interpretation of general words and phrases the principle of strictly adapting the meaning to the particular subject-matter in reference to which the words are used, finds its most frequent application while expressing truly enough all that the Legislature intended they frequently express more in their literal meaning and natural force.

That in such cases general words are to be restricted to the fitness of the matter with reference to the subject-matter in the mind of the Legislature. Further there is a presumption that the Legislature does not intend to make any alteration in the Law beyond what it expressly declares by express terms or by implication (Maxwell pp. 122, 123).

I do not therefore think that the construction of section 75 of the Railway Act adopted by the Punjab Court is right. Under the Indian Law Reports Act (XVIII of 1875, section 3) this Court is not bound to follow that Court's ruling or that of the Bombay Court of Small Causes.



However in view of the above rulings, and having regard to the liberal grammatical construction of section 75, I entertain some doubt as to the correctness of my opinion and as there is no ruling on the point by the other High Courts, I submit the question for an authoritative decision by the High Court.

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*Shankarrao N. Karnad (amicus curiae)* for the plaintiff:—The responsibility of a Railway Company for loss of goods entrusted to them is governed by section 72 of the Railway Act. This section saddles the Company with liability in general as that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. If the goods are of special value such as those mentioned in the second schedule of the Railway Act, then section 75 applies. This section requires that the sender, in order to claim compensation for loss, must cause the value of the goods contained in the package to be declared at the time of delivery of the parcel to the Railway Company. The package in this case was a mixed parcel. It contained cotton as well as silk goods. Section 75 contemplates a package of silk goods alone. It does not refer to a package of mixed goods. The words "of the parcel or package" have made an alteration in the old law. The section in the Acts of 1854 and 1879 which correspond to section 75 of the present Act should be considered in determining the scope of that section. It is submitted that section 75 should be construed liberally: Maxwell on the Interpretation of [707] Statutes, 4th Ed., pp. 89, 122 and 123. Sections 72 and 75 do not exclude each other. Where the package contains articles of special value along with others, section 75 would apply to the goods of special value and in the case of the other goods, section 72 would apply. Section 75 applies only to goods mentioned in the second Schedule while with respect to other goods contained in the package, the Railway Company would be responsible for their loss under section 72. The Punjab case referred to by the Subordinate Judge in his reference was decided under the old Acts.

*S. V. Palekar (amicus curiae)* for the defendant was not called upon.

SCOTT, C. J.:—We are of opinion that the protection given by section 75 of the Indian Railways Act (IX of 1890) extends to the whole parcel in which silk goods such as are mentioned in clause (1) of the 2nd Schedule are contained, whether the rest of the parcel is composed of articles mentioned in the 2nd Schedule or not.

This appears from the words of the section which draws a distinction between the articles mentioned in the Schedule and the parcel or package in which they are contained, and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

We therefore answer the point submitted for our decision in the affirmative.

*Order accordingly.*



33 B. 708 (=3 I. C. 960=11 Bom. L. R. 830.)

## [708] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*BHAGAVANDAS DHARAMSI (*Original Plaintiff*), *Applicant*, v. A. BESSE  
FRENCHMAN (*Original Defendant*), *Opponent*.\*

[22nd July, 1909.]

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830.*Aden Courts Act (II of 1864), sections 8 and 9†—Presidency Small Cause Courts Act (XV of 1882), section 69—Resident's Court—Application to state a case to the High Court—Application unconditional before delivery of judgment.*

A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay, under section 8 of the Aden Courts Act (II of 1864) should make an unconditional application to him in that behalf before judgment is delivered.

*Ralli Brothers v. Goculbhai Mulchand* (1) and *Bank of Bengal v. Vyabhoj Gangji* (2) applied.

Section 9 of the Aden Courts Act (II of 1864) gives the Resident the same option of either reserving his judgment or delivering it contingent on the opinion [709] of the High Court as section 69 of the Presidency Small Cause Courts Act (XV of 1882) gives to the Presidency Small Cause Court.

APPLICATION under the extraordinary jurisdiction (section 155 of the Civil Procedure Code, Act V of 1908), against the decision of Major General E. De Brath, Political Resident, Aden, confirming the decree of Major J. R. Carter, Assistant Political Agent, Aden.

The plaintiff sued the defendant for the recovery of Rs. 8,077-11-6, being the balance of the amount advanced to the latter from the 15th September 1907 to the 12th January 1908 as per account attached to the plaint.

The Assistant Political Agent who tried the suit dismissed it with costs.

On appeal by the plaintiff, one of the prayers urged in the appeal was as follows:—"If, however, after considering all the circumstances, your Honour feels any reasonable doubt as to such a finding in my favour as regards the sugar item, I submit that your Honour will be pleased under

\* Civil Application No. 78 of 1909 under extraordinary jurisdiction.

† Sections 8 and 9 of the Aden Courts Act (II of 1864) are as follows:—

(8) No appeal shall lie from any decision or order of the Resident given or made by him, whether in the exercise of his original jurisdiction, or in the exercise of his jurisdiction as a Court of appeal or of revision; but if, in the trial of any suit in which the claim estimated as aforesaid shall not exceed one thousand rupees in value, any question of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, on which the Resident shall entertain doubts, the Resident may, either on his own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with his own opinion, for the decision of the High Court of Judicature at Bombay.

And if, in the trial of any suit or the hearing of an appeal in any suit in which the claim estimated as aforesaid shall exceed one thousand rupees in value, any question of fact or of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, the Resident shall, on the application of any of the parties to the suit, or he may on his own motion draw up a statement of the case and submit it, with his own opinion, for the decision of the said High Court.

(9) The Resident may proceed in the case notwithstanding a reference to the High Court, and may pass a decree contingent upon the opinion of the High Court on the point referred; but no execution shall be issued in any case in which a reference shall be made to the High Court, until the receipt of the order of that Court.

(1) (1890) 15 Bom. 376.

(2) 1891) 16 Bom. 618.



section 8 of Aden Act II of 1864 to draw up a statement of this part of my case and submit it with your Honour's opinion to the Honourable High Court at Bombay." The Political Resident, however, who heard the appeal confirmed the decree without making the reference prayed for.

The plaintiff, thereupon, presented an application to the High Court under its extraordinary jurisdiction (section 155 of the Civil Procedure Code, Act V of 1908), urging that the Political Resident should have referred the case to the High Court under section 8 of the Aden Act and that he had no jurisdiction to decide the case finally. A rule *nisi* having been issued to the defendant to show cause why the decree of the Political Resident should not be set aside.

J. B. Patel with L. A. Shah appeared for the applicant (plaintiff) in support of the rule.

K. N. Koyaji appeared for the opponent (defendant) to show cause.

SCOTT, C. J.:—This is an application under section 115 of the Civil Procedure Code of 1908 for revision of a decree passed in appeal in a civil case by the Resident of Aden.

[710] A suit was instituted by the applicant in the Court of the Assistant Resident and was decided against him by that Judge.

An appeal was then preferred to the Resident with a statement of the appellant's case in which after setting forth his contentions with regard to a certain question regarding sugar which arose in the case, he said: "If, however, after considering all the circumstances your Honour feels any reasonable doubt as to such a finding in my favour as regards the sugar item, I submit that your Honour will be pleased under section 8 of the Aden Act II of 1864 to draw up a statement of this part of my case and submit it with your Honour's opinion to the High Court at Bombay."

The Resident having considered the argument advanced affirmed the decision of the Assistant Resident and did not draw up a statement of the case and submit it with his opinion for the decision of the High Court.

It is contended on behalf of the applicant that the Resident was bound, upon the application to which we have referred, to draw up a case and submit it for the decision of this Court in accordance with the provisions of section 8 of Aden Act II of 1864.

On behalf of the opponent it has been contended that no such application as is contemplated by that section was made to the Resident because the application which was made was a conditional application not to be acted upon unless the Resident felt reasonable doubt as to the correctness of the appellant's contentions.

In our opinion the argument of the opponent must prevail. The provisions of section 8 of the Aden Act are, in all material respects for the purposes of this case, the same as those of section 69 of Act XV of 1882, the Presidency Small Cause Courts Act, and we have the recorded opinion of Judges of this Court that any party requiring a case to be stated under that section of the Small Cause Courts Act is bound to make an unconditional application before the delivery of judgment. Thus in the case of [711] *Ralli Brothers v. Goculbhai Mulchand* (1), Mr. Justice Farran says: "It appears to me that the party who requires the Small Cause Court to state a case must do so unconditionally before judgment is delivered. To require the Small Cause Court to deliver judgment and to state a case only in the event of such judgment being adverse to the party requiring

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(1) (1890) 15 Bom. 876 at p. 887.



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the case, would deprive the Court of the power of reserving judgment until after the opinion of the High Court is obtained, which power is expressly conferred upon it by the Act." Again, this Court in a judgment delivered by Sir Charles Sargent in the case of the *Bank of Bengal v. Vyabhou Gangji* (1) said: "The language of section 69 of the Small Cause Courts Act (XV of 1882) shows that the party requiring the Judge to make the reference to the High Court must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it contingent on the opinion of the High Court."

Now those remarks are directly applicable to the present case, because by section 9 of the Aden Act it is provided that the Resident may proceed in the case notwithstanding the reference to the High Court and may pass a decree contingent upon the opinion of the High Court on the point referred. It is to be observed that the 'may' is used in this section while the word 'shall' is used in section 8. The permissive terms of section 9 are also in marked contrast with the imperative terms of the corresponding provision in section 7 of Act XXVI of 1864, the Presidency Small Cause Courts Act of the same year. We therefore think that section 9 of the Aden Act gives the Resident the same option as section 69 of the Small Cause Courts Act of 1882.

As pointed out in the judgments above referred to, to allow of reservation of judgment, the application must be made unconditionally before delivery of judgment.

For these reasons we dismiss the application with costs.

*Application dismissed.*

83 B 712 (=4 I. C. 244=11 Bom. L. R. 1087).

[712] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

GANPATI AMBADAS GAYDHANI (*Original Plaintiff*), Appellant, v.  
RAGHUNATH ANANT GAYDHANI (*Original Defendant*), Respondent.\*  
[23rd July, 1909].

*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.*

Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land.

Held, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title. *Runjeet Ram Panday v. Goburdhun Ram Panday* (2) and *Agency Company v. Short* (3) followed.

*Framji Cursetji v. Goculdas Madhowji* (4) referred to.

[Ref. 60 I. C. 298=24 C. W. N. 1057=33 C. L. J. 344 ; 66 I. C. 764=24 Bom. L. R. 373.]

\* Second Appeal No. 141 of 1908.

(1) (1891) 16 Bom. 618 at p. 624.

(8) (1888) 18 App. Cas. 798.

(2) (1878) 20 W. R. 25 (Civ. Rul.).

(4) (1892) 16 Bom. 338.



SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree of C. D. Kavishvar, First Class Subordinate Judge.

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33 B. 712=4  
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Plaintiff sued in the year 1906 to have it declared that the land in suit belonged to him, to obtain possession of it, to recover Rs. 45 as damages for the defendant's wrongful possession and to obtain an injunction ordering the defendant to remove the superstructure raised by him on the land and restraining him from obstructing the plaintiff in the enjoyment of a door and well jointly with him. The plaint alleged that the land was plaintiff's ancestral property, that plaintiff's building had been erected on it for more than 22 years, that the land had been in plaintiff's possession and that the defendant took wrongful possession of it two months before the institution of the suit and began to build on it in spite of the plaintiff's protests.

[713] Defendant contended that the allegations in the plaint were false, that the land belonged to the defendant and had been in his possession since a long time, that it did not belong to the plaintiff and was never in his possession, that the door and the well did not belong to the plaintiff and were never in his enjoyment, that the plaintiff never raised any protest against the defendant's structure and that the claim was time-barred.

The Subordinate Judge found that the plaintiff was proved to be the owner of the land in dispute, that the claim was not time-barred, that the plaintiff was entitled to obtain possession of the land and passed a prohibitory order against the defendant and a further order directing the defendant to remove his superstructure, and further held that the plaintiff was entitled to recover from the defendant Rs. 5 as nominal damages. He passed a decree accordingly.

On appeal by the defendant the District Judge found that the house-site belonged to the ancestors of the plaintiff and that the plaintiff had not been in occupation since 1880 when the ancestors of the plaintiff were expelled from the house and the building was pulled down by the ancestors of the defendant. He therefore held that the claim was time-barred by defendant's adverse possession and reversed the decree and dismissed the suit. His reasons were :—

It appears that the ancestors of the defendant expelled the ancestors of the plaintiff from the house about the year 1880 and that the plaintiffs have never been in occupation since. I cannot conceive of a better starting point of a claim adversely to the rightful owner than pulling down his house and expelling him. If then the defendant has since been in occupation and the land has not since remained empty space of no certain proprietorship the rightful owner must be barred. But it is clear from the sight of the place, that the site so invaded is enclosed so as to form part and parcel of the defendant's premises, and that it is actually part of the plinth of his house. It is, therefore, not a mere empty site adjacent to defendant's house such as those over which it is difficult to establish effective ownership but the enjoyment of it is inextricably and of necessity attached to the enjoyment of the defendant's premises as a verandah is part of a bungalow or a garden of a villa. In my opinion the plaintiff has been out of possession and the defendant in possession since 1880. I, therefore, reverse the finding and decree of the lower Court and dismiss the suit with costs in both Courts.

[714] The plaintiff having preferred a second appeal, the High Court (Scott, C. J., and Batchelor, J.) sent down the following issue for trial :—

" Whether the defendant has been in possession, if so, how long and whether adversely ? "

In sending down the said issue the High Court made the following observations :—



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In deciding the question of adverse possession the District Judge appears to have based his conclusion upon two circumstances. First, he says, that in 1880 there was a starting point of adverse possession, because the defendant's father pulled down the plaintiff's house and expelled him; and secondly, he says, that at the time of his view of the site, towards the end of 1907, the land in dispute was enclosed so as to form part and parcel of the defendant's premises and is actually part of the plinth of his house.

It does not appear to us that those two circumstances standing by themselves can in this case afford a safe basis for the conclusion that the defendant has been in adverse possession, for, as stated in the judgment of the first Court, the defendant's father was punished for pulling down the plaintiff's house in 1880. The judgment of the Magistrate filed as exhibit 55, shows that the accused Anant admitted in that case that the house belonged to the minor, that he had pulled it down and he said he would get it built again. In face of this admission which we take as an admission that Anant would not wrongfully claim the land from the plaintiff, but would restore it to his possession with a new house upon it.

We are unable to agree with the District Judge that there is a good starting point for a claim of adverse possession, and in the absence of any finding of fact by the District Judge as to positive acts of exclusive possession by the defendant for the statutory period prior to suit, we are unable to accept the opinion expressed by him that the plaintiff has been out of possession and that defendant has been in possession since 1880.

With respect to the first part of the said issue the District Judge found that no one of the parties was in exclusive possession having regard to the position of the site, its surroundings and ther circumstances in the case.

As to adverse possession he observed as follows :—

As for adverse possession I should express an opinion that the "admission" as to plaintiff's ownership was doubtless made. But is such an admission made by an accused to a Magistrate to avoid punishment equivalent to an undertaking given to the plaintiff to hold under him or to restore? It is, I submit, only in the latter case that the originally unlawful expulsion by the defendant [715] of the plaintiff would merge in a subsequent lawful and derivative occupancy and do not give rise to a starting point for limitation. It appears from the judgment of the magistrate that he adjourned the case to allow of such an undertaking being given but in vain. There were also other violent acts, obstruction of doors and locking of persons up in rooms about the same time which gave rise to a wahiwat case Exhibit 51. No admission was made in this case.

I Should find then that if these acts are legally an assertion of ownership limitation ran from 1880, but if not there have been no acts subsequent to 1880 which would give a starting point for limitation.

The plaintiff-appellant filed cross-objections to the finding of the District Judge.

*D. R. Patwardhan* appeared for the appellant (plaintiff):—The finding of the lower Court on the issue sent down by the High Court is not precise and does not amount to a finding of adverse possession. The finding as it stands cannot be taken to be a finding of adverse possession in law. The High Court, when it sent down the issue, held in its remand order that the admission of the plaintiff's title by the defendant's ancestor in the criminal case saved the bar of limitation and there was no subsequent act of adverse possession on the part of the defendant. The land being an open space and there being no evidence of defendant's adverse possession since his father's admission in 1880 the principle laid down in *Framji Cursetji v. Gecul'as Madhowji* (1) applies. In such cases possession goes with title: *Dharm Singh v. Hur Pershad Singh* (2).

*R. R. Desai* appeared for the respondent (defendant):—It is found as a fact that in 1880 the plaintiff's ancestor was forcibly ejected by the

(1) (1892) 16 Bom. 388.

(2) (1885) 12 Cal. 88.



defendant's ancestor. Since then the defendant's possession became adverse to the plaintiff. There is no evidence in the case showing that plaintiff's title was admitted. The alleged admission is merely referred to by the Magistrate in his judgment in the criminal case. This circumstance cannot be evidence of the admission. Moreover, the alleged admission was made to evade criminal liability and is inadmissible in evidence as proof of plaintiff's title. Further, the undertaking given in the alleged admission was never carried out, and it is found by [716] the lower Court that in the possessory suit brought by the plaintiff there was no such admission. All this happened more than twelve years prior to the present suit.

As to adverse acts subsequent to 1880, the defendant has repaired the compound wall and used the site as his court-yard to the exclusion of the plaintiff. Further, the defendant has built a new house. We submit that such acts are evidence of adverse possession, therefore, the ruling in *Framji Cursetji v. Goculdas Madhowji* (1) does not apply.

[SCOTT, C. J., referred to *Runjeet Ram Panday v. Goburdhun Ram Panday* (2)]

That case is distinguishable. There the defendant was not in possession. In the present case it is found that the defendant has continued in possession to the exclusion of the plaintiff and the *status quo ante* was never restored.

It is undisputed that in spite of the Mamlatdar's decree in the possessory suit the defendant has continued in possession and it is not proved that the plaintiff was ever in possession within twelve years of the suit.

SCOTT, C. J.:—In this case the plaintiff sues to have it declared that the land described in the plaint belongs to him and to recover damages from the defendant for wrongfully taking possession of it. He alleges that the defendant took possession of it wrongfully two months before suit.

The plaintiff obtained a decree in the first Court but in the lower appellate Court on an issue, which raised substantially the question, whether the plaintiff or the defendant had been in possession of the land prior to the alleged date of dispossession by the defendant, the learned Judge found that the defendant had been in possession.

We were not satisfied with that finding and therefore remanded the case again to the lower appellate Court for a fresh finding as to possession. On the facts found now as to the nature of the property and after perusal of the judgment of the Magistrate in [717] a criminal case instituted in 1880, which contained certain statements made by the defendant's father, we are of opinion that the issue as to possession ought to be decided in favour of the plaintiff. The criminal proceedings to which we have referred were instituted by the plaintiff's mother in consequence of the defendant having committed certain wrongful acts upon the plaintiff's property, and pulled down part of the plaintiff's house. On the charge of mischief, the defendant pleaded that he had merely entered upon the house of the plaintiff because it had tumbled down and he had to repair it. But he admitted that he had no interest in the house which belonged to the plaintiff who was separate from him.

Now the house in question stood in a walled compound which contained also the house of the defendant. It appears that the plaintiff's house was not re-built after it had been pulled down in 1880 and the District Judge finds as follows :—

(1) (1892) 16 Bom. 338.

(2) (1873) 20 W. R. 25 (Civ. Rul.).

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The house originally belonging to plaintiff and defendant's house originally formed one self-contained property isolated on all sides from other property by boundary-walls. These boundary-walls are not new, though one has been repaired within the last ten years. The position of things is such that any person owning the only residence in the enclosure must make use of the whole enclosure including the property claimed by the plaintiff. To this extent defendant is in possession. He has made no permanent use of it inconsistent with its being the plaintiff's or any one else's land, and therefore had it not been for its isolation and inclusion in defendant's property, I should have been inclined to hold as is so often the case in the country with townlets, that no one was in exclusive possession.

Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in the absence of direct evidence. Now it is held in the case that the title to this land was in the plaintiff and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so a case is made out for the application of the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Panday v. Goburldhun Ram Panday* (1), that possession goes with title. No contrary presumption adverse to the plaintiff can, we think, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated by him when he was charged in the Magistrate's Court. For, as observed by their Lordships of the Privy Council in *Agency Company v. Short* (2):—"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner."

Such use as the defendant is held to have made of the vacant ground of the plaintiff since the year 1880 is no evidence of adverse possession: see *Framji Cursetji v. Goculdas Madhowji* (3).

We, therefore, reverse the decision of the District Judge and restore that of the Subordinate Judge.

Plaintiff to have costs throughout.

*Decree reversed.*

(1) (1873) 20 W. R. 25 (Civ. Rul).

(2) (1888) 13 App. Cas. 793 at p. 798.

(3) (1892) 16 Bom. 388.



33 B. 719 (=11 Bom. L. R. 1083=4 I. C. 242).

[719] APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

BOO FATMA (Original Defendant 1), Appellant, v. BOO GHISANBOO  
AND OTHERS (Original Plaintiff and Defendants 2 and 3),  
Respondents.\*

[26th July, 1909.]

Limitation Act (XV of 1877), Schedule II, Article 127—Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation.

Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property.

Sayad Gulam Hussein v. Bibi Anvarnisa (1) followed.

[Ref. 38 Bom. 449 ; 80 I. C. 118.]

SECOND APPEAL against the decision of N. R. Majmudar, First Class Subordinate Judge of Ahmedabad with Appellate Powers, confirming the decree of M. M. Bhutt, Additional Joint Subordinate Judge of Ahmedabad.

The plaintiff sued to recover separate possession of her five-sixteenth share in the houses in suit by partition, alleging that as the daughter of her deceased father she was entitled to such share according to Mahomedan Law. The plaintiff further alleged that she and the other persons interested in the properties had all along the use and enjoyment of the properties.

Defendant, plaintiff's cousin, contended that the claim was time-barred, that the plaintiff had not the use and enjoyment of the properties as alleged in the plaint and that the plaintiff never got a share in the rents of the houses.

Defendants 2 and 3 were absent though duly served.

The Subordinate Judge found that the suit was in time and that the plaintiff was entitled to one-fourth share in the houses. He passed a decree accordingly.

On appeal by defendant 1 the Appellate Court confirmed the decree. On the point of limitation the Court observed :—

The first point that arises is what Article of the Limitation Act is applicable to the present case. For the plaintiff it is alleged that the appropriate article [720] is Article 127 of Schedule II. It is unquestionable that so far as this Presidency is concerned the Article in question applies to Mahomedans as well as to Hindus (*Bavasha v. Masumsha*, I. L. R. 14 Bom. 70). But as pointed out in (*Molvi Abdul Kadir v. Haji Mahomed Ibrahim*, 5 Bom. L. R. 355) to attract the applicability of this Article it is necessary for the plaintiff to show that there had been previous joint possession. She has given evidence herself (exhibit 22) and has also examined five witnesses, Kabir, exhibit 26 ; Gulab, exhibit 25 ; Purbhai, exhibit 27 ; Charaj, exhibit 28 and Fakir, exhibit 29. This evidence shows that the plaintiff, after the death of her husband which took place more than 20 years ago, left her husband's house and came to reside with her cousin Chandbhai and that she left it at the earliest only four years ago.

Defendant 1 preferred a second appeal.

T. R. Desai for the appellant (defendant 1):—The question is what Article of the Limitation Act is applicable, whether Article 123 or 127. The suit was brought by a Mahomedan female to recover her share in the family estate of her grandfather. The estate is in the possession of defendant 1 who is plaintiff's cousin. The plaintiff's father died admittedly 30 years ago. So the suit is *prima facie* time-barred under Article

\* Second Appeal No. 286 of 1908.

(1) P. J. 1885, p. 170.

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123 of the Limitation Act. Article 123 applies because the plaintiff sued to recover a distributive share in the estate of a deceased intestate. Both the lower Courts held that the suit was governed by Article 127 of the Limitation Act and finding that the plaintiff was not excluded from the property to her knowledge over 12 years, they allowed the claim as not time-barred. In coming to that conclusion they have followed the rulings of this High Court: *Sayad Gulam Hussein v. Bibi Anvarnisa* (1), *Bavasha v. Masumsha* (2), *Abdul Rahim v. Kirparam Daji* (3), *Abdul Kadar v. Bapubhai* (4).

But the other three High Courts in India have unanimously dissented from the view of this Court. We therefore submit that the question may be referred for consideration to a Full Bench. The other High Courts have held that Article 127 of the Limitation Act does not apply to suits by Mahomedans and that such suits are governed by Article 123. The Full Bench of Allahabad as in *Amme Raham v. Zia Ahmad* (5) laid down that the [721] words "joint family property" cannot cover the property of a Mahomedan family which cannot be said to be a joint family. Those words contemplate the property of a joint family and not joint property of any family. A joint family is unknown to Mahomedan Law. The view of the Allahabad Full Bench is confirmed by the High Court of Madras in *Patcha v. Mohidin* (6). The ruling of the Calcutta High Court in *Mahomed Akram Shaha v. Anarbi Chowdhuran* (7) adopts the view of the Allahabad and Madras High Courts.

In the Bombay cases the suits were brought by male members. Females cannot claim to occupy the position of males. A Mahomedan female cannot be said to be a member of a joint family.

[SCOTT, C. J.:—The claim in *Sayad Gulam Hussein v. Bibi Anvarnisa* (1) was at the instance of a Mahomedan daughter as in the present case.]

That ruling is, no doubt, against our contention and is hard to be distinguished. In a recent decision of this Court an attempt has been made to reconcile the authorities. *Abdul Kadir v. Mahomed* (8).

*M. N. Mehta* for respondent (plaintiff) was not called upon.

SCOTT, C. J.:—The question in this case is whether Article 127 of the Limitation Act applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an Appellate Bench of this Court in 1885 in *Sayad Gulam Hussein v. Bibi Anvarnisa* (1) that it did so apply, and that decision, so far as we are aware, has been followed in Bombay for the last 23 years. It is a decision which is binding upon us and we therefore hold that the suit falls within Article 127. Upon this point, therefore, the judgment of the lower appellate Court is confirmed.

*Decree confirmed.*

(1) P. J. 1885 p. 170.

(2) (1889) 14 Bom. 70.

(3) (1891) 16 Bom. 186 at p. 189.

(4) (1898) 23 Bom. 188.

(5) (1890) 13 All. 288.

(6) (1891) 15 Mad. 57.

(7) (1895) 23 Cal. 954.

(8) (1903) 5 Bom. L. R. 355.



33 B. 722 (=11 Bom. L. R. 1109=4 I. C. 252).

[722] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice.*

MAHIPATI VALAD SHAMLA (*Original Defendant*), *Applicant v.* NATHU  
VALAD VITHOBA AND OTBERS (*Original Plaintiffs*), *Respondents.\**

[5th August, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879)—Civil Procedure Code (Act XIV of 1882), sections 373 and 622—Civil Procedure Code (Act V of 1908), section 115—Redemption suit—Sale really a mortgage—Section 10A (†) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.*

Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale deed, was really a mortgage. The suit was not governed by section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan [723] Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

*Held*, that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

[*Ref.* 8 I. C. 868=9 M. L. T. 204; 41 Mad. 701.]

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order dated the 12th December 1908 passed by A. R. Gupte, Second Class Subordinate Judge of Sirpur in the Khandesh District, in original Suit No. 444 of 1908.

The plaintiffs sued to redeem the lands in dispute under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the

\* Civil Application No. 53 of 1909 under extraordinary jurisdiction.

(†) Section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) runs as follows:—

10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision.

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction.

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bona fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

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document sued on was in the form of a sale-deed but in reality it was a mortgage.

The defendant contended that the plaintiffs were not entitled to adduce oral evidence to prove that the transaction was a mortgage.

After the issues were framed and before the Court proceeded with the trial the plaintiffs presented an application for the withdrawal of the suit with liberty to file a fresh suit on the ground that they would suffer serious loss if they continued the suit inasmuch as the views of the different High Courts in India were different with respect to the admissibility of oral evidence in such cases, and section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not made applicable to the Khandesh District.

The Subordinate Judge granted the plaintiffs' application and allowed the suit to be withdrawn with liberty to bring a fresh suit.

The defendant thereupon applied under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of [724] 1908) urging that the Subordinate Judge, in granting the plaintiffs' application, exceeded the jurisdiction vested in him by law. A *rule nisi* was issued requiring the plaintiffs to show cause why the order of the Subordinate Judge should not be set aside.

K. H. Kelkar appeared for the applicant (defendant) in support of the rule:—Section 373 of the Civil Procedure Code does not empower the Court to pass an order for the withdrawal of a suit like the present. The plaintiff launched the proceedings and he must proceed with the suit and cannot now retire with the object of taking advantage of a provision of law which was not in existence when the suit was filed and which he expects to come into force hereafter; *Watson v. The Collector of Rajshikhye* (1), *Prabhakar v. Khanderao* (2).

P. B. Shingne appeared for the opponents (plaintiffs) to show cause:—The decision in *Prabhakar v. Khanderao* (2) contemplates withdrawal of a suit with the intention of taking advantage of a substantial provision of law newly enacted. While in the present case we want to take advantage of section 10A of the Dekkhan Agriculturists' Relief Act which is a provision of adjective law. Section 373 of the Civil Procedure Code is broad enough to cover a case like the present: *Misser Debee Pershad v. Buldeo Pershad* (3), *Koomar Poresk Narain Roy v. Ranee Surat Soonduree Debee* (4), *Mussamut Khatoon Koonwar v. Baboo Hurdoot Narain Singh* (5).

The case falls under section 622 of the Civil Procedure Code, therefore, it will not be in consonance with the provisions of that section to interfere in a case of this kind.

SCOTT, C. J.:—The plaintiffs filed this suit for redemption alleging that the document which had been passed by them in favour of the defendant in the form of a sale deed was really a mortgage.

[725] The defendant disputed this allegation and contended that evidence was not admissible for the purpose of proving that the sale-deed was really a mortgage.

Issues were raised and the further hearing was fixed for a certain date. After the raising of the issues but before the hearing, the plaintiff put in the following application:—"This is a suit for redemption: plaintiff and defendant had entered into a mortgage transaction and the defendant

(1) (1869) 13 Moo. I. A 160.

(2) (1903) 10 Bom. L. R. 625.

(3) (1873) 5 N. W. P. R. 116.

(4) (1871) 16 W. R. 100 (Civ. Rul.).

(5) (1873) 20 W. R. 163 (Civ. Rul.).



has taken from the plaintiff a mortgage in the form of a sale-deed. We have got evidence to show that the sale-deed is really a mortgage. The defendant has now given a petition contending that oral evidence is inadmissible though he did not say so in the written statement. The different High Courts have taken different views as to whether oral evidence was admissible or not. Further, section 10A of the Dekkhan Agriculturists' Relief Act states that oral evidence is admissible. The third part of the Dekkhan Agriculturists' Relief Act has been applied to this district. But section 10A is not included in it. Therefore the point in dispute is whether oral evidence is admissible or not. In such a state of things if this suit is further prosecuted, plaintiff is likely to suffer loss. Therefore the plaintiff should be permitted to withdraw this suit and then to bring a fresh suit."

The application was in effect a confession that upon the law as it then stood the plaintiffs would not be able to give evidence which would entitle them to succeed.

Notwithstanding the protest of the defendant the Subordinate Judge granted permission to the plaintiffs to withdraw the suit with liberty to file a fresh suit hereafter.

The defendant feeling aggrieved by that order has applied to this Court under section 115 of the Civil Procedure Code of 1908 for revision, on the ground that the lower Court has acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. Section 373 of the Civil Procedure Code of 1882 under which the order of the Subordinate Judge was passed provides that "If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the [726] suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

In the case of *Muddun Ram Doss v. Israil Ali Chowdhry* (1), Mr. Justice Kemp of the Bengal High Court held upon the words of section 97 of the Civil Procedure Code of 1859 which provided that the Court on being satisfied that there was sufficient ground for permitting the plaintiff to withdraw the suit, might grant permission, that such a permission should not be granted except in cases where the suit had failed by reason of some formal defect, following the decision of the Judicial Committee in *Watson v. The Collector of Rajshahye* (2).

The words of the Code of 1882 are different from the words construed in that case by Mr. Justice Kemp, for, the Court is authorized to permit withdrawal not only where the suit must fail by reason of some formal defect but also where there are sufficient grounds for permitting the plaintiff to withdraw.

It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of section 373 but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant. The power of the Court in India appears to me under the Civil Procedure Code to be no greater than the power of the Court in England under Order XXVI, Rule 1. With regard to that Rule Lord Halsbury in

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(1) (1874) 21 W. R. 291 (Civ. Rul.).

(2) (1869) 13 Moo. I. A. 160.



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delivering the Judgment of the House of Lords in *Fox v. Star Newspaper Company* (1), said "The substance (of the new procedure) is that when it once comes into Court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant." That, as I have pointed out, is in effect the situation here. The plaintiffs by their application confess upon [727] the law as it now stands that they cannot give any evidence which would enable them to obtain a decree yet they have obtained permission to withdraw their suit in order that they may wait and see if the law is not altered at some future date in such a way as to enable them to obtain a decree against the defendant who is now ready for trial and prepared to resist the claim and certain of success on the law now in force.

It seems to me that in the circumstances of this case the Subordinate Judge acted with material irregularity in passing the order which he did, and I therefore set it aside with costs.

*Order set aside.*

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(1) [1900] App. Cas. 19.



THE  
INDIAN HIGH COURT REPORTS

**BOMBAY VOL. V.**

**(I. L. R. Bom. Vol. XXXIV).**



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# I. L. R. XXXIV BOMBAY.

34 B. 1 (=11 Bom. L. R. 1=1 I. C. 14.)

ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

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*In re* THE INDIAN ARBITRATION ACT, 1899, AND *In re* ARBITRATION BETWEEN THE ATLAS ASSURANCE COMPANY, LIMITED AND OTHERS AND AHMEDBHOY HABIBBHOY. THE ATLAS ASSURANCE COMPANY, LIMITED, AND OTHERS, *Petitioners, v. AHMEDBHOY HABIBBHOY, Claimant and Respondent.\**

[7th December, 1908.]

*Letters Patent, 1865, clause 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.*

An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

*Per CHANDAVARKAR, J.*—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

[2] The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred.

*Montoya v. London Assurance Company* (1) referred to.

The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal.

\*Appeal No. 8 of 1908.

(1) (1851) 6 Ex. 451 at p. 458.



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As to the objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory.

*Per* BATCHELOR, J.:—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact.

[Ref. 36 All. 351; 35 Mad. 1.]

APPEAL from an order of Davar, J., dated the 23rd January 1908.

The respondent, Mr. Ahmedbhoy Habibbhoy, was the owner of certain premises situate at Fergusson Road, wherein previous to October 1906 there was a mill known as the Victory Mills; this property was insured with 19 Insurance Companies for various [3] amounts against loss or damage by fire. On the 14th of October 1906, there was a fire on the mill premises and loss and damage was caused to the property insured. The respondent made his claims against the Companies. By nineteen different agreements made by each of the Companies on the one part and Mr. Ahmedbhoy on the other part the matters were referred to the arbitration of Mr. Armstrong and Mr. Dwarkadas Dharamsey. The arbitration proceedings having reached a certain stage a difference of opinion arose as to the admissibility of certain evidence tendered by the respondent. After a very elaborate argument before them, the arbitrators decided to admit the evidence. Their decision ran as follows:—

"Without in any way deciding the question as to whether or not, any, and if so, what, consequential damage could be awarded to the claimant under the contract of assurance we hold that evidence of the nature offered to be produced on behalf of the claimant and objected to by Mr. Chamier on behalf of the Companies is allowable for the purposes of the subject matter of the reference. We think that it is open to the claimant to contend that under the Policy the Companies did take possession and they were bound to protect and clean the machinery."

On this decision being given the Companies presented the present petition wherein amongst other things they prayed that they might be allowed leave to revoke the submission to arbitration and in the alternative they prayed that:—

"In the event of Your Lordship being satisfied that the arbitrators will comply with Your Lordship's directions and ruling as to the proper course to be pursued, Your Lordship will rule that the arbitrators had acted wrongly in law and have intimated their intention to act in future and have erred in the manner complained of in paragraphs 21, 22, 23 hereof, that Your Lordship will rule and direct the arbitrators as to the course that it is their duty to take and pass no further order on this petition beyond intimating to the arbitrators that they should order the said Ahmedbhoy Habibbhoy to pay all costs of proceedings before them caused by and incidental to the attempt made on behalf of the said Ahmedbhoy Habibbhoy to adduce the said evidence and of the objection thereto and of this petition which was necessitated thereby."

Mr. Justice Davar dismissed the petition with costs.

Against this order one of the petitioners, the Bombay Fire and Marine Insurance Company, filed an appeal on the following grounds:—

[4] (1) That the learned Judge erred in not complying with one or other of the prayers of the petition. (2) That the learned Judge erred in declining to comply with



the alternative prayer in the petition on the ground that he had no power to enforce his ruling or directions if the arbitrators should not choose to follow or obey them. (3) That the learned Judge erred in refraining from expressing any opinion on the merits of the question raised before him by the petitioners.

*Strangman*, Advocate-General, with him *Chomier*, for the appellant.

*Inverarity* (with him *Lowndes*) for the respondent raised a preliminary objection that no appeal lay. The arbitrators have up to this moment decided nothing, they only say we are entitled to contend what we do. We say they are liable not only for damage at the actual moment the fire occurred but also for their not taking care of the machinery after the fire when and after they took possession. We want to show that the damage now is a good deal greater than it was when they first took possession. We say that as the arbitrators decided nothing and as the Court below was asked either to revoke the reference or to express an opinion and refused to do either, there is not a judgment; nor is there a decree and therefore no appeal lies. Our next objection is that only one of nineteen appellants have appealed. The other eighteen have not been joined as respondents. The appellant therefore cannot appeal on behalf of those eighteen.

*Strangman* :—This argument is based on a fallacy, namely, that the arbitrators decided nothing.

[CHANDAVARKAR, J. :—Mr. *Inverarity* says that the arbitration Act gives the judge a discretion, that he has exercised that, and that we cannot interfere.]

*Strangman* :—It is necessary to go into the facts before one can appreciate what our position is. The respondent insured with nineteen different Companies in respect of the Victory Mills. On the 14th October 1906 a fire took place. A claim was made and assessors were appointed, one by each of the parties. In February 1907 the assessors made a joint report, Ahmedbhoi was dissatisfied, there was an agreement to refer to arbitration on 28th May 1907. The proceedings commenced and before the arbitrators it was contended that the Companies entered into [6] possession and subsequent to possession there was great loss and damage, it was contended that the arbitrators were to decide not only the loss caused by the fire but all subsequent loss and damage including loss due to want of cleaning. This was strenuously argued and the arbitrators gave their decision. What does this decision mean? They say that they propose to find that if the Companies did take possession they would make the Companies liable for the damage caused by the neglect to clean. When we look at the reference we see that it does not contemplate anything of the sort.

[CHANDAVARKAR, J. :—Your argument comes to this that the moment the arbitrators say that it is open to contend they admit that the point is within the reference.]

*Strangman* :—Exactly that: see clauses 10, 11, 17 of the Policy of the General Accident Insurance Company and see the reference, damage under the policy is damage due to the fire, i.e., at the time the fire occurred and was extinguished. An attempt was made to extend the scope of the reference. There is a good deal of correspondence which shows what our attitude has been. We do not say that Ahmedbhoi has not got a right of action against the Company, but that this reference has nothing to do with it. Loss and damage intended to be referred to was simply loss and damage caused by fire and nothing more. Ahmedbhoi tried to widen the scope of the reference and that is what we objected to.

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[BATCHELOR, J.:—There might be a doubt in the minds of the arbitrators as to whether there was not a difference between "consequential loss" and damage due to neglect in cleaning.]

*Strangman*:—I take my stand on the last sentence of the arbitrators' decision. There is no damage contemplated under clause 11 of the policy. Supposing a mill insured for one lac and worth eight lacs. Fire causes loss of one lac and over. The Company goes into possession and is guilty of gross neglect so as to cause loss of two or three lacs. The reference could not go beyond one lac because that is all that is covered by the policy. See Indian Arbitration Act, section 5.

[6] [CHANDAVARKAR, J.:—Davar, J., says that the only thing before his mind was the complaint that there was an improper reception of evidence.]

*Strangman*:—We say the learned Judge did not grasp the point. He says the arbitrators decided nothing. That is the fallacy.

[BATCHELOR, J.:—What is the right that is denied to you?]

*Strangman*:—The right to revoke the submission. See *Hart v. Duke* (1). Our case is much stronger than this. *East and West India Dock Company v. Kirk* (2), *Robinson v. Davies* (3), *Scott v. Van Sandau* (4) is an entirely different case to the present one. It only dealt with the improper reception of evidence. Here the arbitrators want to go outside their reference.

[BATCHELOR, J.:—What is there to prevent you from coming before the Court after the award is made to have it set aside on the ground that the arbitrators have exceeded their jurisdiction?]

*Strangman*:—We could not do so, because supposing they awarded to Ahmedbhoy fifteen lacs on his claim of twenty lacs how could we come before the Court and satisfy it that such and such amounts were allocated to items beyond the jurisdiction of the arbitrators. It would be impossible so we must come in now. The learned Judge should have adjourned the matter and seen whether the arbitrators would follow his ruling. The learned Judge has gone wrong in holding that the arbitrators decided nothing because they did decide that they had jurisdiction. We ask the Court to give directions to the arbitrators and tell them that all they can decide is the loss occasioned by the fire and by the water thrown on to extinguish the fire.

*Inverarity*:—Our first point is that the Court has no jurisdiction to entertain this petition on the ground that it does not comply with the requirements of the Arbitration Act and Rules of the High Court. There are nineteen policies and agreements and one award could not be made because the conditions are not the same. The conditions on the back of the policies must also be [7] deemed to form part of the contract. That being so can nineteen Companies present one petition? It is not in accordance with the Rules of this High Court. The verification of the petition is wrong. The petition ought never to have been received. High Court Rule 863; section 51, Civil Procedure Code. This petition is not signed by any of the petitioners, it is not even signed by a person who holds a power of attorney. If we are right the Court has no jurisdiction to entertain the petition. This is all the more remarkable because other so called petitioners have dropped out. The appeal is brought by the Company

(1) (1862) 32 L. J. Q. B. 55.

(2) (1887) 12 App. Cas. 788.

(3) (1879) 5 Q. B. D. 26.

(4) (1841) 1 Q. B. 102.



with whom Mr. Croft, who signs and verifies the petition, has nothing whatever to do.

[CHANDAVARKAR, J.:—Is this not a mere irregularity ?]

*Inverarity* :—I submit not. As regards the second point, nineteen petitioners could not join in one petition there being nineteen different submissions. The body speaks of one submission and so does the prayer, which submission is the Court asked to revoke? It is said that clause 2 cures that defect, but it is not signed by all the Companies and again it is qualified. Take again the amounts of the policies, some are larger and some are smaller. Then we come to the merits of the case. What we meant by saying that the arbitrators decided nothing was that no right of the parties was decided. A "judgment" does not include a mere decision to admit or reject evidence. Mr. Strangman says he had a *right* to the order he asked for; nothing of the kind, it is a pure act of discretion. See Russell on Arbitration, 9th edition, page, 125; *James v. James*. (1). Davar, J., has not expressed any opinion on any of the questions in the case. They are now asking the Court to do what the arbitrators had to do. The deed of reference does not mention loss by fire but loss according to contract. Our point is that this loss is covered by the policy even though it was not the direct result of the fire. "Consequential loss" is a very ambiguous term. Some losses are admittedly recoverable under the policy though they occur after the fire, *e.g.*, damage done by water, debris falling on the machinery. You cannot limit the loss to the action of the fire itself or in point of [8] time to the moment the fire is extinguished. If that is correct a great deal of damage done to the machinery is the direct result of the fire. You cannot touch the machinery till it is surveyed by the surveyors and now they want to shut us out from giving any evidence to show what time elapsed and who is responsible.

It is impossible to fix a date after which our evidence should be limited. The Insurers have to pay us the damage done to the property, there is no intervening cause. We say they were in possession till August 1907 at least, the fire having taken place in October 1906. Any damage done to the machinery must be deemed to be the direct result of the fire. An omission to do a thing which they might do is not an intervening cause. Supposing that there was a neglect of duty on the part of the Companies, how did that duty arise? Clearly under the contract of assurance, see clause 11 of the policy. Therefore it is within the terms of the policy. How can this Court decide now that all our contentions are incorrect? The arbitrators have made no mistake of law. We submit the case is on all fours with *Scott v. Van Sandau* (2). It being a matter of discretion is the Court going to interfere? The arbitrators should be asked to state what sums they would allow on different heads and then it is easy to set them right if they go beyond the scope of the reference. This application is practically to decide that for which the arbitrators have been appointed and therefore is unprecedented: see *In re Lord Gerard and London and North Western Railway Co.* (3), *The Irish Society v. Bishop of Derry* (4), *The Carron Iron Co. v. Maclaren* (5).

*Strangman* :—As to the verification of the petition I ask leave to have it done now. As to discretion see section 14 of the Arbitration Act : *Toolse Money Dasse v. Sudevi Dasse* (6).

(1) (1889) 23 Q. B. D. 12.

(2) (1841) 1 Q. B. 102.

(3) [1894] 2 Q. B. 915.

(4) (1846) 12 Cl. & Fin. 641.

(5) (1855) 5 H. L. C. p. 457.

(6) (1899) 26 Cal. 361.

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CHANDAVARKAR, J.:—Both the preliminary point and the point on the merits raised in this appeal turn upon the question whether the arbitrators have decided that the submission to them included the matter now in dispute between the parties. In other words, the question is—Have the arbitrators decided [9] that they have jurisdiction to decide the matter as part of the terms of the reference to arbitration? Davar, J., has indeed held that they have decided nothing; but that is clearly wrong. The contention raised before the arbitrators by the respondent Ahmedbhoy Habibbhoy's solicitor, Mr. Hormusjee, was that the respondent was entitled to claim damages from the Insurance Companies for the loss suffered by him owing to deterioration of the machinery consequent upon the neglect of the Companies to take proper care of it after they had taken possession of it, and that this claim was part of the submission. The Insurance Companies denied that the claim in question formed part of the reference. The meaning of the decision of the arbitrators upon that preliminary question is, to my mind, plain. They substantially held that, whatever conclusion they might ultimately arrive at after hearing evidence on the claim, they had jurisdiction to take evidence and decide whether Ahmedbhoy was entitled to any, and if so what, damages for the specific loss alleged.

What the arbitrators have, then, finally decided is, that they have jurisdiction over the matter now in dispute; that it is competent for them to enter into the merits of the dispute after taking evidence and to adjudicate upon it.

Davar J.'s order virtually compels the Insurance Companies to submit to the jurisdiction of the arbitrators, whereas those Companies complain that, having regard to the terms of the reference, no such jurisdiction exists. The order decides a question of their right. They say that they have a common law right to have the dispute decided in the ordinary way—in a Court of law. Davar, J., decides that they have not, but that the arbitrators have jurisdiction to decide it. The order is, therefore, a judgment within the meaning of clause 15 of the Letters Patent.

Passing to the merits, Davar, J., seems to me to have failed to perceive the real question at issue. He thought what he had to deal with was a case in which the complaint was merely that the arbitrators were committing an error of law by admitting irrelevant evidence. But in reality the admission of evidence by the arbitrators was complained of by the Insurance Companies not as an independent ground for grievance but as the result of [10] an unwarranted jurisdiction assumed by the arbitrators. It was not the admission of inadmissible evidence that was the grievance: but the taking cognizance of a dispute not within the terms of the reference was complained of. The question, therefore, was—were the arbitrators exceeding or have they exceeded their jurisdiction? The answer to that depends upon a proper construction of the terms of the reference.

In construing the agreement to refer to arbitration we ought to bear in mind one cardinal principle—viz., that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a Court of Law. Therefore, it must clearly appear from the terms of the submission that with reference to any point arising the party has so deprived himself. Here the dispute referred related to damages or loss from fire, whereas the claim on which the arbitrators were asked to adjudicate and which they have held they have jurisdiction to decide, in addition to the loss or



damage from fire, is the loss or damage consequent on the tortious conduct of the Insurance Companies after the fire had been extinguished. Mr. Inverarity has before us attempted to show that what his client wants to do before the arbitrators is to prove that this latter loss is in substance loss from fire. But that was not the case made before the arbitrators, and I do not think that the loss alleged can be included in loss from fire on any reasonable view of the case, because the deterioration of machinery from neglect on the part of the Insurance Companies to take care of it is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire in fire insurance cases and from perils of the sea in maritime insurance, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that underwriters become responsible for the further mischief so incurred. See Pollock B. in *Montoya v. London Assurance Company* (1).

The question, whether before the arbitrators or before Davar, J., was by no means one of discretion. It was, in my opinion, one of excess of jurisdiction in the arbitrators.

[11] Mr. Inverarity has raised the point that the petition before Davar, J., ought to have been dismissed because it was not signed by all nineteen petitioners, that this appeal is by but one of the Insurance Companies, and that the other Companies are not parties to it. This ground would have required serious consideration if we had to revoke the submission to arbitration; but as the order we have decided to pass is at present no more than an intimation to the arbitrators of our opinion on the question of their jurisdiction, it is immaterial whether all or some of the Insurance Companies are *formally* parties to the proceedings in this Court. As to the other objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to the signatory. And this irregularity does not affect the merits of the case.

The result is that the order of Davar, J., must be discharged with costs, in both his Court and this, on the respondent; and that the arbitrators should be informed that, in the opinion of this Court, their jurisdiction extends only to the dispute relating to loss or damage from fire under the terms of the policy in each case, and not to the question of any loss or damage alleged to have arisen from the neglect of the Insurance Companies to take care of the machinery after the fire had been extinguished and the Companies had entered upon possession under clause XI of the Policy.

BACHELOR, J.:—I concur: but as I am differing from my brother Davar I should like briefly to explain the reasons for my opinion.

The only question, it appears to me, is what have the arbitrators decided, if they have decided anything?

The learned Judge below was of opinion that they have decided nothing, and, therefore, he declined to interfere with their order. Now, their order is one of which it is not easy to be quite confident as to the meaning, but upon the best consideration that I can give to it, it seems to me to decide that the [12] reference to the arbitration does include the question whether the plaintiff is entitled to damages on the ground that the Companies having gone into possession were guilty of negligence in not cleaning and not protecting the machinery. If that is the meaning of the

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order, then I think the appellants must succeed, for, as to the preliminary point that no appeal lies, that order on my interpretation is a judgment since it goes to jurisdiction by enlarging the scope of the arbitration submission and by depriving the appellants of their rights to have these matters decided by a suit : see *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (1). And if the appeal is competent, then, I think, it ought to be successful ; for the policy, the agreement to refer and the terms of the reference all satisfy me that no claims on account of negligence by the companies after they had, as alleged, gone into possession, were included in the submission. That I think was limited to the loss by fire (including of course the loss by water in extinguishing the fire) and it is plain that a claim on this footing must be limited somewhere and that it cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*.

Now here the plaintiff's case is that the Companies were in possession from October 1906 to August 1907 at least, and it seems to be impossible to hold the damages arising by reason of their negligence throughout this prolonged period are such damages as are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from a totally different origin, an origin which, it seems to me, is wholly distinct and separable from the fire, namely a neglect by the Companies of some duty imposed on them after the loss by fire or water had become an accomplished fact.

As to the technical objections which have been urged by Mr. Inverarity I am of opinion that they are all of a merely formal nature ; that there is no substance in them ; and that they ought not to be allowed to stand between us and the decision of this appeal on its merits.

[13] For these reasons, I concur with my learned colleague as we are assured that the arbitrators will gladly give effect to any expression of opinion from us.

The appellants must have their costs.

*Order reversed.*

34 B. 13 (=3 I. C. 837=11 Bom. L. R. 273).

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*Before Mr. Justice Beaman.*

MULJI TEJSING v. RANSI DEVRAJ.\*

[25th January, 1909.]

*Jurisdiction—Practice—Presidency Small Cause Courts Act (XV of 1882), section 22—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing valid rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), section 93—Sale—Tender.*

The Bombay United Rice Merchants Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules

\* Suit No 172 of 1907.  
(1) (1874) 13 Ben. L. R. 91.



were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated "to decide all disputes which may arise as to contracts and do all other business relating to contracts." It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the *vaida* should fix the *vaida* rate (*i. e.* the market rate of the day) on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in [14] Bombay, who were members, to purchase rice for them and on the 24th November 1906 these agents brought from the defendants 1,340 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud 1968 (*i. e.* from the 18th November 1906 to 30th November 1906). The contract which was in the printed form framed under the rules as above mentioned contained the following clause:—"This contract is made subject to the rules of the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that in settling the *vaida* rate the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice a general meeting of the Association was held on the 30th November 1906 at which after discussion a special Sub-Committee was appointed to fix the rate consisting only of three persons one of whom was not a member of the standing Sub-Committee and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee and the other because he was interested in fixing a low rate, and they contended that for these reasons (*inter alia*) they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November 1906. The sum claimed as damages was less than Rs. 1,000.

The defendants pleaded—

1. That having regard to section 15 of the Civil Procedure Code (Act XIV of 1882) and section 18 of the Presidency Small Cause Courts Act (XV of 1882) the suit was not maintainable in the High Court.
2. That certain alleged partners of the plaintiffs not being parties to the suit it should be dismissed for non-joinder.
3. That having regard to the rules of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law at all events until they had exhausted the remedies provided by the rules.
4. That the plaintiffs were bound by the *vaida* rate fixed by the Sub-Committee appointed by the Association.

[15] *Held*, (1) That the High Court had jurisdiction and that the suit should proceed subject to the provisions as to costs contained in section 22 of the Presidency Small Cause Courts Act (XV of 1882).

(2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder.

(3) That the plaintiffs were entitled to sue at law notwithstanding the provisions contained in the rules of the Association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other.

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(4) That at the meeting of the Association held on the 30th November 1906 the plaintiffs (through their agents) had consented to the appointment of a Sub Committee of three persons to fix the *vaida* rate and that they were therefore bound by the rate then fixed.

Any stipulation that the award of an arbitrator shall be accepted as final restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void.

The effect of section 28 of the Indian Contract Act (IX of 1872), section 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899) and of the Civil Procedure Code dealing with arbitration is that a person may not contract himself out of his right to have recourse to Courts of law but that in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts.

THE plaintiffs filed this suit to recover from the defendants the sum of Rs. 710-6-8 as damages for breach of contract in failing to deliver certain bags of Rangoon rice which the plaintiffs had contracted to buy and take delivery of by two contracts, the first of which was dated the 22nd October 1906 and made between the defendants' firm of Gangi Narsi and the plaintiffs' firm of Mulji Dharsi, and the second of which was dated the 24th November 1906 and made between the defendants' firm of Gangi Narsi and the firm of Ravji Narsang who were the agents of the plaintiffs in making the contract. The two contracts were made subject to the rules of the Bombay United Rice Merchants Association.

The defendants denied that the firm of Ravji Narsang were the agents of the plaintiffs in making the second contract so that the plaintiffs had any right of action in respect thereof and they submitted that inasmuch as the sum claimed by the [16] plaintiffs as damages in respect of the first contract did not exceed Rs. 1,000 the High Court had no jurisdiction to try this suit. They further alleged that the firm of Khoorpal Dungeersey was a partner in the plaintiffs' firm of Mulji Dharsi and was therefore a necessary party to the suit.

Without prejudice to the above contentions the defendants also alleged that they were at all times ready and willing to deliver the said bags of rice to the plaintiffs, but that the plaintiffs never asked for delivery.

They denied that the plaintiffs had suffered any damage and they disputed the price of the rice on the due date.

The defendants further alleged that according to the rules of the Bombay United Rice Merchants Association subject to which the contracts in suit were made, the plaintiffs and defendants were bound by the rates fixed by the Association and that the rate so fixed for the *vaida* for which the said contracts were entered into was Rs. 8-11-0 per bag upon the footing of which the defendants had become entitled under the said rules to recover from the plaintiffs the sum of Rs. 481-9-0 in respect of the first contract referred to and the defendants counter-claimed accordingly. They further counter-claimed against the plaintiffs in respect of three contracts dated the 12th, 14th, 16th November 1906 under which the firm of Ravji Narsang purchased from the defendants for the same *vaida* 670, 1,340 and 1,340 bags of rice at the respective rates of Rs. 8-14-8, Rs. 9-0-2 and Rs. 8-15-11, and alleged that in respect of these three contracts and the second contract abovementioned they became entitled to recover from the firm of Ravji Narsang the sum of Rs. 1,381-14-0



by way of difference, no delivery having been taken by the said firm under any of the said contracts.

At the hearing the plaintiffs abandoned their claim on the first contract which amounted to Rs. 60.

*Bahadurji* (with him *Lowndes* and *Desai*) for the defendants :—

The firm of *Khoorpal Dungey* is a partner with the plaintiffs and should have been joined as a co-plaintiff. The suit should therefore be dismissed. See *Kalidas Kevaldas v. Nathu* [17] *Bhagvan* (1); *Ramse-buck v. Ramlall Koondoo* (2); *Motilal Bechardass v. Ghellabhai Hari-ram* (3); *Aga Gulam Husain v. A. D. Sassoon* (4); *Ahinsa Bibi v. Abdul Kader Saheb* (5).

The plaintiffs cannot sue in a Court of law according to the rules of the United Rice Merchants Association until the Association has given its decision. See Rules 14, 29, 41, 46; *Leake on Contract* (5th edition), p. 675; *Scott v. Avery* (6); *Spurrier v. La Cloche* (7); *Trainor v. Phoenix Fire Assurance Co.* (8).

The plaintiffs never asked for delivery, they only demanded a delivery order. *Mulji Govindji v. Nathubhai Hirachand* (9).

Indian Contract Act (IX of 1872), section 93, *Benjamin on Sales* (5th edition), p. 595.

The plaintiffs are bound to accept the *vaida* rate fixed by the Association, this rate leaves a balance in favour of the defendants which we ask for in our counter-claim.

*Kirkpatrick* (*Inverarity* and *Jinnah* with him) for the plaintiffs :—

The onus of proving that *Khoorpal Dungey* is a partner is on the defendants.

Even if proved the suit should not be dismissed. See Civil Procedure Code, Order I, Rule 9; *Mahabala Bhatta v. Kunhanna Bhatta* (10).

The cases cited by the other side do not apply. They were dismissed because at the date at which a necessary party was added they were barred by limitation.

The plaintiffs are entitled to bring this suit. That point was decided when the summons taken out by the defendants to stay these proceedings under section 19 of the Arbitration Act, was dismissed. The defendants did not appeal against that decision. We rely on the Indian Contract Act (IX of 1872), section 28; [18] *Specific Relief Act* (I of 1877), section 21; *Arbitration Act* (IX of 1899), section 19; *Koomud Chunder Dass v. Chunder Kant* (11); *Crisp v. Adlard* (12).

The following rules of the Rice Merchants Association were mainly referred to in the argument as well as in the judgment :—

*Rule 14.*—All kinds of disputes relating to *vaidana soudas* (transactions) shall be decided only in the manner mentioned in these rules. And the exclusive authority to decide such disputes shall rest with the Committee and the Association only. And it is on this express condition that contract forms are supplied and every person signing such forms shall be taken to have knowledge of this express condition and to consent to and abide by all these rules. The Sub-Committee and the Association shall decide the matters placed before them as they think proper and each party to the contract shall be at liberty to go to Court in connection with the aforesaid transaction only for the purpose of enforcing the decision that is given in accordance with

(1) (1883) 7 Bom. 217.

(2) (1881) 6 Cal. 815.

(3) (1892) 17 Bom. 6.

(4) (1897) 21 Bom. 412.

(5) (1901) 25 Mad. 26.

(6) (1856) 5 H. L. O. 811.

(7) [1902] A. C. 446.

(8) (1892) 65 L. T. 825.

(9) (1890) 15 Bom. 1.

(10) (1898) 21 Mad. 378 at p. 382.

(11) (1879) 5 Cal. 498.

(12) (1896) 28 Cal. 956.

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these rules. If any party does not respect such decision then whatever order the Sub-Committee or the Association shall make against him he shall have to submit to and if he does not submit his name shall be struck off from the records of this Association.

*Rule 29* — For transacting all the above-mentioned business relating to *vaidana sondas* (transactions) this Sub Committee shall meet daily in the rooms of the Association from 3 to 5 o'clock. It shall keep a note of the daily *vaid* rates and if the purchaser refuses to take the goods appertaining to a contract or if the vendor fails to give delivery of the goods sold or fails to give delivery in accordance with the terms of the contract or if any party to the contract commits any default whatever then as to any damages on account thereof which the Sub-Committee shall fix and award or any other kind of order which it may make each party shall have to abide by the same and as to any decision which the Sub Committee or the Association will give in any matter relating to a contract each party to the contract shall be regarded as bound by the same.

*Rule 30* — On the due date, that is on the last date mentioned in the contract, this Sub-Committee will settle the rate of that *vaid*. Even if that rate be less or higher than the rate of that day yet each of the parties to the contract shall consider himself bound by the said rate so fixed. And in accordance therewith each party shall have to finish receiving or making payments on account of his profit or loss within twenty-four hours after the due date. And if the contract goods shall have been sold legally then each party shall have to regard the difference between the rates realised by the sale and the contract rate as profit or loss and shall have to receive or make payments thereof immediately after the goods are sold. And in receiving or making such payments if any party to the contract make any default then whatever order the Sub Committee will make he shall have to abide by.

*Rule 31.* — On any three gentlemen of the above Sub-Committee meeting at the Association rooms they can transact all the business of the Sub-Committee but without the sanction of the President or Vice-President and Secretary they shall not be able to give any decision and a decision given without such sanction shall be considered null and void.

*Rule 35* — If there be any disputes or business relating to *vaidana sondas* (transactions) which have connection with any member or members of this Sub-Committee or in which he or they are in any way concerned or interested then the decisions thereof or any business whatever in connection therewith shall not be given or done until other independent appointments are made in place of such member or members. But on such occasions arising this Sub-Committee shall at once call a meeting of the Managing Committee of the Association and from out of them shall get the necessary number of independent gentlemen appointed in the places aforesaid and after that the new Committee formed as aforesaid including these new gentlemen shall transact in accordance with what is written above all business relating to the aforesaid disputes and their decisions shall be regarded as the decisions of the Sub-Committee and such decisions shall be regarded as having been given in pursuance of these rules.

*Rule 37.* — All powers to make changes (and) alterations in the appointments of the gentlemen appointed on the Sub-Committee and to fill up their vacancies and also to make alterations or amendments (or) additions in (or to) these rules, rest with the "Rice Merchants Association."

*Rule 46* — Of these rules, if any rule be found defective or uncertain in meaning or should it happen that on any occasion the Sub-Committee is unable to do its work or is unable to do its work in a satisfactory manner in conformity with these rules then on all such occasions as a last resource, a meeting of the Association shall be called and whatever decision may be passed thereat with regard to such matters, all persons concerned shall be bound thereby. But in connection with the contracts made in pursuance of these rules or in connection with any kind of business relating thereto no party to a contract shall be at liberty to go to Court in any way with regard to the said contract so long as he may be able to get all kinds of lawful decisions from the Sub-Committee or the Association; in other words, it is to be understood that every person entering into contracts in accordance with what is written above appoints by these rules, the Sub-Committee and the Association as arbitrator and final umpire and as to the decision which will be given in accordance with these rules the same shall be regarded as the arbitrators' award. Such being the case, every person entering into a contract shall have to go before the Sub-Committee or the Association for getting any matter relating to the contract decided and if he may not have been able to enforce the decision given by them in accordance with these rules then in that case he can go to Court only to enforce such decision and it shall be considered that every



party to the contract and every party concerned therewith agrees with the rule made to this effect.

BEAMAN, J.:—The first point requiring decision is whether the firm of Khoorpal Dungey is a necessary party to the suit? The answer to that question plainly depends upon the determination of a further question of fact, whether the firm of [20] Khoorpal Dungey is a partner of the plaintiff? That is a matter which must have been in the plaintiff's knowledge. Both he and Khoorpal Dungey know and knew throughout the suit whether a partnership existed between them.

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The defendant contends that the result of finding that Khoorpal Dungey is plaintiff's partner must be the dismissal of the suit. To this the answer is that Rule 99, Order I of the Civil Procedure Code, forbids any suit to be defeated for misjoinder or non-joinder. Under the old Civil Procedure Code, section 31, it was enacted that no suit should be defeated for misjoinder. But as in England where the Rule of the Supreme Court first stood in the same language, the Courts inclined to include non-joinder. Yet there is more than one obvious difference both in the nature and the results flowing from the two defects, misjoinder, and non-joinder. Misjoinder can do the defendant no real harm, and remedying the mistake at any time, could not, as far as I can see, prejudicially affect in any particular, the course of the defence or attack. But non-joinder is altogether a different thing. Withholding a plaintiff and making him a witness, which is what the defendant alleges has been done in this case, might give the plaintiff an unfair advantage throughout the trial. Many questions which might be put to a plaintiff could not be put to a witness; and the whole effect of statements made by an interested party, must be, when the Court comes to weigh and appreciate the evidence tested and judged by other standards than those which would apply to the same statements made by a disinterested witness. If then a plaintiff has designedly, with the object of strengthening his case and evading awkward questions kept back a co-plaintiff, by a denial of facts which if proved would have entitled his opponent to insist upon having that person added at once as a co-plaintiff; and has thus throughout the trial secured exactly the advantages he had in view; it does seem that merely adding that person as a co-plaintiff or a co-defendant formally at the time of judgment is, from the defendant's point of view, no remedy at all of the wrong which has been done. Taking a case like this, if the Court finds when the trial is over, upon a painstaking analysis of much evidence and long consideration of many arguments, [21] that the fact which the plaintiff denied, is proved against him; that the man he said was not, really was his partner; then considering that if the fact had been admitted, that person must have been and would have been made a co-plaintiff or co-defendant from the beginning, it is a serious question whether the plaintiff should be allowed to turn round and say, well, it does not matter now; the Court may if it pleases add the man. For that amounts to this, that the plaintiff is permitted to make the fullest use of deliberate perjury; is allowed to lead evidence, as of a certain quality, while it really is not of that quality; is enabled to evade many questions that might otherwise have been put: to escape the effect of what might have turned out damaging admissions, all with complete impunity.

The cases cited under the old law, while they appear to recognise the defendant's right to have partners joined in the suit, are distinguishable, in



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this respect, that the suits were dismissed because by the time that the Court had found on the facts that other persons were partners and were necessary parties, the claim had against them become time-barred. *Kalidas Kevaldas v. Nathu Bhagvan* (1) and *Ramsebuk v. Ramlall Koonloo* (2). The principle I have in mind is essentially the same, resting on it the right as a right of the defendant to have partners made parties to any partnership suit brought against him; but its application, in the way I have suggested above, would go further, and on a divergent line, from the authorities on which defendant relied. Nor do I see any way of getting over the plain language of the Code.

Defendant has contended that this is not a matter of procedure, and therefore that the decision ought to be given under the old Code. He relies on section 45 of the Contract Act. But waiving the first part of that argument, it appears that while the English Rule was so worded as only directly to cover cases of misjoinder it was in practice extended to cases of non-joinder; and presumably the Courts in India would follow the English Judges. Nor am I able to accede to the argument that this is a matter of substantive right rather than procedure. [22] Certainly it is the defendant's right, if he can show that a person is plaintiff's partner to have that person made a party to the suit; but it is matter of procedure how that person is to be made a party, and also what the effect of his not having originally been made a party is to have on the course of the suit. All this is specifically provided for in O. I, r. 10. True, the words of that rule appear to contemplate cases where the misjoinder or non-joinder are attributable to *bona fide* mistakes, whereas here there can be no question of a *bona fide* or any other mistake at all. Still the fact remains that the law says that no suit shall be defeated for non-joinder, and as non-joinder is all that the defendant alleges, I do not see how he can succeed in his further contention that if it is proved, the Court must dismiss the suit. I should be only too glad to take that view if I felt able to do so. But as I am quite unable to read any such qualification as would be needful to validate the defendant's plea, into the words of the law, it follows that even, should I on the question of fact find against the plaintiff, I could not for that reason dismiss the suit. And merely adding Khoorpal Dungeysey as plaintiff or defendant would not, as far as I can see help the defendant now in any way, or assist the Court in more thoroughly and satisfactorily disposing of what is in issue between the parties. So far as the defendants might stand in need of protection against another suit in respect of this claim by Khoorpal Dungeysey, it is sufficient to note that that firm has on oath denied that it has any interest in this contract, so that it would not be in a position afterwards to advance any claim upon it.

Thus it becomes of comparatively little importance to decide now whether Khoorpal Dungeysey is or is not the plaintiff's partner. But as a great deal of evidence has been led on the point and a good deal of argument addressed to it, as in various ways it has run through the whole case, colouring many parts of it, I think it as well briefly to resume the evidence, and state my conclusion upon it. [His Lordship then discussed the evidence upon the question of partnership and continued.]

I hold that there was a non-joinder, and that Khoorpal Dungeysey ought to have been a party plaintiff. But I do not [23] think in view of what I said in beginning to deal with this preliminary point, and upon

(1) (1889) 7 Bom. 217.

(2) (1881) 6 Cal. 815.



a careful consideration of the scope and intent of O. I. r. 10 that I need not make any order adding Khcorpul Dungensey as plaintiff or defendant or that on account of the non-joinder I can dismiss the suit. I must proceed to dispose of it as it stands, limiting myself to the parties already on the array and the matters in issue between them.

The next point which is likewise of a preliminary nature arises on issue 11. Shortly it comes to this, whether the plaintiff is precluded from coming into Court until he has exhausted the remedies provided for any members of the Association dissatisfied with a decision of the Sub-Committee? It might be put in other ways but that is the real meaning of it; and I may observe that it has been much blurred in argument by a failure to keep it wholly distinct from one or two other cognate questions which will need to be separately dealt with and answered. The rules, as I understand them, provide that the Sub-Committee shall fix the *vaida* rate. That is one thing. Next, that all disputes arising between members of the Association shall be referred to the Sub-Committee. That is another thing. Then further, that no member of the Association shall go to law about any such dispute until he has obtained the final decision of the Association and then only to the extent of enforcing that decision. That is still another thing, and the thing with which I am at present concerned. I do not think that the point presents any difficulty. The statute law on the subject is contained in section 28 of the Contract Act, and section 21 of the Specific Relief Act. The effect of those sections read with the related sections in the Indian Arbitration Act, and in the Code of Civil Procedure dealing with arbitration, is that a person may not contract himself out of his right to have recourse to Courts of law; but that in the event of any party having made a lawful agreement to refer the matter in difference to arbitration, as a condition precedent to going to law about it, the Courts will recognize the agreement and give effect to it by staying proceedings in the Courts. The principles underlying this branch of the law have I think long been clearly settled. The series of decisions starting with *Scott v. Avery* (1) lay down the rule to [24] which statutory enactment has been given in section 28 of the Contract Act. And the question is whether the defendants' contention, if found to be correct, brings this case within the rule.

First, it is to be observed that the contract in suit was made on a printed form supplied by the Association. That form sets forth the terms and conditions upon and under which the contract is made. It has been argued for the plaintiff more than once that he is not a member of the Association, and it is therefore suggested, I would say, rather than contended, that in working out his liabilities under the contract form, he is entitled to be treated with more liberality than a member of the Association. I do not think that need be seriously considered. The contract was made for him by an agent who is a member of the Association, with another person who is also a member of the Association. The plaintiff was an undisclosed principal. The defendant knew nothing about him; he made his contract with a member of the Association, on an Association form, binding both parties to the contract to abide by the rules of the Association. It cannot be, and I do not think it has been directly contended that the plaintiff is not as much bound as his agent would have been bound had he been in reality, what he appeared to be, *viz.*, a principal. This is not an isolated dealing; the plaintiff in employing Ravji Narsang knew quite well

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(1) (1856) 5 H. L. C. 811.



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what sort of contracts he was empowering him to make ; and what he did, what the agent did I mean, in the exercise of his delegated power, appears to have been entirely within the scope of his ordinary and legitimate authority as plaintiff's agent. Moreover for one part at least of his case the plaintiff himself strongly relies upon a rule of the Association imported by reference into this contract. It does not therefore lie in his mouth to repudiate other rules similarly imported.

Exhibit A is the contract in suit ; it contains these words :—

"This contract is made subject to the rules framed by the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." "All other conditions relating to the *kabala*, are in accordance with the aforesaid rules. Each party admits that he is fully aware of the same."

[25] Rule 14 says :—

"All kinds of disputes relating to '*vaidana soudas*' shall be decided only in the manner mentioned in these rules, and the exclusive authority in all respects to decide such disputes, shall according to these rules rest with the Sub-Committee and the Association. . . . The Sub-Committee and the Association as mentioned in these rules bring an end to or decide the matters placed before them, as they may think proper and each party to the *kabala* shall be deemed as bound to accept the same as final decision."

Now I may observe on that at once that it goes beyond the principle. It does amount to excluding the jurisdiction of the Courts altogether : see *Coringa Oil Company, Limited v. Koegler* (1). Any stipulation that the award of an arbitrator shall be accepted as final does restrict the rights of the contracting parties to invoke the aid of the ordinary Courts, and to that extent appears to me to be void : see *Ranga v. Sithaya* (2).

Then the rule goes on—

"And any party to the *kabalas* shall be at liberty to go to a Court in connection with the aforesaid *soudas*, only for the purpose of enforcing the decision that is given in accordance with what is written in these rules."

That again appears to me to go a long way beyond the principle.

The rule concludes with a penal clause providing that if any member does not abide by what has been quoted his name shall be struck off from the Association. That, I think, is within its powers, but it is not a matter into which I have now to inquire.

Then comes rule 46 which is of a very sweeping character. First, it vests a general meeting of the Association in the last resort with plenary powers to supply all deficiencies in the rules themselves and all disabilities on the part of the Sub Committee. And it says that all persons concerned shall be bound by whatever decision may be arrived at by that body in regard to such matters. It continues—

"But in connection with the *kabalas* made in pursuance of these rules, or in connection with any kind of business relating thereto no party to a *kabala* shall be at liberty to go to Court in any way with regard to the said *kabalas* [26] so long as he may be able to get all kinds of lawful decisions from the Sub-Committee or the Rice Merchants Association. In other words, it is to be understood that every person or persons entering into the *kabalas* in accordance with what is written above appoints by these rules the Sub-Committee and the Association as its arbitrators and final umpire, and as to the decision which will be given in accordance with what is written in these rules, the same shall be regarded as the arbitrator's award."

I pause to remark the ambiguity of such words as "all sorts of lawful decisions." That of course leaves a very wide door open. Any one may say, as the plaintiff now says, that he could not obtain any sort, let alone

(1) (1876) 1 Cal. 466.

(2) (1883) 6 Mad. 868.



all sorts, of lawful decision out of the Sub-Committee or the general assembly of the Association.

The rule goes on—

“Such being the case every person entering into a *kabala* shall have to go before the Sub-Committee or to the Association for getting any matter relating to the *kabala* decided; and if he may not have been able to enforce the decision given by them in accordance with these rules, then in that case, he can go to Court only for enforcing such decision.”

That is the rule upon which the defendant chiefly relies. It is of peculiar importance as constituting the Sub-Committee arbitrators, and the Association the final umpire of all matters in disputes over *vaida soudas*. And the question of course is whether to that extent it is not quite a lawful agreement which the Courts would enforce. So much of it as compels members to accept any decision as final, I have already said, is in my opinion unlawful, and would not be recognized to the extent of shutting any member of the Association out of the regular Courts.

Now although the plaintiff did not submit his grievance in person to the general assembly of the Association, he lost no time in protesting against the rate fixed at the meeting of the 30th November 1906, and as a matter of fact a general meeting was called, and all that is in contemplation in Rule 46 seems to have been done. It is true that the plaintiff was not present. But that was his own choice. He refused to attend any more meetings of the Association after the 30th November, because what had happened there had, he says, convinced him that he could not hope for fair treatment. But he sent in lawyer's letters, and therefore made it plain that he had a grievance of the [27] kind contemplated. Then the Association called a meeting and we must suppose that all that the plaintiff had advanced in his letters was duly considered, with the result that the proceedings of the meeting of the 30th November and the rate fixed at it were confirmed. So that really the only question open is whether the plaintiff can come into Court to question the finality of that decision. I am quite clear that he can. To hold otherwise would put a practically unlimited power in the hands of men who, judging from what I have seen of them in this case, are certainly not fit to be entrusted with it. Suppose that when the rate had been fixed on the 30th November the plaintiff had immediately filed a suit; then it would have been open to the defendants to move the Court under section 19 of the Indian Arbitration Act to stay proceedings till such submission as is contemplated in Rule 46 had been duly made; and the Court would then have considered whether this was the proper course. In fact this was actually done by the defendants although as far as I can see all that the rules required had been done, and all arbitration proceedings properly or improperly so called under the rules of the Association, had ended. That application was heard by my learned brother Davar in chambers. It was apparently argued at length, and Davar, J., refused to stay this suit under section 19 of the Indian Arbitration Act. In those circumstances especially having regard to the fact that the general body of the Association did meet and decide the points upon which the plaintiff now craves the judgment of the Court, the question narrows down to this, is the plaintiff shut out by any term of his contract from coming into Court and challenging the finality of the decision made against him by the Rice Merchants Association? If he is, then he is most certainly deprived of his ordinary common law right. For there is no decision in his favour, which he could, according to the rules, come into Court to enforce. So

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that his position would be this. He had a serious controversy with members of the body, involving charges of partiality and misconduct but he is wholly precluded from agitating those matters in a Court of law in the terms of the rules to which he is a subscribing member. The absurdity of this contention is that it shuts every dissatisfied [28] party out of Court. It is only those in whose favour the assembly of the Association has pronounced that may go to Court to enforce that decision. Those against whom it has decided have no remedy. That I think is a proposition which needs only to be stated to carry on its face its own refutation. Doubtless the Association may expel, if so advised, any of its members who break this rule and insist upon bringing their grievances to trial in a Court of law.

But assuming for the purposes of this discussion that the procedure provided for the settlement of disputes by the rules of the Association is really procedure by arbitration, then at most it might be contended that until any dissatisfied member had tried his chances in the way provided by the rules he could not be heard in a Court of law. And that brings us back to this point, that if there is anything at all in this contention it is exactly what would be material in any contention of the same kind advanced under section 19 of the Indian Arbitration Act. And that again is always preliminary, and is to be decided *in limine*, as it was decided in this suit. Supposing that Davar, J., decided it wrongly, and I should be very slow to think that he did, what is the result? Only what might always happen, viz., that a reference to arbitration had proved abortive. Courts are not infallible, and as long as they have to decide in each case brought before them whether a suit ought or ought not to be stayed for the reason given now by the defendant there is always an equal chance that it will not be stayed. To go beyond that and, at the close of the trial, to contend that the plaintiff cannot have the benefit of the litigation at all (if he should prove successful), because a reference to arbitration was not carried out in whole or in part, seems to me an extremely strange proposition. Indeed, I do not really know how the defendant would work it out. If the Court were to hold that Rule 46 required reference of the particular matters now in suit to the arbitration of the Sub-Committee and after them to a general meeting of the Association, does the defendant say that the Court should dismiss the suit and remit the plaintiff to where he stood in December 1906? What would be the result of that? Only that the plaintiff would have to go through the [29] form (if he could get anyone now to listen to him) of appealing to the Sub-Committee and again to a general meeting to rescind all the resolutions and acts done and passed in November and December 1906, failing which I presume he would have to re-open this suit and pursue his remedy once more through exactly the same tedious and expensive litigation. If the defendant was dissatisfied with Davar, J.'s chamber order why did he not then appeal? I am not aware of any law or principle which could be vouched for the extraordinary proposition that a suit which has after a long hearing come to an end should be stayed for the purpose of sending one of the parties back to an already pre-judged arbitration. I must therefore overrule that objection and find upon the eleventh issue, that the plaintiff can have the judgment of the Court on the matter put in issue before it, notwithstanding anything in Rules 14 and 46 of the Rice Merchants Association to the contrary.

Seemingly connected with and referable to the same principles as the question just dealt with is another, namely, whether the plaintiff in this



suit is bound by the rate fixed by the Sub-Committee or its delegates at the meeting of the 30th November 1906. Whether the fixing of the *vaida* rate, under Rule 30 of the Association, is, when all the rules are read together, to be regarded as the award or arbitrators, the result of a reference to arbitration, or only so by a loose analogy, it is plain that this is an altogether different question from that which disputes the plaintiff's right under the rules to come into Court at all. For assuming that this is an arbitration award, it has been given. It is finished; the arbitrators are *functi officio*. And the plaintiff, as far as that award is concerned, and that only, has undoubtedly the right to come to Court and challenge it on the ground that the arbitration itself was improperly procured, or that the arbitrators were partial or were guilty of misconduct. It is only when we read Rule 14 with Rule 46 that the preliminary question takes definite form.

It may very well be doubted whether when we read Rules 14, 37 and 46 together, the Association meant to leave anything open for subsequent challenge or dispute touching the rate [30] fixed under Rule 30. All the disputes which are contemplated seem to be disputes between member and member about *vaida* and other contracts, not a dispute about the correctness of the rate decided upon to be the standard of settlement. In that connection it is important to pay careful attention to the wording of Rule 30. The rule says nothing about "impartial" persons. It only says that the Sub-Committee shall fix the rate; and all members of the Association shall be bound by that rate; and shall pay or receive differences on the basis of it, and that should any member make default in settling on the said basis, he shall be subject to any orders which the Sub-Committee may make in that matter. Now it looks as though the concluding clause contemplated possible disputes to arise after the rate has been fixed, and Rule 37 provides *inter alia*, as I understand it, for the settlement of such disputes. Then no doubt it would be necessary that the persons entrusted with making the settlement should not be the parties to the dispute, and should in that sense be impartial. But considering the nature of the Association and its composition, it might very well be that no *quorum* of "impartial" men, in the sense of men having no contracts for the *vaida*, could be found; and so I suppose the Association would not insist upon that special qualification. And as a matter of fact when we look into what has been done it is clear that the Sub-Committee has comprised men who had *vaida* contracts. If, as the plaintiff now contends, it should have consisted of at least ten or eleven members, it is obvious that it might frequently have been impossible to find so many or anything like so many out of a body of, say, forty or fifty, all rice dealers who had no forward contracts. So that while no doubt, under the general language I have already quoted from Rule 46, all these proceedings are declared to partake of the nature of arbitration proceedings, the only proceedings which might be thought to bear a close analogy to, and be governed by the principles applicable to what the law understands by arbitration, are those which would be called for when a dispute had arisen after the fixing of the *vaida* rate, between members of the Association upon other points of settlement. And it is only when a member has failed to have recourse to those proceedings [31] before coming into Court that the preliminary objection could properly be taken, and then, it appears to me, only in a particular way, by motion to stay the suit till the agreement to submit to arbitration had been fulfilled.

That is of course an entirely different thing from the contention I now have to examine, that the plaintiff is bound by the *vaida* rate fixed

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on the 30th November 1906. For rightly or wrongly that was fixed. If the plaintiff be held to have agreed to submit that question to arbitration, *nolens volens* he has submitted it to arbitration. He says he did not want to; that he was dissatisfied with the arbitrators, and still more dissatisfied with their award; but at any rate the award was made. The resultant question is the common question whether or not the plaintiff is entitled to have that award set aside as far as he is concerned on the grounds of misconduct, partiality, and so forth. And as to that of course there can be no preliminary bar at all. So that we must keep it distinct from the former question, which is of a preliminary kind, and if answered in the defendant's favour, would result in the suit being stayed, and the parties remitted to the contemplated arbitration.

Now though by analogy, and really too in the last analysis, this fixing of the *vaida* rate was an act of arbitration (for what else could it be?), looking to the scope and character of all the rules together it can hardly be treated from the same legal standpoint as quite normal arbitrations. The first principles of ordinary arbitration require that the parties should be heard before the arbitrators, and that the arbitrators should be impartial (I speak now quite generally). But under Rule 30 it is plain that no hearing was contemplated or ever in fact took place since the founding of the Association. Nor, as I have already pointed out, is it likely that in view of the restricted field from which the arbitrating body had to be chosen, impartiality in the strict sense was made, or was ever intended to be made, an indispensable qualification. In the history of the Association there can be no doubt that before the 30th November 1906 many members who had *vaida* contracts sat on the Sub-Committee appointed to fix the *vaida* rate. And it would appear [32] from the tenor of the plaintiff's concluding arguments that he does admit that under the terms of his contract he would have been bound by a rate fixed in accordance with the rules. Practically no doubt he would, though for the sake of consistency I must again point out that any contract, not only to refer to arbitration, but to accept the award as absolutely final, goes beyond the true principle. That is to say, even if the rate had been fixed strictly according to the rules, I doubt whether any member who was dissatisfied might not come to Court and try to get the rate set aside on such grounds as fraud or misconduct. I say the practical result would be much the same as though no such course were open to him, because, if all the rules had been followed it is hard to believe that any Court would interfere in favour of a dissatisfied member. But I do not doubt at all that the Court would have the power to do so for sufficient reason.

And in this connection I may take up an argument which properly belongs to the consideration of the preliminary objection, namely, that even if the rules are rightly construed to mean that it is only for the settlement of other disputes, not for the settlement of disputes about the actual fixing of the *vaida* rate, that a scheme of arbitrators was framed, still where in fixing the rate under rule 30 there has been such a wide departure from what the rules enjoined as to make the whole of that proceeding invalid, a dissatisfied member would be absolved by that initial illegality from all further duty of obedience to the rest of the rules. If, however, I am right in keeping these two matters separate, I do not think that it would necessarily follow that a member of the Association who was dissatisfied with the manner in which the rate was fixed would necessarily be at liberty to ignore all other provisions in the Rules, sending him



before other bodies of the Association for redress, and come at once into Court. The fixing of this *vaida* rate is a matter in which presumably all or a majority of the Association would always be interested, and in respect of which there would be a recurring dispute (potential at any rate) between those to whose interest it was to have a high, and those to whose interest it was to have a low, rate fixed. And therefore the absoluteness with which the rule lays down the procedure, as well as the [83] manner in which it compels obedience in the immediate results of the procedure, seems to me to indicate that when the Association framed their rules, they intentionally put the fixing of the *vaida* rate on a different footing from ordinary accidental personal disputes and did not contemplate any exception being taken to it. That view, however, I must admit is weakened by what has happened in the present case, for after the plaintiff's party had seceded and sent in lawyer's letters, it appears that the Association did reconsider the question and (in the absence of the plaintiff who refused to attend) reaffirmed the *vaida* rate.

But the really important question which arises as soon as we have more or less successfully cleared the way to it through the intricacies of these Rules, seems to be whether in the particular instance any member of the Association is bound by the *vaida* rate fixed on the 30th November 1906? The plaintiff says no, for the following among other reasons:—

1. That the whole proceeding went on in violation of the rules.
2. That one at least of those who served on the Sub-Committee to fix this *vaida* rate was not a member of the Sub-Committee at all.

I admit, says the plaintiff, that I was bound to accept the rate fixed for the *vaida*, in accordance with the rules but I was not bound because I never contracted to accept a rate which was fixed, not according to the rules, but in a manner which certainly I had never contemplated, and did not assent to. And it was added that what happened at the meeting when looked at in the light of this contention was immaterial, the point being not whether protests were or were not made, but the fact that the rules did not authorize what was done.

There is however a way of looking at this question which would, or at least might, make the plaintiff's conduct at the meeting material. For, if although owing to differences of opinion the original intention of appointing a committee of twelve in accordance with the rules could not be carried out, yet the plaintiff and all others present did consent to a substitution of another [34] tribunal for the tribunal provided by the rules, then to that extent it might be reasonably contended that they made Ransi Devraj, Amarchand and Morarji their arbitrators for the purpose of fixing the rate, and would in consequence be bound by the award given, unless it could be shown that it was procured in such a way that a Court of Justice would set it aside for that or some other sufficient reason inhering in the composition or conduct of the arbitrating body.

Now let me look a little more closely in the materials upon which the rival contentions are based. When the Association was founded, or at any rate when the rules were drawn up, in March 1902, rule 2 appointed the Sub-Committee. It consisted of four *ex officio* and eight appointed members. The rule does not say that the Committee shall consist of twelve persons. It merely names twelve persons, and constitutes them to be the first Sub-Committee. But it does appear to mean that four at least (the *ex officio* members) shall *always* be members of the Sub-Committee, and the implication of course is that the total number would

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exceed four. On the other hand, I do not find anything to lend colour to the contention that twelve was the minimum number or that there was (unless we take the four *ex officio* members to be an irreducible minimum) any minimum number. And looking to the course of business in the Association and what we know has been done and passed unquestioned, I doubt whether there is as much force as the plaintiff thinks in his argument that the Sub-Committee of November 30th was incompetent because it consisted of only three members. All sorts of business is entrusted to this Sub-Committee, which is no doubt a standing Sub-Committee. And rule 30 certainly says, this Sub-Committee shall fix the *vaida* rate. But I am not prepared to go the length of saying that that means necessarily the whole of this Sub-Committee. We must remember that the rules are very loosely, often very badly, worded. They appear to have been drafted by the Rice Merchants themselves without legal assistance. And I look upon them as intended to give a general, rather than an absolutely and rigidly accurate description, of the manner in which the internal business of this Association was to be conducted and [35] its disputes were to be composed. Some elasticity of construction ought I think to be permitted. And it is shown that on one previous occasion at any rate the *vaida* rate was fixed by four members only. No exception appears to have been taken by anyone to that departure from the ordinary procedure. The ordinary procedure, I may add, appears to have been to nominate some twenty members or so and then to select twelve from them at the meeting called to fix the *vaida*. Now that again shows how difficult it is to keep to any literal interpretation of the rules. For as far as this record goes, unless I am mistaken, the Court has not been told that the number of the Sub-Committee was so much enlarged as to make the naming of twenty persons, all members of it, possible. And yet naming others who were not members of the Sub-Committee as eligible for selection to fix the *vaida* seems to imply that the literal application of Rule 30 had ceased to be insisted on. If in that important particular, a particular be it noted on which the plaintiff much relies when he objects to the inclusion of Morarji in this Sub-Committee, then why not in other particulars which are not even prescribed *totidem verbis* by the rules, such as the minimum number, and so forth.

However that may be, the material facts are that the Association, as all such Associations naturally would, includes buyers and sellers, or as we may call them for convenience Bulls and Bears. The Bulls want a high rate fixed; the Bears want a low rate fixed. And underlying all this is of course a suspicion, to put it no higher, that a considerable number at any rate of these so-called *vaida* contracts are purely speculative, even gambling. The Bulls mean to force a high rate and so profit by the differences; in the same way the Bears want to force a low rate and in their turn make their profit out of differences. In such contracts it may very well be doubted whether the parties have in contemplation anything more than the differences upon their speculative dealings which will be determined by the *vaida* rate. Plaintiff was a Bull and the defendant was a Bear for this *vaida*. A few days before due date, plaintiff seems to have got wind, or suspected an intention on the part of the Bears to force an unfairly low rate on the Association. Theore- [36] tically of course the due date rate should correspond with the actual market rate. Rule 30 provides that the mere fact that it does not exactly correspond with the market rate, is not to be a ground of objection. But



it clearly means no more than that the Sub-Committee is not infallible, and indicates that the object in view is to fix a fair market rate of the day. It appears from the accounts which the plaintiff and his witness give of the meeting that the Bears were in the majority. And there were rumours flying about a day or two previous that an unfairly low rate would be fixed. On the 24th a preliminary meeting had been summoned at which twenty names had been put forward, and according to the summons the meeting of the 30th was to select from them twelve to form the Sub-Committee to fix the *vaida*. Alarmed at what was going forward the Bulls went to their Solicitors and got letters written to the Association protesting against any unfairly low rate being fixed. These letters were read at the meeting of the 30th and gave rise to all the trouble which has followed. Instead of proceeding at once to business and choosing twelve men to serve on the Sub-Committee, Morarji appears to have asked the plaintiff (when I say the plaintiff I mean of course his representative) what his objection stated in the letters really was. To this the plaintiff and his friends replied by nominating on behalf of their party, five men, including Morarji himself. Then one of these was rejected, and Morarji said that if they took up that attitude for the Bulls it would be necessary to nominate four men from among the Bears. Then a member, Karamsi, rose and said that at this rate they would never get to business, and he would name three men who would command the full confidence of all to fix the rate. He accordingly named Amarchand, the President of the Association, and one of the plaintiff's own men, Morarji, whom the plaintiff had himself first named, and Ransi Devraj who is a defendant. This was seconded by Bhara and according to the defendant and the minutes was carried by a show of hands *nemine dissente*. Bhimsey Bhanji and Fateh Mahomed, who were all Bulls, swear that so far from this proposition being carried unanimously they vehemently protested, but no attention was paid to them.

[37] Now suppose, for the sake of argument, that the defendant's version is true, what would be the position? Surely an informal, but not the less quite a reasonable, submission to arbitration on lines somewhat analogous to, although no doubt different from, the ordinary lines laid down by the rules. If knowing, as they all then did, that Ransi Devraj was a Bear, and even supposing that they had lurking doubts about Morarji, yet as far as I can see having no more reason then than now to know that he was against them, while they were quite sure that the most influential man of the three (Amarchand) was on their side, they did accept these three men to fix the rate, taking their chance of one certainty *plus* one doubtful factor, against one adverse certainty, how could it be said that they did not submit the question to the decision of these three men, or that when they found that that decision was unfavorable they could repudiate it for that and that reason alone? Bhimsey, who is a very bad witness I may remark, says that he did not object to the men but to the proceeding. Immediately after he makes it plain that he did object to the men. But what seems to me more important is that he waited to see what rate they would fix. He was still taking his chance. So, though Bhimsey Bhanji and Fateh Mahomed say they protested against the constitution of the Sub-Committee it appears that they both waited for the announcement of the rate. I should have said perhaps that although Morarji evidently took the names mentioned by Bhimsey Bhanji to be those of Bulls, the witnesses themselves say that they only wanted impartial men, neither

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Bulls nor Bears, and that the names they gave, were those of men who to the best of their belief had no contracts for that *vaida*. Fateh Mahomed says that he went to tea after lodging his protest through Dhanji and Bhimsey, but it is clear that he wanted to hear the rate, because he says he accompanied the other two, when the meeting broke up, to their solicitors to lodge another protest.

Now the defendant contends that Rule 46 is wide enough to give the Association power to deal in a difficulty like this, with the emergent question of setting the rate and to authorise the [38] settlement to be made in a way which is not apparently the ordinary way or the way in which the Rules meant that it should be fixed. I do not attach much importance to that. I apprehend, though I confess that I construe these verbose and intricate rules with a good deal of diffidence, that the intention was where necessary to call a special meeting of the Association for any special emergency. No emergency was in contemplation when the meeting of the 30th November was summoned. It had been preceded by the meeting of the 24th and there was no reason to foresee any hitch or need to depart from the recognized procedure. The meeting of the 30th was a large meeting and a fairly representative meeting. That cannot be denied. But it was not summoned as a special general meeting to deal with a particular difficulty, nor when the difficulty did arise was any attempt made to meet it in that way. Unless indeed it can be argued that putting a proposition before the meeting and getting it carried in supersession of the ordinary rule went so far, I doubt it. I doubt whether if the plaintiff's party really protested, as they swear they did, and went on protesting, it could be held in any Court of law that merely by reason of their formal contract term to accept a rate fixed in accordance with the rules, any one of them upon the premises so far assumed would be bound to accept this rate. If I am so far right, it will be seen that the sustainability of this objection may really turn very largely upon what plaintiff considered relatively immaterial, namely, whether in fact he did object and persist in his objection when the departure from the rules was made. Upon this point there is a great conflict of evidence: man for man the defendant's witnesses are immeasurably better than the plaintiff's. But no Judge of experience cares to be too much influenced by demeanour and demeanour alone. The cool and hardy liar often makes an infinitely better witness to all outward appearance than the nervous, excitable, irritable man who is easily drawn by counsel, and while really speaking the truth or more of it than the other, makes a very poor show in the witness box; so that I will not press too hardly on the witnesses for the plaintiff merely because they impressed me most unfavourably. And if it were merely a question of weighing the evidence given by the witnesses themselves on both sides, I should not hesitate to accept the story of the witnesses for the defence. But before doing that, I cannot shut my eyes to other considerations affecting the probabilities of these rival versions of what took place at the meeting. Considering that the plaintiff had protested in advance, that he admittedly opened the discussion, by insisting upon having impartial men or at least men whom he declared or thought to be impartial on the Committee, considering further that when this proposal fell through, one at least of the three men named was a known seller on a large scale and that immediately after the rate was published the plaintiff went straight off to his solicitors to protest again, and that his party published in the papers a contradiction of the authorised version of



the meeting to which the Association had at once given publicity, I must allow that there is, as plaintiff alleges, a considerable antecedent improbability that he would have assented unconditionally to the nomination and appointment of the three men to fix the rate. The point is how far that antecedent probability ought to be allowed to outweigh the positive and, as far as I can see the strong and good evidence of defendant's witnesses supported by the minute book of the proceedings? It is after all a qualified probability to this extent, that while no doubt it is most unlikely that the plaintiff and his friends were really pleased with what was being done, it by no means follows that they were so dissatisfied as to carry their early protests to the length of setting the authority of the Association openly at defiance and refusing to accept a majority vote.

Some light too is thrown upon the conflicting accounts of what really did take place at the meeting by the subsequent correspondence. Exhibit Q is the letter which the plaintiff's solicitors were instructed to write immediately after the meeting while every fact was fresh in the minds of the persons instructing them. Then too, if ever, the plaintiff's party must have been smarting under a sense of their recent injuries and defeat. If everything had been carried in a high-handed way, as the plaintiff now alleges, surely they would have made that an additional ground of protest. But do they? Not at all. Their objection is restricted to the disqualification they urge against two of the [40] members. It turns upon their allegation that both Ransi Devraj and Morarji were interested, as sellers for that *vaida* and they deliberately pin it down to the words of Rule 35. It might be replied that the Court would be hasty in assuming that the solicitor's letter necessarily contains everything that has been poured into his ears by two or three indignant clients. My own short experience on this side of the Court has shown me that as a rule attorneys do not err on the side of brevity or conciseness. But I will not lay too much stress on that. I will allow that a wise attorney might exercise his own discrimination in selecting from too abundant materials those which he thought would best serve the interests and the purpose of his clients. And therefore it is of course possible that the plaintiff's solicitors thought that the strongest feature in his case was what appeared to them to be the infraction of Rules 30 and 35; while the supplementary points arising out of the conduct of the meeting and the manner in which the Sub-Committee was appointed were deemed to be comparatively unimportant and negligible. But it is a little strange in view of Bhimsey's statement that it was the procedure and not the men he objected to, to find that he there and then goes off to his legal advisers and instructs them to complain of the men and not of the procedure. Nor does this letter stand alone. On the 10th December after the aggrieved parties had had ample time to deliberate and arrange their complaints, they again instruct their solicitors to write to the Association. The letter is Exhibit S. And here again we find no specific complaint of procedure though the letter certainly does seem to be to contain instructions that the instructing persons were not satisfied with it. But there is something in it which is more important, lending colour as it does to the conjecture I have hinted at, that while the plaintiff's party opposed nomination of the three men who were appointed by a majority to fix the rate, they did not carry their opposition further than the initial stage. One at least of the dissentient members appears to have instructed the solicitors to say that finding further opposition hopeless he allowed the majority to have their way. Now that is precisely what I should have

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thought from the fact that Bhimsey Bhanji and Fateh Mahomed [41] all waited for the announcement of the rate, most probably did happen in the case of all of them. When they found that their own idea of getting a composite committee containing four at least of their own nominees appointed impracticable, and the sense of the meeting so plainly against them, it is natural that they should have acquiesced, sullenly perhaps, but still acquiesced in the motion put by Karamsi. For that at any rate gave them on the whole much better chances than, according to their views, they were likely to have if the committee had consisted of any twelve men picked up from that meeting. Observe that they say there were only three or four Bulls present. In such a committee their nominees would have been outnumbered, and owing to the undisguised manner and motives of election, they could have expected but little consideration from their opponents. Whereas in this select committee of three they had a very reasonable prospect of securing a majority. It is therefore less improbable than at first sight it appeared, that the plaintiff should have acquiesced in the appointment of Amarchand, Morarji and Ransi Devraj to fix the rate and if the plaintiff did so consent, although only tacitly, I think it would be difficult to say that he was not bound by the award, unless he could get it set aside on any of the grounds upon which awards, otherwise lawful and regular in inception, may be set aside.

Thus far of the probabilities. Now I turn to the evidence. As I have already said I regard that of the defendants as much better and more trustworthy than that of the plaintiffs. And not only this, but we have the minutes of the meeting, and these minutes positively corroborate the defendants. A great deal has been made, and very naturally made in argument out of the interlineation. This interlineation consists of precisely the passage which according to the plaintiff the defendant would have inserted had he had in mind a planned scheme to defeat the plaintiffs' present case. It says that after the nomination of the three as a special committee, full liberty was accorded to every member to speak and urge objections, but "every member present at the meeting very willingly agreed to accept whatever rate the said three persons would unanimously fix." Without the [42] interlineation the minutes would have gone on "therefore as no body opposed the proposition the above-named three gentlemen met for nearly half an hour, etc." And it appears to me that really that passage was quite enough to serve the purposes of the defendants. It formed an undisputed part of the minutes, and it states the cardinal fact that there was no opposition. Whether anything is really gained by the amplification contained in the interlineation, may be doubted. But even supposing it was an after-thought it was a speedy after-thought. For it is certain that the words were put in the press communique which must have been sent off that evening. The evidence, leaving mere guess work aside for a moment, is that the words which now appear as an interlineation were in the Secretary's rough notes. And it certainly seems that they must have been, or they could hardly have got into the papers the next morning. The evidence is that when the minute book was written up from the rough notes, these words were omitted, and when the book was submitted to Ransi Devraj, and compared with the rough notes, he noticed the omission and ordered the Secretary to write the missing passage in. It is contended for the plaintiff that this is, on the face of it, improbable, since the minute book as originally written runs on grammatically and consistently. But surely



that might account for the omission. If there had been a break in construction, the copyist must have noticed it at once. But where, if the whole interlineation be omitted the sense remains substantially the same and there is nothing wrong with the construction, it might well be that the words had been left out through a *bona fide* mistake. Another point taken by the plaintiff is that the rough notes are lost. But I think nothing of that. Rather I should have thought it singular had they been preserved. When a Secretary takes down rough notes of what occurs at a meeting and afterwards writes them into the permanent minute book I believe that it is commoner for him to throw away or destroy the rough notes than to keep them. This interlineation is initialled by Amarchand the President, showing that he accepted its correctness and he is, if not actually a plaintiff himself, one of the plaintiff's men. At the subsequent meeting [43] of the 29th December these minutes were put to the meeting in the usual way and carried and signed by the President (see Exhibit 22). Thus the official record which I see no reason to doubt bears out the testimony of Ransi Devraj and Morarji. And upon a careful consideration of all these materials I must hold that the plaintiff did consent to the appointment of Ransi Devraj, Morarji and Amarchand to fix the rate.

Doubtless a further question might arise on that whether doing so was within the scope of his authority as an agent, so as to bind the real plaintiff, who was not present at the time, and that again would lead up to a consideration of the very difficult question how far in mercantile dealings of this general and more or less stereotyped character an agent has authority to bind his principal to submit to arbitration. For it might be said that while the plaintiff does not contest the authority of his agent Ravji Narsang to sign the contract form and so to bind him to abide by all its conditions, that authority does not go the length of making him the plaintiff's representative for selecting a wholly new body of arbitrators not contemplated by the Rules. And this in turn raises another question, namely whether assuming that the rate fixed was binding upon all who were present at the meeting, and must therefore constructively at any rate be taken to have assented to the constitution of a new tribunal of arbitration, it would have the like effect upon other members who were not present. To answer that, which is really the practical question raised, it is necessary to consider I think not only from the strictly theoretical legal, but from practical mercantile side, what commonly happens in the conduct of such affairs. Where a body like the Rice Merchants Association meet to select a Committee and then empower that Committee to fix a rate, I suppose that the procedure is very much like that of any other club or lay Association. Probably it was the intention of all to abide by the rules, assuming for a moment that the rules made a particular procedure imperative. But when it was found that owing to unexpected obstruction strict adherence to the rules would lead to an *impasse*, the sense of the meeting might override the technical difficulty, and suggest a short cut to the [44] desired solution. Thus a new proposition like that of Karamsi, might be put, and then if the meeting which was essentially a general meeting carried this proposition unanimously, which is what the evidence shows happened on the 30th November, I do not see why a Court should stickle too much over the terms of particular rules. The general meeting is in the last resort the legislature of all such bodies, and the sense of a general meeting ought to be enough, I should think, to warrant a formal departure from the ordinary procedure, I say a

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formal departure, because after all what was carried at this meeting and then done, does not appear to me inconsistent with the spirit of the Rules. Nor was it after all such a very startling innovation. On a previous occasion, as I have said, a very small Sub-Committee fixed the rates. It was not quite so small as this, and I do not think it laboured under the one special defect upon which the plaintiff insists, that all its members were not members of the standing Sub-Committee. But the object of the Association in procedure under Rule 30 is to get a rate fixed to be the standard of differences. And if a general meeting chose to say, "For this *vaida* we are content to take a rate fixed by three of our leading men, I do not think that this really constitutes any great deviation in principle from what Rule 30 intended. A good deal has been made out of the plain advantage that was to be secured by maintaining the members of the Sub-Committee at a high figure, say ten or twelve. But is this really so great an advantage as it is made to appear? If the Committee consisted of ten Bears and only two Bulls, which might well happen, the Bulls would be in a far worse position than if it consisted of one Bull and one Bear, and one doubtful member. For what do we find that the procedure in fixing the rates has ordinarily been? All the members apparently write down what they consider the *vaida* rate should be. It appears that first a rough measure is agreed upon, and all are bound not to vary more than four annas above or below it. Then when all the members have stated the figure each has chosen, an average is struck and that average is accepted as the *vaida* rate. Whether the body consists of three or ten, there is not likely to be much practical difference, unless the [45] whole body be of one mind, when no doubt an unfair rate might easily be announced. Now if we turn again to Rule 46 we find that the Association clearly contemplated cases of difficulty and emergency, and that it provided that in all such cases a general meeting of the Association should be called, and the decision is to bind all persons. Difficulties arising out of the Sub-Committee being unable to do the work are specially contemplated. And though as I have said, there is a difference between calling a general meeting as a last resort to surmount some unforeseen difficulty of that kind, and dealing with it at a general meeting at which it has arisen, the difference is less real than nominal. Of course it might be contended that as soon as it was known that a general meeting was to be convened for the purpose of acting under Rule 46 every member who was interested in the point in dispute would attend and insist upon having a hearing while if that were not known, anything might be rushed through an ordinary general meeting which might prove highly detrimental to absentees. I allow that there is a good deal of force in that. But we have to remember that in this instance there was a subsequent general meeting convened, with the object of allowing the malcontents to be heard. They would not attend, and in the result a general meeting did ratify what had been done at the previous general meeting. And this introduces the principle of ratification upon which the defendant relies. The rule in *In Re London and New York Investment Corporation* (1) and *In Re Portuguese Consolidated Copper Mines Limited* (2), might with little straining be extended to cover the present case. But I am not quite sure that I ought to rest too confidently on those cases. In the first case the Memorandum of Association provided that preference shares

(1) [1895] 2 Ch. 860.

(2) (1890) 45 Ch. D. 16.



might be issued on such terms as the Company should by special resolution determine. Preference shares were issued without any such special resolution. But at meetings subsequently held and attended by all classes of shareholders, resolutions were unanimously passed, adopting the terms under which the preference shares were issued. It [46] was held that the imperfect issue of preference shares was capable of ratification and had been ratified. In the second case the Articles of Association of the Company provided that the shares should be allotted by the directors, and that the first directors should be appointed by the subscribers to the Memorandum of Association. An allotment was made at a meeting which the Courts subsequently held was irregular and the allotments were consequently invalid. Notice of the allotments was sent on the following day to A. B. A. refused to pay the allotment money on his shares, B. paid his to the Bankers under protest, but the evidence failed to prove that either of them revoked his application, or repudiated his shares, on the ground of the allotment being invalid. Later the Company brought an action against A. for the allotment money and recovered judgment. Later another meeting of directors was held at which only two attended and they passed a resolution, that the certificates of the shares allotted should be sealed and issued to the allottees. B. refused to accept the certificate of his shares, but did not distinctly repudiate the allotment. Another meeting of directors was held at which all four in number attended, and the chairman signed the minutes of the last meeting. At a later duly constituted meeting of the directors a resolution was passed formally confirming the allotment of shares made at the previous meeting of the 24th October. A. B. then moved for a rectification of the register by striking out their names. It was held that although the original allotment of shares was invalid, it had been ratified by the Company and was binding on the allottees. It is, I think, plain that there are points which might distinguish that from the present case. The former appears to be more directly in point. But there too there appears to have been no dissent or repudiation by any member of the Company at any time: just as in the latter case the allottees did not repudiate till long after the ratification. Here however we have to reckon with an immediate protest made before (according to the view of the plaintiff) the general meeting of the 29th December had ratified what was done at the meeting of the 30th November. And on the whole I am very doubtful whether if there was any departure from the Rules at the meeting of the 30th what was [47] done as a consequence of that departure could be made binding on any one who protested and refused to accept it before ratification, by a subsequent ratification on the 29th December.

But it is first important to be sure that there was any real violation of the Rule regulating the fixing of the *vaida* rate. That rule says that the Sub-Committee shall fix the rate. It does not say how many of the Sub-Committee, and though surely the natural reading of the rule would give by implication a command that no one who was not on the standing Sub-Committee could be associated with members who were on it, for the purpose of fixing the *vaida*, that conclusion seems to me to be somewhat shaken by the proved fact that some twenty names at least were submitted, from whom the Sub-Committee to fix the rate was to be chosen. Turn now to Rule 31. That provides that any three gentlemen of the above sub-Committee may meet at Association's room, and transact all the business of the Sub-Committee, but that without the sanction of the

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President or the Vice-President and the Secretary, they shall not be able to give any decision, and a decision given without such sanction shall be considered as null and void. Now that rule, while to a certain extent it may be thought to help the defendant as showing that three form a quorum of the Sub-Committee for the purpose of giving provisional decisions, yet on the other hand it favours the plaintiff inasmuch as it seems clearly to confine this kind of authority to members of the Sub-Committee. I do not think that the Rules anywhere provide for the election of new members to the Sub-Committee. And it might therefore be open to the defendants to contend that when business had to be done by the Sub-Committee and the Sub-Committee only, a vote at a general meeting including, for the purposes of doing that business, a member who was not a member of the Sub-Committee was tantamount to appointing him a member of the Sub-Committee for that special purpose. But I doubt whether that would not be going too far in the way of construction. And on the whole I gravely doubt whether looking to the words of Rule 30, and to the fact that Morarji was not a member of the standing Sub-Committee the fixing of the rate at the meeting of the 30th could bind anyone who was not present at that meeting and a consenting party to [48] the appointment of the three arbitrators, and who did protest before the proceedings of the meeting were ratified.

I must observe here that I do not think that there is any force in the objection which the plaintiff took from the first and has chiefly insisted upon ever since, namely, that these Arbitrators were not impartial within the meaning of Rule 35. That Rule, as I have I hope, made plain in the earlier part of this judgment was framed in my opinion to meet altogether different disputes, than such as might be permanent and recurrent over the fixing of the *vaida* rate. I do not read that rule in the sense in which the plaintiff has read it from the first. Nor do I think that the Association ever intended to exclude from the Sub-Committee entrusted with the fixing of the *vaida* rate, every member of the Association who might have contracts for that *vaida*. So that, if as I find, the plaintiffs' representative, whom I have loosely called the plaintiff, was present at this meeting of the 30th and himself took part in the proceedings and acquiesced in the appointment of the three men as arbitrators to fix the rate under Rule 30, I do not think that he could evade liability under the rate fixed for no better reason than that one of the men had contracts on a large scale for that *vaida*. *Ellis v. Horper* (1) seems to me to be a strong authority for this proposition, nor do I think that plaintiff was at all successful in his attempts to distinguish it. Such cases as he cited upon the broad general principle that no man interested may be a Judge seem to me to turn on wholly different considerations. Thus if the plaintiff himself had stood in the shoes of his agent at this meeting I think that he would have been bound by the rate which was then fixed, unless he could have shown that over and above what he now puts forward as the principal ground, namely the disability under which he knew at the time that one of the chosen arbitrators was labouring, there was some fraud or dishonesty against which the Court would on general principles relieve him.

Is the case altered because the plaintiff in person was not at the meetings? I doubt it. It is true that I do doubt very seriously whether as the law stands an agent may bind his [49] principal to

(1) (1858) 3 H. & N. 766.



arbitration. But here the principal admits that he had allowed his agent to bind him to one kind of arbitration, and it would be stretching the legal principle which has already occasioned grave inconveniences in the larger mercantile communities of this country, further than is either necessary or desirable to say that an agent empowered to pledge his principal to one kind of arbitration is not empowered to pledge him to another, which is, in essence, after all, precisely the same. In my opinion the plaintiff is bound by the *vaida* rate which was fixed at the meeting of the 30th November, although I am not prepared to say that that *vaida* rate would bind members who were not at the meeting and protested before the proceedings of that meeting were ratified in the meeting of the 29th December.

So far then as this point goes, namely, whether the plaintiff is bound by the rate fixed nothing remains to be considered but this, whether being first bound to the submission and consequent award fixing the rate, he is freed from that obligation by any misconduct or fraud or disability, on the part of or in, any of the persons conducting the arbitration. And to that I must give a short answer in the negative. As to the mere fact that one at least of these three was himself interested in contracts for that *vaida*, I have said enough to show, that in my opinion and having regard to the constitution of the Rice Merchants Association, and the usual course of business here, the fact alone would not be and had never been thought to be a disqualification. And as to what was done by the specially appointed Committee, I do not find any trace anywhere of so markedly an improper bias, or partiality or misconduct, as would justify a Court in setting aside their award. True no parties were heard before them; but then, for this particular business, no parties ever are, and that must be taken to be a known and implied condition of the submission. We know exactly what did happen at this meeting. We know that Ransi Devraj suggested the lowest rate; that was to be expected and if we look at the records of other meetings of this Sub-Committee we shall find that while some members suggest a high, others suggest a low rate. But the entire difference in [50] this meeting between the highest and the lowest rate suggested was inconsiderable. A mere matter of two annas and a half. Bearing in mind that Amarchand was quite as interested in getting a high rate fixed, as Ransi Devraj was in getting a low rate fixed, while apparently Morarji was impartial. I would not say that Ransi Devraj's suggestion to fix the rate 8-10-0 indicates any dishonest bias or partiality. It is much more important to note that Amarchand himself who is the plaintiff's man did not put the rate higher than 8-12-6, while Morarji thought it ought to be 8-11-0. I am not therefore able to accede to the plaintiff's contention that the award of this body ought now to be set aside as having been improperly procured or infected with fraud or partiality.

Before dealing with the last material question, what was the true market rate for the big mill Rangoon rice on the 30th November 1906 I must say a few words about one or two incidental points. The plaintiff sues on a contract. He alleges therefore a breach on the part of the defendant. The defendant in his turn sues on the same contract by way of counterclaim; and it is contended that he cannot prefer any such claim because he does not even allege that there was any breach on the part of the plaintiff. The ordinary law on this subject is contained in section 93 of the Indian Contract Act. "In the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for

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delivery." Primarily, then, the initiative rests with the buyer, and if the buyer makes no demand in the absence of a special promise, no obligation lies on the seller to tender. But in this case the contract in suit was made subject to all the Rules of the Association, and condition 4 on the back of the contract, (which is a compendious reproduction of Rule 17 of the Association), runs as follows: "Excepting the *kabalas* made, in the name of an incoming steamer, in connexion with other *vaida* *kabalas*, during the *vaida* period, whenever before the last five days of the *vaida*; the party selling may give to the party purchasing the delivery order in respect of the *vaida* goods in accordance with the aforesaid rules, the party purchasing is bound to take the same, then, and [51] thereafter he is bound to take the goods appertaining to such order in accordance with these rules. The party selling is bound to send to the party purchasing the delivery order five days before the last day of the *vaida* period." I confess that the first part of that rule does not convey a very clear meaning to my mind. But the upshot of it all seems to be that the seller must send a delivery order to the buyer five clear days before due date. I now turn to Rule 17. It provides in plain English that a seller may send a delivery order any time within the *vaida* period five clear days before the due date. Then "the purchaser shall have to take that delivery order and the goods mentioned therein in pursuance of these Rules. The vendor shall have to send to the purchaser the delivery order at least five clear days before the last day of the period mentioned in the contract—a purchaser will not be considered bound to accept any delivery order that is received after that time, but both the parties shall be bound to receive and pay the profit and loss according to the difference between the rate fixed or settled on the due date, and the rate mentioned in the *kabala* and the receipt and payment in respect thereof shall be made immediately after the due date." This again is by no means as explicit as might be wished. But it seems to me to mean, that if a delivery order is sent five clear days or more before the *vaida*, the purchaser must accept the goods; if it is not, then the parties are to settle on the differences only, measured according to the *vaida* rate fixed for due date and the same meaning appears to me to be deducible from the language of Rule 30.

That Rule has two possible applications. First, it may be contended that a member of the Association is bound by the rate fixed under it to this extent, that in any difference which may arise over non-fulfilment of a *vaida* contract, that rate is to be taken as the measure of the differences. Second, it may be contended that the latter part of the rule goes further and really provides that where a *vaida* contract has been made, the parties to it, whether either or both are guilty of breach, are in the same position with regard to the settlement, that is to say, that the party guilty of, as well as the party innocent of, the breach may equally claim profits on the *vaida* rate. And [52] that means of course that all parties so agreeing to be bound by that rule, are contemplating gambling contracts. Because the law would certainly not consider the claim of any party for damages calculated on such a basis if he himself were the party who had committed the breach. No doubt what the framers of that rule might have had in view, is that by implication no party, benefiting by the *vaida* rate, would have committed a breach, and therefore it is merely a short way of avoiding intermediate steps; or possibly it might be more correct to say that the framers of the rule did not contemplate any party who, if he had



literally fulfilled his contract would have made a profit, wilfully committing a breach of it. And so it was broadly laid down, that whether the contract was fulfilled or not, and irrespective of all enquiry as to whose fault it was that it was not carried out, it would be enough to produce the *kabala*, compare the rate with the *vaida* rate fixed on the due date and then make the contracting parties settle differences accordingly. It does not necessarily follow that if that is a correct interpretation of the intention of the framers of this Rule, it was meant to regulate gambling contracts only. Many perfectly *bona fide* contracts which, with the best intention in the world to fulfil them, one of the parties had been unable to do so, although if he had, he would have made a profit, would likewise fall to be included in it. However that may be, it certainly does seem to me that while a person might be bound by the *vaida* rate, that is to say, has to take that as the measure of his damages, when he came into Court to claim them, he might very well contend that he certainly was not bound by the rest of the rule which ignores a fundamental legal principle that only the party who is innocent of the breach can claim damages. It is also I think clear that under these rules the seller has to send a delivery order five clear days before due date. Admittedly the defendant did not do so. The plaintiff called upon him for a delivery order; but the defendant contends, setting the rules aside as far as I understand him, that that was not a demand for fulfilment, it was not a demand for delivery but merely for a delivery order, and as he was always ready and willing to deliver the breach was due to the plaintiff. I may observe in this connexion that Rule 17 [53] cannot be meant to be always strictly enforced. For we have it in evidence that these *vaida* contracts are not infrequently made within less than five days of the due date. In such cases it is obvious that the condition prescribed by Rule 17 becomes impossible of fulfilment. Still, where contracts are made under the Rules, in time for the seller to comply with them, I think it is enough, if he fails to do so, to give the buyer a cause of action for breach. To this extent, the plaintiff is, in my opinion, right.

What the defendant's position is, in respect of his counter-claim, is not so easy to determine. Except upon the hypothesis that it was never the intention of either party to do more than pay and receive differences, it is difficult to understand how a man who admits that he did not send the delivery order which he was bound to send as a condition precedent to the completion of the contract can claim any damages because it was not completed. I have very little doubt in my own mind that this and a good many other *vaida* contracts made and settled under the rules of the Association are purely gambling contracts. The parties have no intention of buying or selling anything, and in such circumstances it is natural that they should consider themselves under mutual obligations, when the *vaida* rate is declared to pay or lose on the figure at which they had respectively elected to sell or buy. But I do not see how a Court of law could be asked to enforce any such understanding even though the contract may be made under the Rules of the Association, and those Rules may contemplate that peculiar kind of dealing. On that point too, I think, the plaintiff is right.

I will now give my decision upon the question of fact, what was the market rate on the 30th November 1906? [His Lordship then examined the evidence given as to market rate on the 30th November 1906 and concluded—]

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Still taking the evidence as a whole, and allowing that it is far from good evidence, the Court must do the best it can with it. And after carefully considering it, testing it by the ordinary tests, and looking at it too in the light of surrounding circumstances, and general probabilities, I must conclude that the *vaida* rate of 8-11-0 fixed at the Association Meeting of the 30th November fairly represents the market rate of that day. [54] On that finding, apart from the former finding that he is bound by the rate fixed on the 30th November, the plaintiff would again fail on the merits.

But I must add that I do not see my way to allowing the defendant's counter-claim. I have already given my reasons and need add nothing to them.

It was urged on behalf of the plaintiff that because this suit occupied many days in trial, and because the judgment took two hours to read, it must have been a proper suit to bring in the High Court. I do not see any force in that argument. The case was deplorably protracted, but not on the only points upon which it could properly be said that there was any reason at all to withdraw it from the ordinary tribunal. Almost all the time was spent upon two points, the alleged partnership of Khoorpal Dungey with the plaintiff, and proving what the true market rate was. Certainly there was also a good deal of evidence about what occurred at the meeting of the 30th. But that evidence, confined to that point only might as well have been sifted in the Small Cause Court. I am most strongly opposed on principle to encouraging parties who might have their differences settled cheaply and expeditiously in the Small Cause Court to come into this Court. After giving this matter long and careful consideration I have come to the conclusion, that in all the circumstances of the case, I ought not to give the plaintiff the certificate he wants under section 22 of the Small Cause Court Act.

As to the failure of the defendant on his counter-claim, I should find it hard to say that any appreciable time was spent over that, certainly not enough to give the basis of any fair fractional calculation. I must, therefore, dismiss the suit, and refusing the certificate under section 22 direct that the plaintiff do pay the defendant's attorney and the client costs. Two Counsel certified for.

*Suit dismissed.*

Attorneys for plaintiffs : Messrs. Bhaishankar, Kanga and Girdharlal.

Attorneys for defendants : Messrs. Wadia, Ghandi and Co.



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[55] APPELLATE CIVIL.

Before the Hon'ble Mr. Justice Chandavarkar, Acting Chief Justice, and  
Mr. Justice Heaton.

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BHACHUBHA MAUSANGJI (*Original Defendant*), Appellant, v.  
PATEL VELA DHANJI AND ANOTHER (*Original Plaintiffs*),  
*Respondents.\**

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[7th July, 1909.]

*Talukdars' (Gujarath) Act (Bom. Act VI of 1888), section 31†—Talukdar's estate—  
Talukdari estate—Estate held by a Talukdar on any other tenure.*

The expression Talukdar's estate means only the estate held by a Talukdar on Talukdari tenure and not properly held on any other tenure which is distinguishable from the former.

*Khodabhai v. Chaganlal* (1) followed.

[Ref. 35 Bom. 97].

SECOND appeal from the decision of N. R. Majmundar, First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of G. M. Pandit, Second Class Subordinate Judge of Dhanduka and Gogha.

The two lands in dispute situate at the village of Bhadiyad belonged to the minor defendant's deceased father Mavsangji Samatsangji who had mortgaged them with possession to the plaintiff's deceased father under a registered deed, dated the 15th May 1903. Subsequently Mavsangji died leaving him surviving a son, the minor defendant. Mavsangji being a Talukdar, the Talukdari Settlement Officer, Gujarath, became the guardian of [56] the minor defendant and took charge of his estate. Under the order of the Talukdari Settlement Officer, the Talati of the village in the year 1906 attached the produce and recovered the income of the mortgaged fields which under the mortgage-deed were in the possession of the mortgagee. The mortgagees thereupon brought the present suit against the minor defendant represented by his guardian the Talukdari Settlement Officer for an injunction against the defendant restraining him from taking the produce of the mortgaged property and for the recovery of Rs. 67-13-0 illegally levied by the defendant from the plaintiffs on account of the produce and income of the lands.

The defendant did not admit the mortgage-bond sued on or payment of any consideration therefor, and contended that the deceased Mavsangji was the Talukdar of Bhadiyad and other villages and that the plaintiffs'

\* Second Appeal No. 245 of 1903.

†Section 31 of the Gujarath Talukdars' Act (Bom. Act VI of 1888) is as follows:—

31. (1) No incumbrance on a Talukdar's estate, or on any portion thereof, made by the Talukdar after this Act comes into force, shall be valid as to any time beyond such Talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer, or of some other officer appointed by the Governor in Council in this behalf.

(2) No alienation of a Talukdar's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made by the previous sanction of the Governor in Council. which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the Talukdar.

(1) (1907) 9 Bom. L. R. 1122.



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mortgage transaction was invalid as it was entered into without the sanction of the Talukdari Settlement Officer.

The Subordinate Judge found that the mortgage sued on, though proved, was void for want of sanction under the Talukdars' Act. He, therefore, dismissed the suit.

On appeal by the plaintiffs the appellate Court found that the mortgage in suit was not ineffectual under section 31 of the Talukdari Settlement Act (Bom. Act VI of 1898). It, therefore, reversed the decree and allowed the claim. The reasons were as follows :—

It is contended on behalf of the defendant that the fields mortgaged are a Talukdar's estate within the meaning of section 31 of the Talukdars' Act and that the mortgage is not binding on the defendant as it was not effected with the sanction required by that section. The mortgaged fields Survey Nos 1082 and 1092 are situated in the village of Bhadivad. This village is a Government and not a Talukdari village (exhibit 31); and in the Revenue Records Survey No. 1082 has been described as 'Political Inam' and Survey No. 1092 as Government land (see exhibit 29). I agree therefore with the lower Court that the lands in question are not a 'Talukdari estate'. That Court however seems to have held that the words 'Talukdar's estate' as used in section 31 of the Talukdars' Act means every sort of landed property belonging to a Talukdar; and for this position reliance has been placed on *Parshettam v. Bai. Punji*, 4 Bom. L. R. 817. This case, however, simply decided that the expressions a Talukdari estate and a Talukdar's estate are not synonymous, that the former expression means "an estate of Talukdari tenure;" and that an estate of that [87] tenure, though held by a person other than the Talukdar, is none the less a Talukdari estate. "It does not give the meaning of the term 'Talukdar's estate'." The meaning of that expression is given in the recent case of *Khodabhai v. Chaganlal*, 9 Bom. L. R. 1122. It lays down that the expression 'Talukdar's estate' must be interpreted as meaning an estate held by the Talukdar as a Talukdar. Here one of the mortgage fields has been held by the defendant as an occupant and the other as an Inamdar. They cannot, therefore, be called a Talukdar's estate; and so no sanction was necessary for their mortgage.

The defendant preferred a second appeal.

*Jayakar* with *R. W. Desai* for the appellant (defendant).

*Setalvad* with *L. A. Shah* for the respondents (plaintiff).

CHANDAVARKAR, Ag. C. J.:—The question of law in this case is whether the expressions "Talukdar's estate" and "Talukdari estate" occurring in section 31 of the Talukdars' (Gujarath) Act VI of 1888 include the estate held by Talukdar on any other tenure than Talukdari.

The question is really beset with difficulties of construction, because the language of the section itself, and, in fact, of the Act, are rather obscure upon the point. Very careful arguments have been addressed to us on either side; and if the question were *res integra*, I should have taken time to consider it more carefully. But I think that, in principle, the point arising in the present case is the same as that decided in *Khodabhai v. Chaganlal* (1). There it was held that the expression 'Talukdar's estate' meant only the estate held by a Talukdar on Talukdari tenure, and not property held on any ordinary tenure, which is distinguishable from the former.

That is a decision of a Division Bench of this Court. It was passed two years ago, and, unless I find that it is clearly erroneous, we must follow it. If I could not agree with that decision, the case would have to be referred to a Full Bench. I see no reason to disagree, and I do not think that the circumstances of this case call for any such reference. The Act is obscurely worded and if the decision in *Khodabhai v. Chaganlal* (1)

(1) (1907) 9 Bom. L. R. 1122.



is wrong, the Legislature is at hand to correct that decision and amend the law.

[58] Accordingly the decree must be confirmed with costs.

HEATON, J. :—As a party to the decision in *Khodabhai v. Chaganlal* (1), there are a few words I should like to say. I have heard a very elaborate argument and after hearing and considering it there is not one word in my judgment in the previous case which I should wish to alter. There we came to a decision on the ground that the property under consideration was not property held by a Talukdar as such and therefore was not property which was covered by the provisions of section 31. And that is precisely the reasoning which seems to me right in determining the present case.

It is found as a fact by both the lower Courts that the lands which are now in dispute are not held under a Talukdari tenure, that is to say, they are not held by a Talukdar as such. That being so, it seems to me that they are not lands of a kind on which section 31 is intended to operate.

It is perfectly true that Bombay Act VI of 1888 is a very difficult Act to understand; indeed, speaking for myself, I can say, in some particulars, it is an Act which it is impossible to understand. But giving it the best attention I can, I see no reason whatever for doubting that the decision arrived at two years ago was a correct one.

*Decree confirmed.*

34 B. 59 (=11 Bom. L. R. 1130 =4 I. C. 257).

[59] APPELLATE CIVIL.

*Befors Mr. Justice Chandavarkar and Mr. Justice Heaton.*

SANGIRA MALAPPA BIN AYAPPA (Original Defendant No. 1),  
Appellant, v. RAMAPPA BIN SANGAPPA PATTUR AND ANOTHER  
(Original Plaintiff and Defendant No. 2).\*

[27th August, 1909.]

*Evidence Act (I of 1872), section 92—Written agreement—Sale-deed—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c — Oral agreement cannot be pleaded.*

Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void.

[Ref: 36 Bom. 305; Fol: 35 Bom. 231].

SECOND appeal from the decision of C. E. Palmer, Acting District Judge of Bijapur, reversing the decree passed by V. G. Sane, Subordinate Judge of Bagalkot.

On the 15th December 1886 the plaintiff sold his house to defendant No. 1 by a registered sale-deed. The latter sold it to defendant No. 2 by a registered sale-deed on the 13th October 1903.

The plaintiff filed this suit on the 14th October 1904 to recover possession of the house. He alleged that the sale was in reality a mortgage, for contemporaneously with the written deed of sale there was an

\* Second Appeal No. 593 of 1908.

(1) (1907) 9 Bom. L. R. 1122.



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oral agreement to treat the sale as a mortgage, and to restore the possession of the house on repayment of Rs. 200.

The defendant No. 1 denied the oral agreement

The Subordinate Judge held that the plaintiff could not be allowed to prove the oral agreement set up by him; and he therefore dismissed the

On appeal, the District Judge was not satisfied with the findings of the Subordinate Judge: he therefore remanded the case for determination of the following issues:—

1. Does plaintiff prove any fact which would invalidate the document or entitle him to any decree or order relating thereto?

[60] 2. Is plaintiff entitled to any and what relief?

The Subordinate Judge returned an affirmative finding on the first issue; and on the second he found that the plaintiff was entitled to recover the property on payment of the debt due. His reasons were as follows:—

Mr. Sane, who decided the suit in this Court, relied on the ruling in *Keshavrao v. Raya* (1) and excluded from his consideration the evidence of the circumstances which were supposed to be the existence of an oral agreement contemporaneous with the deed of sale. The case of *Keshavrao v. Raya* (1) was decided in January 1906. It seemed to follow the ruling in *Dattoo v. Ramchandra* (2) decided in 1905 and to ignore the decisions of the Bombay High Court prior to *Dattoo v. Ramchandra* (2). Then followed the case of *Abaji v. Larman* (3) referred to by the District Court in the foregoing order. This case was decided in June 1906. By it, the effect of the ruling in *Dattoo v. Ramchandra* (2) was modified. In July 1906 followed the case of *Navalbai v. Sivubai* (4) and in August 1906 the case of *Krishna Bai v. Rama* (5). By these two last cases the ground lost by the decisions preceding them is greatly re-claimed.

In *Navalbai v. Sivubai*, (4) it is said: "So in this case if the plaintiffs were told that the document, which in form is a sale-deed, would not be enforced as such against them, and on the faith of that representation Hariba executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale deed."

The case of *Krishna Bai v. Rama* (5) pointedly calls attention to this statement of law. The effect, therefore, of the recent rulings would appear to be that evidence of contemporaneous representations or of conduct of parties may be admitted, not for the purposes of proving any oral agreement, contradicting, varying, adding to or subtracting from the terms of the document but for the purpose of proving that the parties understood that the document was not intended to operate at all as a sale-deed though in form it bore that character. Mr. Justice Henton's observations in *Krishna Bai v. Rama*, (5) seem to support this view.

In this view of the law on the subject I find that there are ample materials in this case to hold that the document was not intended to operate as a sale.

The witnesses for plaintiff, Exhibits 58 and 59, state that the sale transaction was only colourable and that the parties understood that the sale-deed in reality represented a mortgage. Even apart from this evidence about the admissibility of which there may be yet some question, I think there are circumstances [61] which show that defendant No. 1 understood that the sale-deed obtained by him was not to operate as a sale deed.

Firstly, there is the circumstance of the house and the land which had been sold only for Rs. 200, being really worth more than that. The house itself has been conveyed by defendant No. 1 to defendant No. 2 for Rs. 200. The land would appear from the rent notes produced capable of yielding rent of Rs. 26 to 40. This means that the land itself is worth Rs. 250 to 350. It is unlikely that property worth Rs. 400 to 500 was intended to be sold for Rs. 200 only.

Then there is the circumstance of the land and the house having continued in possession of the plaintiff ever since the sale-deed of 1886 till about 1902, that is, for 16 years. The khata of the land has been all along allowed to remain in plaintiff's name.

(1) (1906) 8 Bom. L. R. 287.

(2) (1905) 30 Bom. 119.

(3) (1906) 30 Bom. 426.

(4) (1906) 8 Bom. L. R. 761.

(5) (1906) 8 Bom. L. R. 764.



In rural parts of Deccan great importance is attached to the khata, and the omission to obtain a transfer of it from the vendor's to the vendee's name, in the absence of any satisfactory explanation, may be taken to be an indication of the ownership of the land not having been understood to have passed to the apparent vendee.

It is further significant that the assessment receipt books, Exhibits 51 and 52, show that during 1886 to 1891, that is, for 5 years after the deed of sale, the assessment was paid by the plaintiff. The receipt book for the years 1891 to 1897 is not in existence. The plaintiff says he has paid the assessment for those years also. Defendant No. 1 has got accounts. He has produced extracts of them. They do not show that the defendant No. 1 has paid the assessment for those years. It is not also explained by defendant No. 1 why plaintiff paid the assessment for those years, and why defendant No. 1 did not credit to plaintiff in those years the assessment paid by him for defendant's land. The payment of one year, that is, of 1896, is accounted for. It is provided in Exhibit 43 that plaintiff should pay the assessment for that year. But rent-notes Exhibits 37, 41 and 42 which are for the years 1889, 1890 and 1891, do not stipulate that plaintiff should pay the assessment for those years, yet the assessment for the years is paid by plaintiff. This could be only on the assumption that plaintiff was regarding himself as the owner of the land in spite of the deed of sale.

Lastly, the most significant fact is the following. From the extracts of accounts produced by defendant No. 1 it appears that in Exhibit 77 an item of rupee 1 annas 8 and in Exhibit 89 an item of Rs. 5, Re. 1 and of Rs. 21 annas 13 are debited to the plaintiff on account of outlay on improvements or watching of crops. If the plaintiff was only a tenant the outlay of Rs. 21 annas 13 made for removal of weeds from defendant No. 1's land would not in defendant No. 1's account be debited to plaintiff. This furnishes an almost unanswerable argument for holding that defendant No. 1 understood that the sale-deed was not to operate as a sale-deed at all.

All these facts prove that the plaintiff is entitled to an order relating to the sale-deed to the effect that the sale-deed was not understood by the parties to [62] operate as a sale-deed transferring the rights of ownership from the plaintiff to the defendant No. 1.

The District Judge agreed with these conclusions and decreed the suit in plaintiff's favour.

The defendant No. 1 appealed to the High Court.

*V. G. Ajinkya* for the appellant.—The oral agreement contradicting, varying, etc. the written contract cannot be proved: see section 92 of the Indian Evidence Act (I of 1872); *Balkishen Das v. Legge* (1). Here fraud or misrepresentation is neither alleged or proved. The cases relied upon by the lower Court are all cases where one party induces another to enter into a transaction by representations, etc., and who but for such representation, etc., would not have entered into it.

*K. H. Kelkar* for the respondent.—In this case the District Judge has found that there was an agreement to recover the property: and on remand, the Subordinate Judge has found that the sale-deed was not understood by the parties to operate as a sale-deed. These findings must mean that the defendant had represented to the plaintiff that the transaction was not to be enforced and on the faith of such representations or inducement the plaintiff passed the deed in question. See *Pertab Chunder Ghose v. Mohendra Purkait* (2).

CHANDAVARKAR, J:—The learned District Judge has found upon the evidence that there was between the plaintiff and the first defendant an oral agreement, at the time of the formal sale transaction was arranged, to reconvey the property on payment by the latter of Rs. 200; and he has held that the said agreement is a fact which, under the proviso to section 92 of the Indian Evidence Act, entitles the plaintiff to have the sale-deed executed by him in favour of the first defendant set aside and to

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(1) (1899) L. R. 27 I. A. 58.

(2) (1889) L. R. 16 I. A. 233.



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34 B. 59=11  
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recover the property on payment of Rs. 200. In support of this view the learned District Judge has relied on two decisions of this Court: *Keshavro-v. Raya* (1) and *Abaji v. Laxman* (2). These decisions followed *Pertab Chunder Ghose v. Mohendra Purkait* (3). In this last case the facts were that the plaintiff therein had induced his [63] tenants to sign certain *kabulayats* by representing that certain stipulations therein, to which they had objected before signing, would not be enforced. It was held that that "statement of the effect of the law was a misrepresentation." Their Lordships said:—

"Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently. If such a representation had not been made the tenants might have refused to sign the *kabulayat*. Farther, if there is any stipulation in the *kabulayat* which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the *Kabulayat* is not the real agreement between the parties, and the plaintiff cannot sue upon it."

The facts in the present case before us are entirely different. The plaintiff has never alleged either in his pleadings or in his deposition that he was induced to sign the deed of sale executed by him under any misrepresentation. His case throughout has been that by the agreement of both parties the transaction between them was reduced to writing as one of sale of the property to the first defendant with a contemporaneous oral agreement that it should be treated as a mortgage. That was his allegation in the plaint and that is what he and his witnesses, relied upon by both the Courts below, state in their depositions. To this state of facts neither the proviso to section 92 of the Evidence Act nor any of the decisions above cited, applies. There is no element of fraud, or misrepresentation or failure of consideration or the like in them to render the deed of sale invalid. Mr. Kelkar, the learned pleader for the respondent, in supporting the decree of the Court below, has argued that the first defendant's promise to enforce the deed of sale as a mortgage and his refusal now to abide by that promise, amounts to misrepresentation and brings this case within the principle of the Privy Council decision above mentioned. But that is not an accurate way of stating the principle. What their Lordships laid down is that where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to its formal insertion in the written contract, by representing that the stipulation in question would be in reality [64] treated by him as a dead letter, it cannot be enforced, because the party induced had never assented to it, and its inclusion in the written contract was the result of misrepresentation. It was the result of a misstatement of the intention of the party inducing, and such a misstatement is one of fact and an action of deceit may be founded on it: *Edgington v. Fitzmaurice* (4).

In the present case there was no inducement of one party by the other; no want of assent at any time on the part of the plaintiff to the execution of a deed of sale and no misstatement of his intention by the first defendant which led the plaintiff to sign the deed of sale. According to the finding of the District Judge and indeed according to the plaintiff's own pleadings, both parties from the beginning arranged the terms by mutual agreement; there was no misleading of the one by the other; and the intention to treat the deed as a mortgage rather than sale was not

(1) (1906) 8 Bom. L. R. 287.

(2) (1906) 30 Bom. 426.

(3) (1889) L. R. 16 I. A. 233.

(4) (1855) 29 Ch. D. 459.



due to any misstatement by the first defendant. Such a case is governed by the decision of the Privy Council in *Balkishen Das v. Legge* (1).

For these reasons the decree of the District Court must be reversed and that of the Subordinate Judge restored with costs throughout on the respondent (plaintiff).

HEATON, J.:—It is now well understood that a contemporaneous oral agreement to vary the terms of a deed should not be allowed to be proved for the purpose of varying or adding to the terms of a deed; that is, where, as in this case, section 10A of the Dekkhan Agriculturists' Relief Act does not apply. In this case, however, the only circumstance established by way of invalidating the deed, is proof of such an oral agreement. I cannot find from the judgments of the lower Courts that anything else is established. It is not found explicitly, or even, so far as I can see, impliedly, that the sale-deed did not represent the real agreement between the parties. If that had been found then the deed would have been invalidated: see *Navalbai v. Sivubai* (2). What is found is that there was a sale-deed which both parties understood and considered to be a contract between them and [65] that by an oral agreement a subsequent reconveyance was provided for. The District Judge proceeded quite correctly in his order framing issues for trial, and had in mind what it is essential to remember in cases of this kind, viz., that a sale-deed cannot be construed as or converted into a mortgage-deed (that is where section 10A of the Dekkhan Agriculturists' Relief Act does not apply) but that the person who executed the sale-deed may show, if he can, that the sale-deed did not represent the real agreement between the parties; or for some other reason is of no effect. This the plaintiff was allowed an opportunity of doing, but as indicated above it has not been found that he succeeded in doing it. Therefore, I agree that the decree of the first Court must be restored.

*Decree reversed.*

34 B. 65 (=4 I. C. 264=11 Bom. L. R. 1143).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar, and Mr. Justice Heaton.*

DAMODAR NANDRAM AND OTHERS (*Original Defendants*), *Appellants*, v.  
MANUBAI, HUSBAND GOVINDRAO PATIL (*Original Plaintiff*),  
*Respondent*. \*

[24th August, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 2†—Agriculturist—Definition—Interpretation.*

(1) (1899) L. R. 27 I. A. 58.

(2) (1906) 8 Bom. L. R. 761.

\* Second Appeal No. 692 of 1907.

† The Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—

1st.—“Agriculturist” shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend or who ordinarily engages personally in agricultural labour within those limits.

2nd.—In Chapters II, III, IV and VI, and in section 69, the term “agriculturist” where used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

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34 B. 59=11  
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34 B. 65=11  
I. C. 264=11  
Bom. L. R.  
1143.

Section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist", one in clause 1 and the other in clause 2.

[66] The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him.

The second clause, which gives a special definition of the term "agriculturist" for the purposes of Chapters II, III, IV and VI and section 69 of the Act, is not exhaustive but is merely inclusive and is intended for a special purpose.

The decision in *Mahadev Narayan Lokhande v. Vinayak Gangadhar Purandhare* (1) does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the Dekkhan Agriculturists' Relief Act, 1879, if he was not an agriculturist at the time the liability in question was incurred, even though it may be that he was an agriculturist within the meaning of the first clause of section 2 at the time of the suit.

SECOND appeal from the decision of W. Baker, District Judge of Ahmednager, confirming the decree passed by G. B. Laghate, Subordinate Judge of Shevgaon.

Suit to redeem a mortgage.

The mortgage was executed by Anandibai (mother-in-law of plaintiff) to one Kesuram (father of defendants) on the 26th March 1874.

The plaintiff alleging that the mortgagees went into possession of the property in 1875 and that the mortgage-debt was satisfied out of the profits they received, instituted this suit in 1904.

The plaintiff was an agriculturist.

The Court of first instance took an account of the dealings between the parties as provided for by the Dekkhan Agriculturists' Relief Act, 1879, and found that nothing remained due under the mortgage. The plaintiff's claim was therefore decreed.

The lower appellate Court confirmed this decree on appeal.

The defendants appealed to the High Court.

*D. R. Patvardhan*, for the appellants.

*K. H. Kelkar*, for the respondents.

CHANDAVARKAR, J.:—The lower appellate Court has found that the respondent is an agriculturist and on that footing has taken the accounts of the mortgage transactions concerned in this case. But it is contended that the finding as to the status of the respondent is erroneous in law, because the Act applies [67] only to a person who was an agriculturist when the liability in dispute was incurred. Reliance is placed in support of that contention upon the judgment of this Court in the case of *Mahadev Narayan v. Vinayak Gangadhar* (1). That decision applies to a state of facts different from the present and lays down no such proposition as is contended for. Section 2 of the Dekkhan Agriculturists' Relief Act gives two definitions of the term "agriculturist"—one in clause 1 and the other in clause 2. Where a party to a suit is an agriculturist at the time the suit is filed by or against him, the former clause applies. That is the case of the respondent before us. In the decision above cited the facts show that there it was admitted that some of the defendants were not agriculturists at the time of the suit, so that their case did not fall within the purview of the provisions of the first clause of section 2 of the Dekkhan Agriculturists' Relief Act. But they sought to bring their case within the second clause, which gives a special definition of the term agriculturist for the purposes of Chapters II, III, IV and VI and section 69 of the Act. The definition

(1) (1909) 33 Bom. 504 : 11 Bom. L. R. 721.



given in the second clause is not exhaustive, but is merely inclusive, and is intended for a special purpose. The defendants in that case wanted to have the benefit of that special definition. It is with reference to that contention that the learned Judges who were parties to that decision held that the case of those defendants did not fall within the second clause. They never intended to lay down the proposition of law which is now contended for by the learned pleader for the appellant before us that a party to a suit is not entitled to the privileges of an agriculturist under the Act if he was not an agriculturist at the time the liability in question was incurred, even though it may be that he is an agriculturist within the meaning of the first clause of section 2 at the time of the suit.

We confirm the decree with costs.

*Decree confirmed.*

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34 B. 65=11  
I. C. 264=11  
Bom. L. R.  
1143.

34 B. 68 (=4 I. C. 582=11 Bom. L.R. 1281).

[68] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

VINAYAK VAMAN PARANJPE (Original Plaintiff), Appellant, v.  
ANANDA VALAD RAMJI (Original Defendant. Respondent.\*

[14th, September 1909].

*Limitation Act (XV of 1877). Article 179, clause 4—Decree—Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed.*

A decree was passed on the 12th October 1894 and an application to execute it was made by the decree-holder on the 16th August 1897. The process fee not having been paid the application was struck off. The second application to execute the decree was presented on the 16th August 1900 by the assignee of the decree-holder; but as he did not produce the assignment the application was struck off on the 27th October 1900. The third application was presented by a *mukhtyar* of the assignee on the 11th August 1903; but as neither the assignment nor the *mukhtyarnama* was produced it was struck off on the 9th October 1903. The same *mukhtyar* presented a fourth application on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882) and the application was disposed of, the decree-holder agreeing to accept a payment of Rs 45 from the judgment-debtor. On the 11th December 1906, the fifth application to execute the decree was filed. The lower Courts holding that the second and third applications could not be regarded as applications for execution made in accordance with law, dismissed the fifth application as barred by the law of limitation:—

*Held*, that the present application was not barred, for the non-production of the *mukhtyarnama* and the assignment did not prove that they did not exist in fact.

*Abdul Majid v. Muhammad Faizullah* (1), followed

SECOND appeal from the decision of F. J. Varley, District Judge of Ahmednagar, confirming the decree passed by G. B. Laghate, Subordinate Judge of Shevgaon.

Proceedings in execution.

On the 12th October 1894 a decree was passed against the defendant Ohima Ramji for Rs. 200, which was made payable in four yearly instalments of Rs. 50 each.

\* Second Appeal No. 46 of 1909.

(1) (1890), 13 All. 89.



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34 B. 468=4  
I. C. 582=11  
Bom. L. R.  
1281.

[69] The first application to execute this decree was presented by the decree-holder on the 16th August 1897. Process fee not having been paid the *darkhast* was struck off.

The decree was then assigned to the appellant, who applied to execute it on the 16th August 1900. The deed of assignment was not produced; and the application was struck off on the 27th October 1900.

The third application to execute the decree was filed on the 11th August 1903, by a *mukhtyar* of the appellant. This *darkhast* also was struck off as the assignment and the *mukhtyarnama* was not produced.

On the 19th December 1905 the fourth application was presented. Notice was thereupon issued to the judgment-debtor under section 248 of the Civil Procedure Code of 1882. The decree-holder agreed to receive Rs. 45 from the judgment-debtor: and the application was accordingly disposed of.

On the 11th December 1906, the present application to execute the decree was filed.

The Subordinate Judge dismissed the application as barred by the law of limitation. His reasons were expressed as follows:—

We have to see whether there is any *darkhast* presented by the right party, between the second *darkhast* of 16th August 1900 and the present *darkhast* of 11th December 1906. The answer is that there is no *darkhast* presented in accordance with law, in this intervening time.

The *darkhast* of 11th August 1903 was not presented by the right party. Therefore the last preceding *darkhast*, although entertained and ordered to be proceeded with, was barred by limitation counted from the *darkhast* of 1900, in which also the right to apply does not appear to have been proved, the *darkhast* of 1903 being not one in accordance with law. If the last preceding *darkhast* is barred for the above reasons, the *darkhast* under consideration is also barred.

I therefore hold that the present application is barred by limitation under article 179 of the second schedule of the Limitation Act.

On appeal, the District Judge arrived at the same conclusion. The grounds of his decision were expressed as follows:—

The cases quoted by appellant's pleader (*Dattchand Bhudar v. Bai Shivkar* (1), and *Nepal Chandra Sadookhan v. Amrita Lall Salookhan* (2)) [70] presuppose that the Court was moved by an authorised person. It is admitted that no *mukhtyarpatra* was filed in the *darkhast* No. 3, and the previous assignment has not been proved under section 232, Civil Procedure Code. It is contended that it is open to the transferee to prove that he is entitled under his assignment (*Balkishan Das v. Bedmati Kher* (3)) at any stage, but the facts in this case appear to have been materially different. If no *mukhtyarpatra* was filed in *darkhast* No. 483 of 1903, it is impossible to hold that it was an application in accordance with law. Nor has any authority been cited to show that a Court is precluded from giving effect to a defect of this nature at any time, and that it is bound to notice only the *darkhast* before it.

The plaintiff appealed to the High Court.

*P. P. Khare*, for the appellant:—The lower Courts have held that the second and the third applications were not made in accordance with law, simply because the assignment and the *mukhtyarnama* were not produced. In this they were wrong. See *Abdul Majid v. Muhammad Faizullah* (4), and *Abdul Kureem v. Chukhun* (5).

*D. W. Pilgankar*, for the respondent:—The intervening applications Nos. 2 and 3 are not made in accordance with law. The deed of assignment and the *mukhtyarnama* not having been proved, the applications cannot be regarded as having been presented by a proper person.

(1) (1890) 15 Bom. 242.

(2) (1899) 26 Cal. 888.

(3) (1892) 20 Cal. 388.

(4) (1890) 13 All. 89.

(5) (1879) 5 O. L. R. 258.



See *Balkshen Das v. Bedmati Koer* (1), *Hafizuddin Chowdhry v. Abdool Aziz* (2); and *Chattar v. Newal Singh* (3).

The case of *Ablul Majid v. Muhammad Faizullah* (4), does not apply because here the finding of fact is that the assignment and the *mukhtyarnama* were not proved.

CHANDAVARKAR, J.:—The facts material for the purposes of the points of law raised in this second appeal are shortly these. A decree was obtained on the 12th October 1894, by the assignor of the present appellant. On the 16th August 1897 the first *darkhast* for its execution was presented by the decree-holder himself. But as the process fee was not paid, it was struck off. The second *darkhast* was presented on the 16th August 1900 by the present appellant, but it was struck off on the 27th October 1900 on the [71] ground that the assignment, not having been produced, was not proved. On the 11th August 1903, a person calling himself the *mukhtyar* of the assignee presented the third *darkhast*. But as neither the *mukhtyarnama* nor the deed of assignment was produced it was struck off on the 9th October 1903. The fourth *darkhast* was presented by the same *mukhtyar* on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code then in force. He not having appeared, the *darkhast* was disposed of.

Both the Courts below have held that the present *darkhast* is barred by the law of limitation, because the second and the third *darkhasts* cannot be regarded as applications for execution made in accordance with law. We cannot agree with that view. These two *darkhasts* were disallowed, not because the persons who made those applications were not competent to make them, but merely because they did not produce evidence to satisfy the Court that there was an assignment and that there was a *mukhtyarnama*. But from the non-production of these it does not follow that the assignment and the *mukhtyarnama* did not exist in fact then. It has been held in *Abdul Majid v. Muhammad Faizullah* (4), under similar circumstances, that the application of a party for the execution of a decree is a step-in-aid of it, though he fails to produce evidence to show that he had a right to execution. See also *Ablul Kureem v. Chulhun* (5). Neither of the lower Courts has found in the present case whether the assignee was in fact an assignee, at the date of his application and was competent to make it, nor was it decided whether the *mukhtyar* of the assignee was *mukhtyar* in fact on the 11th of August 1903 when the third *darkhast* was presented.

We, therefore, reverse the decree of the Court below and send back the *darkhast* to be dealt with according to law with reference to the observations herein. Costs to abide the result.

*Decree reversed.*

(1) (1892) 20 Cal 328.  
(2) (1893) 20 Cal. 755.  
(3) (1889) 12 All. 64.

(4) (1890) 13 All. 89.  
(5) (1879) 5 C. L. R. 253.



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## [72] ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*RAGHUNATHJI TARACHAND, A FIRM (Appellant and Defendants). v.  
THE BANK OF BOMBAY (Respondents and Plaintiffs)\*

[22nd January, 1909].

*Hindu law—Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes.*

One H. persuaded N. who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N. signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H. to B. who advanced monies on them to H.

On a suit by B. to recover the amounts due on the notes from N's firm K. a minor coparcener, pleaded that he was not liable.

*Held*, varying the decree of Heaton, J., that the minor's share in the firm was liable.

*Per Chandavarkar, J.*—Under Hindu law a joint family, which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its *kulacharas* (duty or practice) it attracts to itself all the necessary incidents of trade.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

Where a minor is a coparcener in a joint family his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes. [7] The minor's share is therefore bound by it since it constitutes an obligation of the firm.

*Per Batchelor, J.*—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade.

[Fol: 35 Mad. 692; Ref: 41 Mad. 824; 42 Mad. 629; 53 I. C. 262=10 L. W. 204=37 M. L. J. 316=42 Mad. 761=1919 M. W. N. 600; 60 I. C. 610; 68 I. C. 874=13 L. W. 563=1921 M. W. N. 816=14 Mad. 605; Expl: 55 I. C. 64=29 M. L. J. 55=1920 M. W. N. 112; Ref: 72 I. C. 659=47 Bom. 637; Fol 72 I. C. 816=45 M. L. J. 44; Rel: 75 I. C. 820; Ref: 67 I. C. 95; 79 I. C. 517=22 A. L. J. 295=46 All. 364; Cf: 38 I. C. 691=8 L. W. 463; 81 I. C. 271; 26 I. C. 898=16 M. L. T. 489; 55 I. C. 711 (F.B.).]

THERE were two Summary Suits filed by the Bank of Bombay on two promissory notes or Hundis against the firm of Raghunathji Tarachand in the name of which the notes were made and by whom they were dishonoured and the heirs of the person by name Hirabhai Ghallabhai to whom or to whose order the notes were payable, who endorsed them to the Bank of Bombay and obtained money from the Bank.

\* Original Suits Nos. 60 and 90 of 1903. Appeal No. 28 of 1903.



The latter defendants did not appear. The first defendant obtained leave to defend and pleaded in substance that, though the notes were signed by one Narottam, the son of Gordhandas, who was the only son of the original founder of the firm Raghunath, yet that Narottam had no authority to sign with the name of the firm, and did not sign them for the firm; that the notes were signed by Narottam only when entreated by Hirabhai; that he received no consideration and did not know he was incurring any liability; that they were obtained by fraud and that the Bank through their agent had notice of the fraud.

The firm of Raghunathji Tarachand was the name of a firm belonging to a Hindu family, of which Narottam was the only adult male member. The two notes sued on were signed by Narottam in the name of the firm.

Heaton, J., found *inter alia* that the notes in question were signed by the firm of Raghunathji Tarachand; that the firm of Raghunathji Tarachand was a joint family firm; that Narottam, at the time he signed the notes, was the manager of the joint family firm; that the making of the notes was a clandestine transaction in fraud of the firm of Raghunathji Tarachand, and that the making of the notes was neither in the course of the business, nor in the interest of, nor in any way connected with [74] the affairs of the firm, but that the joint family firm was liable under the notes signed by its manager.

The Court passed a decree against the firm of Raghunathji Tarachand and against the second defendant as the representative of Hirabhai Ghellabhai to the extent of the funds of Hirabhai Ghellabhai which had come to their hands.

The defendant firm of Raghunathji Tarachand appealed.

*Raikes* (with him *Padshah*) for the appellants.

*Lowndes* with *Strangman*, *Advocate-General*, and *Inverarity* for the respondents.

CHANDAVARKAR, J.:—The facts of this case, material for the purposes of this appeal, are undisputed and may be shortly stated:—

One Raghunathji Tarachand started a firm in Bombay in that name for carrying on business in cloth. On his death in 1902, his son Govardhandas continued the business. Govardhandas having died in March 1904, leaving his widow Parvatibai, two minor sons Narottam and Keshavlal, and five daughters, the cloth business was carried on for some time by the Munim of the firm under the orders of the widow. When Narottam came of age, he looked after the business. Narottam was a friend of one Hirabhai Ghellabhai, a pearl merchant, who had been in the habit of getting others to draw promissory notes in his favour for the purposes of his business and negotiating them. Towards the end of 1907, the friends, who had so accommodated him, having refused to give notes in that way any further, Hirabhai persuaded Narottam to sign the promissory notes now in dispute and two more in the name of his ancestral firm, Raghunathji Tarachand. Narottam signed them without the knowledge of his mother and of his Munim and without any advantage to his own firm. The notes were endorsed by Hirabhai to the Bank of Bombay, who thereupon advanced moneys to the former.

The notes having been dishonoured, the suit was brought by the Bank to recover the moneys of the two notes from the firm of Raghunathji Tarachand. The first point made before us in sup- [75] port of this appeal from Heaton, J.'s decree is of a purely technical character. It is urged that the suit was wrongly brought against the firm Raghunathji Tarachand, and that, having regard to the Rules of this Court, it should

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have been filed against the individuals constituting the firm. Section 578 of the old Code of Civil Procedure, replaced by section 99 of the new Code is a sufficient answer to the objection. It provides that no decree shall be reversed or modified in appeal for error or irregularity not affecting the merits of the case or the jurisdiction of the Court which passed the decree.

The second point urged is conceded by Mr. Lowndes, counsel for the respondent. Heaton, J., has given a decree against the firm Raghunathji Tarachand, and the result of that is a personal decree against the minor Keshavlal, who is a partner in the firm, entitling the Bank to attach and sell in satisfaction of the decree any property of the minor apart from his share in the firm. Mr. Lowndes agrees that the decree goes further than the law warrants and must be modified accordingly.

The really important question argued in this appeal is as to the liability of the minor in respect of his share in the firm. It is conceded by the learned counsel for the respondent that the notes in dispute were given by Narottam in fraud of his firm. Heaton, J., has found on the evidence that the plaintiff Bank are indorsees for value in *good faith*, and that finding is not impugned on appeal. At the same time it is clear and conceded by Mr. Lowndes that the Bank had made no inquiry as to the constitution of the firm and the purpose of the liability.

On these facts the argument for the appellant is, shortly, this:—The defendant firm is not a partnership in the legal sense of the term, because it consists of the members of a joint family, governed not by the Indian Contract Act, but by the Hindu law. Those members were coparceners, who carried on an ancestral trade in the name of the family firm. Their relations, whether *inter se* or with the outside world must be regulated by the rules of Hindu law applicable to the joint family system. One of those rules is that laid down by the Judicial Committee of the Privy Council in the leading case of *Hunoomanpersaud v. [16] Mussumat Babooe Munraj Koonweree* (1). There it was held that no debt contracted by the managing member of a joint family, consisting among others of minor coparceners, can bind the minor members unless it was for some family purpose, or unless at least the creditor is able to prove that on proper enquiry he honestly believed that it was for such purpose.

Applying that rule to the facts of the case, it is urged that the Bank are not entitled to a decree even against the share of the minor Keshavlal in the family firm, since the promissory notes in question were given by the other partner, Narottam, in fraud of the firm, and the Bank had made no enquiry as to the necessity for, or purpose of, the notes before becoming indorsees for value.

The reason of the rule that partners in trade have authority, as regards third persons, to bind the firm by bills of exchange or a promissory note is stated in Tudor's Selection of Leading Cases on Mercantile and Maritime Law (3rd Edn., p. 477) to be that, in the case of mercantile partnerships, the circulating of negotiable instruments is necessary. The drawing and accepting of bills and the giving of promissory notes is "part of the ordinary course of such a partnership," because, having regard to its nature, that power is essential and is incidental to its purposes: see the judgment of Cockburn, C. J., in *Nicholson v. Ricketts* (2) The rule has been adopted and enforced in the case of trading partnerships in the interests of trade and the necessities of commerce and has become a rule of the trade.

It is true that neither any Smriti nor authoritative commentary on Hindu law expressly recognises any such law with reference to a joint

(1) (1856) 6 Moo. I. A. 893.

(2) (1860) 2 E. & E. 497 at p. 528.



Hindu family carrying on a trade in the capacity of a firm or to any other trading firm. But it follows, I think from certain general principles laid down by some of the Smriti writers and their commentators that, where such a family embarks on a trade for the purposes of its livelihood it is bound by all the rules and laws applicable to that trade.

According to Hindu law givers, from Manu downwards, traders formed a part of the Hindu polity, and the profession of trade was meant for the third and last of the twice-born castes, namely, [77] Vaishyas. The Brahmins and the Kshatrias were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *kulachara*. The Smriti writers and the commentators all lay down the injunction that the king should see that *kulachara*, meaning the duty of every family or caste, is properly preserved. [See Smriti No. 343 of Yajnyavalkya in the Acharadhyaya of the Mitakshara, Moghe's 3rd Edn., p. 100.]

These preliminary considerations of Hindu law must be borne in mind at the outset in the present case, because, in my opinion, they show that a joint family, which carries on a trade handed down from its ancestors, becomes a trading family; trade being one of its *kulacharas* it attracts to itself all the necessary incidents of trade. The members of such a family may indeed not be partners in the strict sense of the term because their relations *inter se* are those of coparceners. But the definition given of partnership both in the Vyavahara Mayukha and the Mitakshara is that where several persons, such as traders, etc., carry on business jointly it is *sambhuya samuthanam* i.e., partnership. Vijnaneshvara uses the same expression, *sambhuya samuthanamti* i.e., partnership, in explaining Yajnyavalkya's smriti relating to an undivided family. The smriti is that "if the common stock be improved, an equal division is ordained." On this Vijnaneshvara's gloss in the Mitakshara (as translated in Stokes's Hindu Law Books) is:—"Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer." (Stokes's Hindu Law Books, page 390, s. 31.). This translation, I venture to think, does not bring out the force of the original. It ought to be as follows:—

"If the common stock of undivided brothers be collectively augmented in partnership for (the purposes of) agriculture, trade, or the like, by one of them, the partition shall be equal and a [78] double share shall not be allotted to the person augmenting." The gloss shows that coparceners in a joint family become partners, when they trade in union. I say it shows that because Vijnaneshvara speaks of their union in that respect as *sambhuya samuthanam*, which is also the expression used in his Chapter on Partnership at p. 253 of Moghe's 3rd Edn.

There is a Smriti of Brihaspathi, according to which companies of tradesmen "should adjust their disputes according to the rules of their own profession." (Sacred Books of the East, Vol. 33, Part I, p. 281, para. 26). Nilakantha in his Vyavahara Mayukha cites Bhrigu as ordaining that "traders, cultivators of land and artisans must be made to pay" (their debts), "according to the custom of the country." (Mandlik's Translation, p. 109.) That includes mercantile usage. The same com-

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mentator cites Vyasa as laying down that "the decision of a dispute among merchants . . . is impossible to be made by others (i.e., persons of other persuasions); but it should be caused to be made by those who know those pursuits." (Mandlik's Translation, p. 6.) The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interests of trade, are. The implication is that such rules must be followed in the interests of trade. Nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its *kulachara* or family business merely because it occupies also the status of a joint family. If then our Courts have held that, in the interests of commerce, one member of a trading firm has power to bind the other members, whether they be minors or adults, by means of a negotiable instrument given in the name of the firm in favour of a *bona fide* holder for value, and if that rule has become a necessary incident of that trade, or part of its mechanism, the authority of the texts above-cited supports the view that all members of the firm are bound by a promissory note given by one of them in the name of the firm.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception. According to a text of Yajnyavalkya, "among herdsmen, vintners, dancers, washermen, and hunters, [79] the husband shall pay the debts of his wife," and the reason stated to be that "the livelihood of the family depends" upon the wife. [Mandlik's Translation of the Vyavahara Mayukha, p. 114, II. 35 & 36.] In his gloss upon this text Vijñaneshvara in the Mitakshara points out that the reason assigned in the text for this exception shows that the rule applies to similar cases. Apararka (1) states that this is an exception to the general rule relating to families. Balambhatta (2) in his commentary on the Mitakshara points out that the specified cases in the text are not exhaustive but illustrative and that the principle applies to all alike—Brahmins and others similarly situated. That is, the term 'wife' in the text stands for the *karta* or manager of the family and the terms 'herdsmen, etc.,' stand for its members carrying on a family business. From this text it follows that where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt to bind the whole family thereby, because that power is necessary for the very existence of the family. Whether the debt was contracted for the purpose of the family profession or not, it binds the members.

And this is substantially in accordance with the dictum in *Ramlal Thakursidas v. Lakhmichand Muniram* (3), where it was said at page 52:—A minor, who is a member of a joint Hindu family carrying on an ancestral trade as a firm, is bound by such acts as are necessarily incident to the carrying on of a trade. According to the law merchant, the drawing of a bill of exchange or the giving of a promissory note is a necessary incident of the carrying on of trade. The dictum in *Ramlal v. Lakhmichand* (3), strictly speaking, was not necessary for the purposes of its actual

(1) See Apararka's Yajnyavalkya Smriti, Anandashrama Series, Vyavaharadhyaya p. 649.

(2) नंदं परिगणनं किंत्पलभ्युणमित्येनैव सूचितमित्याह यस्मादिति ॥ अन्येपि एतद्भिन्नाः सर्वे ब्राह्मणादयोपि. [Ms. Copy of Balambhatti which is in this Court.]

(3) (1861) 1 Bom. H. O. R. Appx. li.



[80] decision. And the decisions of the Calcutta High Court in *Johurra Bibee v. Sreegopal Misser* (1) and *Bemola Dossee v. Mohun Dossee* (2) and *Sakrabhai v. Maganlal* (3), in which *Ramlal v. Lachmichand* (4) is approved and followed, do not exactly touch the point of law arising in the present case. I should have declined to act upon the dicta in these cases had I found no support for them in the Hindu law books. I am of opinion that they correctly express the Hindu law on the subject, having regard to the texts to which I have referred in this judgment. In *Samalbai Nathubhai v. Someshvar* (5) it has been held by this Court that a joint family carrying on business as a firm is not exclusively governed either by the principles applicable to joint families as such or by the Contract Act. It is, I think, a necessary inference from that decision that those principles will apply to such a firm only so far as they are not opposed to but are consistent with the necessary incidents of trade and the paramount interests of commerce.

We have been asked by Mr. Raikes, in his argument for the appellant, not to apply this law to the facts of this case, because the law, so far as it has been applied to partnerships formed under the Indian Contract Act or to partnerships falling within the English law, has its origin in mercantile usage but no such usage was pleaded by the respondent Bank and indeed it could not be pleaded as the suit was filed as a summary action under the rules of this Court. The answer to this contention is simple. "The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them." [Broom's legal Maxims, 7th Edn., p. 705.]

Then comes the question as to the nature and extent of the liability of the minor Keshavlal. We have been referred by [81] Mr. Raikes to the decision of the Judicial Committee of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (6), that a minor is incapable of contracting. And he argues that section 247 of the Indian Contract Act is inapplicable here, because the minor is governed by the principles of Hindu Law.

Assuming that it is so, what is the Hindu law on the subject? Where a minor is a coparcener in a joint family, his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term family purpose or purposes incidental to it must here give way to the expression trading purpose or purpose incidental to it, having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence and its purposes. It is a necessary incident of the carrying on of the trade. Without it the firm could not gain credit in the market and prosper. The minor's share is, therefore, bound by it, since it constitutes an obligation of the firm. This conclusion arises, in my opinion, from the principles of Hindu law with which I have dealt in the earlier part of

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(1) (1876) 1 Cal. 470.  
(2) (1880) 5 Cal. 792.  
(3) (1901) 26 Bom. 206.

(4) (1861) 1 Bom. H. C. R. Appx. II.  
(5) (1880) 5 Bom. 188.  
(6) (1902) 1 L. R. 30 I. A. 114.



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this judgment. It is unnecessary, therefore, to invoke the aid of either section 247 or any other provision of the Indian Contract Act.

For these reasons I am of opinion that the conclusion of law arrived at by Heaton, J., is correct. His decree, however, goes further than the law warrants and must be modified by striking out the words "against the firm of Raghunathji Tarachand", and substituting for them the words:—"Against the share of the minor defendant Keshavlal in the firm of Raghunathji Tarachand." In other respects the decree must be confirmed. As to costs, the variation we have made in the decree appealed from appears substantial but in name. It is admitted by Mr. Raikes that the minor has no property of his own. The respondents understood the decree to apply only to the minor's share, and when the appeal was opened, their counsel at once [82] conceded the point as to the personal liability of the minor. The argument in appeal was confined to the minor's share in the firm, and on that point the appeal fails. The decree must, therefore, be confirmed with costs.

BATCHELOR, J.:—This appeal raises a question of the liability of the appellants in respect of two promissory notes executed by one Narottam Gordhan in favour of one Hirabhai Ghellabhai, who indorsed them over to the Bank of Bombay and received the money for them from the Bank. The facts necessary for the decision of the appeal are either admitted or are found and not contested. Narottam was the adult manager of a joint Hindu family, the only other coparcener being his brother, Keshavlal, an infant, now about four years of age. Among the assets of the undivided family was a joint firm trading in the name of Raghunathji Tarachand, who was the grandfather of Narottam and the original founder of the business. The promissory notes in suit were executed by Narottam in the name of the firm, Raghunathji Tarachand, but no consideration passed from Hirabhai Ghellabhai. Hirabhai was a friend of Narottam, who executed the notes on the faith of the mere assurance by Hirabhai that he would not be called upon to pay. In fact Hirabhai was unable to meet the notes and appears to have committed suicide. The notes were dishonoured, and the respondents, who are holders for value without notice of any fraud, seek to come upon the firm Raghunathji Tarachand, including the minor Keshavlal's share therein. The only material question for decision is whether the minor's share in the firm is liable. It is admitted by Mr. Raikes that Narottam is liable, and it is admitted by Mr. Lowndes that the decree under appeal cannot be sustained in so far as, being a decree against the firm, it would be enforceable against the minor personally.

With regard to Mr. Raikes's preliminary objection to the frame of the suit, I agree with my learned colleague that a sufficient answer to it is supplied by section 578 of the Civil Procedure Code of 1882; section 99 of the present Code is to the same effect.

This brings me to the principal question whether the minor's share in the firm is liable on the obligations undertaken by [83] Narottam in the name of the firm. Mr. Lowndes has invited us to decide the question on the principles of the law merchant, and has urged in forcible language that the reversal of the decree would have the effect of paralysing a very important branch of trade throughout the length and breadth of the Presidency. But these considerations, though undoubtedly of great consequence in their proper place, do not, I think, assist a Court of Justice. It is our business to ascertain and declare what the law is; we have no concern with what it ought to be in reference to one standard or another.



The law here and now actually is one way or the other : if it is in favour of the decree made, well and good : but if it is not, a Court cannot, I think, make it the law by showing that it would be for the convenience of merchants to have it so. As I understand the matter, no degree of commercial convenience can convert bad law into good. It is of course a satisfaction to a judge to find that the law, as he ascertains it to be, meets the requirements of an important class of the community ; but further than that I do not see how the argument *ab inconvenienti* can properly be pressed. It may be observed, moreover, that here in India we are governed by our Codes, which are subjected to fairly frequent amendment whenever amendment is considered to be required ; so that there should be the less temptation to judges to encroach upon the province of the legislature. And I am aware of no authority for supposing that, side by side with the recognised law, there exists in India to-day a separate set of valid, but somewhat undefined legal principles describable as the law merchant. I should rather suppose that those portions of the law merchant which the Indian legislature has seen fit to accept are to be found embodied in such provisions of that legislature as the Contract Act and the Negotiable Instruments Act ; and that it is not competent to us to leave this firm ground and explore the uncertain regions which are imperfectly defined by the phrase, the law merchant. Some reliance was placed by Mr. Lowndes on *Goodwin v. Roberts* (1), where Cockburn C. J. lays down that the law merchant is not fixed and stereotyped, but is capable of being [84] expanded and enlarged so as to meet the requirements of trade in the varying circumstances of commerce. But in the same sentence the Chief Justice explains that this expansion is effected by the usages of merchants being duly proved and so becoming ratified by the decisions of Courts of law ; and he refers to the dictum of Lord Campbell in *Brandao v. Barnett* (2), that " when a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise." In this case no such usage was even pleaded, and the argument presupposes that, in the entire absence of evidence, we should pronounce, presumably of our own knowledge, that the interests of commerce require the rule of law to be in the respondent's favour and against the Hindu minor. Speaking for myself, I can only say that I have no such knowledge. There would of course have been no difficulty in giving effect to the alleged usage if it had been properly pleaded and proved, but since that was not done, I am of opinion that if the decree is to be affirmed, it must be affirmed by reference simply to the accepted principles of law, as the law has hitherto been understood in this part of India. That of course will still leave it open to us to refer for guidance to English decisions where they are properly applicable, but I do not think that we can, by a stroke of the pen, apply a principle of English law to a minor member of a Hindu joint family. Finally, on this part of the case, I am inclined to think that the liability of the innocent co-partner depends rather upon the general principles of agency than upon anything peculiar to the law merchant.

As the learned Judge below has pointed out, then, the problem is not to be solved merely on the authority of the law in England as to the liability of an infant partner, for the members of this joint Hindu firm are, in strictness, certainly not mere partners in the sense known to English law. The firm is not strictly a partnership, but is one of the assets of

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34 B. 72=2  
I. C. 173=11  
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(1) (1875) L. R. 10 Ex. 337 at p. 346. (2) (1846) 12 Cl. & F. 787 at p. 805.



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an undivided Hindu family in which Narottam and the infant are coparceners. On the other hand the analogy between such a joint firm in its [85] relations with the outer world and an ordinary partnership in many respects extremely close. It becomes necessary, therefore, to consider how the Courts have in the past dealt with these joint firms, and to what extent they have been taken out of the sphere of ordinary Hindu law and brought within the operation of the law of partnership. The leading decision on the subject is Sausse C. J.'s judgment in *Ramlal v. Lakhmichand* (1), which has admittedly been accepted as good law ever since 1861. There the learned Chief Justice in discussing the question "to what extent a minor member of an undivided Hindu family will be held bound by the acts of the family manager with reference to an ancestral family trade" lays it down that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager ... which are necessarily incident to and flowing out of the carrying on of that trade ... The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the *status* of the family represented by the manager whilst dealing with him on the credit of the family property." And he goes on to point out that in the interests of the joint family itself, with which otherwise third parties would be unwilling to take the risk of dealing, it is necessary thus far to trench upon the protection which the Hindu law generally extends to the interests of a minor. This decision was followed in *Johurra Bibee v. Sree Gopal Misser* (2), where Pontifex, J., says that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. Then there is the case of *Joykisto Cowar v. Nittyanund Nundy* (3), decided by Garth, C. J., and two other judges. The judgment was pronounced by Sir Richard Garth who after citing the provisions of section 247 of the Contract Act observes that "on principle there ought not to be [86] any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager." This was quoted with approval in this Court in the Full Bench case of *Sakrabhai v. Maganlal* (4), where Jenkins, C. J., also affirms the following extract from *Bemola Dossee v. Mohun Dossee* (5):—"In this case Gour Churn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also we think, he had power to borrow on the credit of the joint family, as a joint family for the purposes of the firm. A joint family carrying on a business is necessarily a peculiar kind of partnership." I need not pursue the cases further: enough has been cited to show that in establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. Section 247 of the Contract Act appears to me to furnish distinct authority for this view, which so far as I can gather, is not in conflict with any text of the Hindu law dealing specifically with the legal position of an ancestral firm in its dealings with the outside world of commerce. It follows, I think, that the test to be

(1) (1861) 1 Bom. H. C. R. Appx. li at pp. lxxi, lxxii.

(2) (1876) 1 Cal. 470.

(3) (1878) 3 Cal. 788.

(4) (1901) 26 Bom. 306 at p. 318.

(5) (1880) 5 Cal. 792 at p. 804.



applied in such cases is rather the apparent authority of the manager than the actual necessity of the family. And that to my mind is a perfectly reasonable position, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. If this reasoning is right, we have taken what appears to me to be the really important step in the case, that is, the step from the ordinary Hindu law as to a manager's power of alienation to the law of partnership; and, that step taken, the decision of the appeal does not seem to present much difficulty. The law of partnership is laid down in the Contract Act, and for any further elucidation of its principles we are justified in referring—indeed counsel for appellant has insistently referred—to decisions of the Courts in England. The central facts are that the Bank had no knowledge of any fraud; that Narottam, who signed in the firm's name, had in fact authority to do so; and that [87] the execution of such notes is an act necessary for, or usually done in the conduct of such a trade as the family here was carrying on. Therefore, under section 251 of the Contract Act, I am of opinion that Narottam bound the firm; and that, as Heaton, J., has pointed out, would be the law in England. If, then, the firm as a firm is bound, is Keshavlal's share in the firm exempt from liability because Keshavlal is an infant? In England, if the proper steps in procedure are taken, the infant's share becomes available for the benefit of the creditors: see *Lovell & Christmas v. Beauchamp* (1). But here occurs a difficulty which was urged upon us with much force by Mr. Raikes: in England a minor's contract is merely voidable at his election on attaining full age, whereas in India a minor's contract is void. That was laid down by their Lordships of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (2), and the cases of *Joykisto Cowar v. Nittyanund Nundy* (3) and *Rampartab v. Foolibai* (4) were decided before it was settled that a minor was incompetent to contract, and while the general current of Indian decisions was in favour of holding such contract only voidable. But the answer appears to me to be that the statutory provision contained in section 247 of the Contract Act, which after declaring that the minor shall not be personally liable, goes on, "but the share of such minor in the property of the firm is liable for the obligation of the firm." I apprehend, therefore, that when once an obligation is held to attach to the firm, the minor's share in the firm must necessarily be liable. It may be by a plausible conjecture, as suggested by Sir Frederick Pollock and Mr. Mulla in their edition of the Contract Act, that in framing section 247 the draftsman had either overlooked section 11 or had taken the earlier, but now impossible, view of it, namely that a minor's contract was merely voidable; but, however that may be, these are the words of the statute, which, as I understand them, are not the less imperative by reason of the now established interpretation of section 11. If this were a suit by the minor against the other members of the firm, say for an account, I can understand that some difficulty might be caused by the circumstance that under section 11 the [88] minor is not now competent to contract; but I am unable to see how, in a suit like the present, this construction of section 11 can destroy the force of section 247. Though Keshavlal is a minor, and as such not competent to contract, yet for the reasons already given, I think that the

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34 B. 72=2  
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(1) (1894) A. C. 607.

(2) (1902) L. R. 80 I. A. 114.

(3) (1878) 3 Cal. 738.

(4) (1896) 20 Bom. 767.



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84 B. 72=2  
L. C. 173=11  
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liability of his share is a question to be determined by the law of partnership, and it is in the Contract Act that that law is contained.

On these grounds I agree with the learned judge below that the minor's share is liable to the Bank. It is urged that this is a harsh conclusion, but considerations of that nature do not seem to appropriate in such a case as this were unfortunately either one innocent party or another must suffer for the misconduct of a third.

For these reasons I agree that the decree should be affirmed subject to the slight variation not contested, and that this appeal should be dismissed with costs.

*Decree confirmed.*

Attorneys for the appellant: Messrs. *Payne & Co.*

Attorneys for the respondents: Messrs. *Crawford Brown & Co.*

34 B. 88 (=3 L. C. 962=11 Bom. L. R. 855=10 Cr. L. J. 432.)

### CRIMINAL REVISION.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.*

EMPEROR v. NAGJI GHELABHAI.\*  
[21st July, 1909].

*Criminal Procedure Code (Act V of 1898), ss. 195, 473—Sanction to prosecute—Subsequent order to prosecute passed under section 473.*

The grant of a sanction to prosecute a private individual under section 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under section 473 of the Code.

*Queen-Empress v. Shankar (1)*, followed.

THIS was an application to revise an order passed by Davdat D., Second Class Magistrate of Pardi.

[89] The petitioner Nagji Gholabhai and another preferred a complaint against Khandu Malhari and five others charging them with theft or in the alternative with criminal breach of trust. The Second Class Magistrate of Pardi inquired into the case and discharged the accused under section 253 of the Criminal Procedure Code, 1893.

One of the accused, Khandu Malhari, thereafter applied for sanction to prosecute the complainants under section 195 of the Criminal Procedure Code, 1898. This application was granted.

Another of the accused, Dala Sidhu, also applied for and obtained sanction to prosecute the complainants, for offences under sections 211, 193, 196 and 463 of the Indian Penal Code, 1860.

Some time after this, a clerk in the Second Class Magistrate's Court at Pardi filed an information against the same complainants in the Court of the First Class Magistrate at Buisar, charging them under sections 182, 211, 193, 195, 196, 465, 471 and 109 of the Indian Penal Code, 1860, with reference to the same matter. The clerk also produced an order sanctioning the prosecution.

The Magistrate entertained the complaint, and put the petitioners on their trial.

The petitioners applied to the High Court.

\* Criminal Application for Revision No. 144 of 1909.  
(1) (1888) 18 Bom 834.



*H. C. Coyajee* (with *K. M. Talayarkhan*), for the petitioners:—We submit that the Magistrate having once granted sanction to Khandu Malhari, was not competent to grant any more sanctions to others with reference to the same matter. The Magistrate is not even at liberty to extend the time of a sanction which he has once granted; much less can he give a subsequent sanction to the same or any other man.

*G. S. Rao*, Acting Government Pleader, for the Crown:—The first sanction here is granted under section 195 of the Criminal Procedure Code, 1898. It does not restrict the Magistrate's power to direct prosecution of the same persons under section 478 of the Code. See *Queen-Empress v. Shankar* (1).

[90] SCOTT, C. J.:—On the 31st of October 1908 the Second Class Magistrate of Pardi granted sanction to two accused persons in a theft case to prosecute the complainants for the offences mentioned in section 195 of the Criminal Procedure Code. No action was taken upon that sanction, but in the December following a complaint was lodged in the Court of the nearest Magistrate, First Class, by the Karkun of the Second Class Magistrate of Pardi who stated to the Court that he knew the accused who were the complainants in the theft case and that he had lodged the complaint by the order of the Second Class Magistrate, that it was a verbal order, that he was given the sanction order and the papers in the case of the complaint of the accused Nagji Ghelabhai and that he produced the Second Class Magistrate's sanction. Thereupon the accused was arrested and put on his trial.

An application has now been made to us to quash the proceedings on the ground that they have been instituted under an illegal sanction. The argument is that section 195 of the Criminal Procedure Code only contemplates one sanction for prosecution by a private individual, and it does not contemplate a new sanction to a private individual being given, because, that would be an evasion of the proviso to section 195 (6) which in effect provides that the term of a sanction shall not be extended except by the High Court.

The learned Government Pleader, however, has pointed out to us the evidence of the clerk of the Second Class Magistrate to which we have alluded and we think that having regard to that evidence we ought to accept the Government Pleader's argument that the proceedings which are now going on before the First Class Magistrate are proceedings instituted under section 476 by the Court itself.

The Karkun who instituted those proceedings is an officer of that Court and has no personal interest in prosecuting the accused persons.

It has been held by this Court in the case of *Queen-Empress v. Shankar* (1) that the existence of a previous sanction under section 195 of the Criminal Procedure Code is no bar to the institution of proceedings by the Civil Court itself under section [91] 478 and, we think, that is an authority for the view which we take in this case that the sanction of the 31st October to the private individuals is no bar to the proceedings, which are now being taken at the instance of the Second Class Magistrate by his Karkun.

We, therefore, reject the application.

*Application rejected.*

(1) (1888) 13 Bom. 384.



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I. C. 249=11  
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34 B. 91 (=4 I. C. 249=11 Bom. L. R. 1102).

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

NARSINH AND OTHERS (*Original Defendants 1a, 1b and 1c*),  
*Appellants*, v. VAMAN VENKATRAO AND OTHERS (*Original*  
*Plaintiffs 1—3 and Defendants 2—5*), *Respondents*.\*

[27th July, 1909].

*Limitation Act (XV of 1877), sections 22, 23—Civil Procedure Code (Act XIV of 1882), section 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiff's claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.*

Certain lands attached to a vatan belonged jointly to two brothers V and D. In the year 1872 the lands were let by V. under a perpetual lease which was attested by D. D. pre-deceased V. In the year 1905 within twelve years from the death of V., his representatives brought a suit for the recovery of the lands let by V. They sought to recover the entire lands on the ground of eldership. The suit was brought against defendants 1a, 1b and 1c as the heirs of the mortgagee of the lessee (the original 1st defendant), against defendants 2 and 3 as the heirs of the lessee and against defendants 4 and 5 as the heirs of D. The heirs of defendant 1 and defendants 2 and 3 defended the suit on the ground, *inter alia*, of limitation, the suit not having been brought within twelve years from the date of the lease. Defendants 4 and 5 did not contest the plaintiffs' claim. The first Court allowed the plaintiffs' claim to the extent of their share, namely, a moiety on the ground that their claim to that extent [92] was not time-barred. On appeal by the plaintiffs and defendants 4 and 5 the latter of whom in appeal claimed their share, namely, the other moiety, the appellate Court awarded the other moiety to defendants 4 and 5.

On second appeal by the heirs of the mortgagee,

*Held*, affirming the decree that the whole claim was within time. A vatan-dar is entitled to alienate vatan lands for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

Where a lease of vatan property is effected by one joint owner with the consent of the other joint owner, the time for the recovery of the vatan property from the lessee runs from the date of the death of the survivor of the joint lessors.

Defendants 4 and 5 having sought to recover in appeal their share which they had not asked for in the first Court.

*Held*, allowing their claim that they being parties to the suit instituted within the twelve years during which their right to a share in the vatan property could be effectually determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit.

A party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act (XV of 1877) apply.

*Nagendrabala Debya v. Tarapada Acharjee* (1), concurred in.

Plaint and decree of the lower appellate Court amended by entering defendants 4 and 5 as co-plaintiffs.

[*Ref*: 21 O. L. J. 611=30 I. C. 31; 66 I. C. 873; 78 I. C. 23.]

\* Second Appeal No. 248 of 1908.

(1) (1908) 85 Cal. 1065.



SECOND appeal from the decision of V. V. Phadka, First Class Subordinate Judge of Belgaum, with appellate powers, amending the decree of H. V. Chinmulgund, Subordinate Judge of Chikodi.

The facts were as follows:—

The lands in dispute were attached to a Deshpande vatan which belonged to one Raghupat who died leaving him surviving two sons, Venkatrao and Dashrath, of whom Venkatrao was the elder. In the year 1872 Venkatrao leased the lands perpetually to one Annarao Herlekar, father of defendants 2 and 3. The lease was attested by Dashrath. Annarao in the year 1881 mortgaged his right as lessee of the lands to one Krishnarao [93] Balaji, defendant 1. Dashrath died in the year 1876 leaving him surviving two sons Abaji and Narayan, defendants 4 and 5. Venkatrao died in the year 1893 leaving behind two sons Vaman and Vishnu and a grandson Damodar Sitaram as his heirs and legal representatives. In the year 1905, that is, within twelve years from the date of Venkatrao's death, his three representatives brought the present suit to recover possession of the lands against Krishnarao Balaji, the mortgagee of the lessee Annarao, defendant 1, and he having died his sons and heirs Narsinh, Pampa *alias* Shrinivas and Sudam *alias* Raghunath were brought on the record as defendants 1a, 1b and 1c, respectively, against the heirs of the lessee, defendants 2 and 3, and against their cousins, the sons of Dashrath, defendants 4 and 5. The plaintiffs alleged that as they were the representatives of the elder branch of the vatandar family the entire lands belonged to them by right of eldership and that their father Venkatrao has no right under the Vatan Act to alienate to strangers beyond his lifetime.

Defendant 1 contended that the lands were not kept with the plaintiffs in right of eldership and plaintiffs were not the representatives of the elder branch, that Annarao having rendered valuable service to the plaintiff's family, the lands were given to him in gift in lieu of remuneration long before the lease of 1872, that such a gift could not be retracted and was out of the pale of the Vatan Act, that the claim was time-barred, that though defendants 4 and 5 were members of the undivided family represented by them and the plaintiffs they were joined as co-defendants notwithstanding the fact that their claim also was time-barred and that even if the plaintiffs succeeded in establishing their claim they could not recover possession without redeeming the defendants' mortgage on payment of Rs. 1,000.

Defendants 2 and 3 answered that the claim was time-barred, that the Vatan Act was not applicable to the lands in suit and that they had no interest in the lands and were unnecessarily sued.

Defendant 4 admitted the claim and stated that he might be joined as plaintiff if necessary.

Defendant 5 was absent.

[94] The Subordinate Judge found that the plaintiffs were not entitled to the entire lands by right of eldership but were entitled to a moiety, that the lands in suit were vatan governed by the Vatan Act, that the perpetual lease passed by Venkatrao to Annarao was not binding on the plaintiffs, that defendant 1 failed to show that because the claim was time-barred against the shares of defendants 4 and 5, the plaintiffs' claim was also time-barred and that the plaintiffs were entitled to recover by partition a moiety of each of the lands in suit and to get subsequent mesne profits. He, therefore, passed a decree directing the plaintiffs to

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recover by partition a moiety of each of the lands from defendants 1a, 1b and 1c, heirs of defendant 1.

On appeal by the plaintiffs, defendants 4 and 5 joined them in the appeal contending that the first Court was wrong in supposing that their claim was time-barred and it should have awarded to them the other moiety of the lands which it refused to restore to the plaintiffs. The appellate Court found that the moiety of the lands which was not awarded to the plaintiffs could be decreed to the appellants, defendants 4 and 5. It therefore amended the decree of the first Court and directed that the plaintiffs should recover from defendants 1a, 1b and 1c, heirs of defendant 1, half of the lands in dispute with mesne profits from date of suit and that defendants 4 and 5 should similarly recover the other half. With respect to the claim of defendants 4 and 5 the Court made the following remarks:—

The lower Court assumes that the claim of defendants 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within 12 years of the death of the father of defendants 4 and 5. This view is erroneous. Plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided. That having been so, defendants 4 and 5 could not until partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the father (plaintiff's) and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties. For these reasons I hold that the claim of defendants 4 and 5 is in time.

Defendants 1a, 1b and 1c, sons and heirs of defendant 1, preferred a second appeal.

[95] *C. A. Rele* for the appellants (defendants 1a, 1b and 1c):—The permanent lease, Exhibit 43, passed by Venkatrao in 1872 recites that the lands were held by the lessee from generation to generation. So it was a formal recognition of a perpetual tenancy which had been in existence prior to Regulation XVI of 1827. Therefore under section 83 of the Land Revenue Code, we are entitled to remain in possession as the assignees of the permanent tenant.

The Judge in appeal made out a new case for the respondents, defendants 4 and 5. They claimed the moiety for the first time in appeal. Their claim was inconsistent with their pleading and should not have been allowed: *Mylapore Iyasawmy v. Yeo Kay* (1), *Eshenchunder Singh v. Shamachurn Bhutto* (2).

It was wrong to treat the suit as one for partition. It was a suit in ejectment. Defendants 4 and 5 did not claim any share. On the contrary they admitted the plaintiff's claim to the entire lands and stated that they had no share in them. In his deposition defendant 4 admitted that he had no desire to be made a plaintiff and that he had no right to the lands. Therefore defendants 4 and 5 were not in the position of plaintiffs: *Shivmurteppa v. Virappa* (3), *Lakshman v. Narayan* (4).

Dasbrath, the father of defendants 4 and 5, had attested the permanent lease and it also appears that he had knowledge of its contents. Therefore time began to run against them in 1876 when Dasbrath died and their claim for a moiety is, therefore, time-barred. Even assuming that time did not run against them till Venkatrao's death in 1893, their claim for a moiety, which claim they made for the first time in appeal, was clearly time-barred as it was made more than twelve years after Venkatrao's death. Section 28 of the Limitation Act, therefore, applies.

(1) (1887) 14 Cal. 801.

(2) (1866) 11 Moo. I. A. 7.

(3) (1899) 24 Bom. 128.

(4) (1899) 24 Bom. 182.



No application was made to the Court for making defendants 4 and 5 co-plaintiffs and no amendment of the record was made.

S. S. Patkar for the respondents (plaintiffs 1—3 and defendants 2—5):—The question as to when the tenancy commenced is a question of fact and the finding recorded by the lower Court on that point against the appellants is binding in second appeal.

[96] Defendants 4 and 5 have been parties from the commencement of the suit and the Court in appeal was right in treating them as co-plaintiffs and in awarding them a moiety. Under section 32, paragraph 2, of the old Civil Procedure Code (Act XIV of 1882) the Court was empowered to make them co-plaintiffs. Section 22 of the Limitation Act does not apply to such a case: *Nagendrabala Debya v. Tarapada Acharjee* (1).

Limitation did not run against defendants 4 and 5 from the time of Dashrath's death. The lease passed by Venkatrao with respect to the vatan property was good during his life-time: *Appaji Bapuji v. Keshav Shamray* (2). Section 28 of the Limitation Act does not apply as defendants 4 and 5 were parties to the suit from the commencement and were in the position of plaintiffs.

The record can be amended here and defendants 4 and 5 can be made plaintiffs: sections 99 and 151 of the new Civil Procedure Code (Act V of 1908).

C. A. Rele in reply:—The ruling in *Nagendrabala Debya v. Tarapada* (1) is distinguishable. There the plaintiff had claimed only his share and had made his co-sharer a defendant because he had refused to join as plaintiff. The decision in *Krishna v. Mekamperuma* (3) applies.

SCOTT, C. J.:—The plaintiffs who are the sons of one Venkatrao sued the first three defendants for possession of certain vatan land which they alleged had been leased by their father Venkatrao by a lease dated 1872 which was operative only for the period of his life. The plaintiffs were, at the date of the suit, joint with their cousins the sons of Dashrath, Venkatrao's brother, who with Venkatrao had been a joint vatandar of the Deshpande vatan to which the property in suit was attached.

The first three defendants contended that the lease of 1872 was merely a formal recognition of a perpetual tenancy which had been in existence prior to the date of the Vatan Regulation of 1827 and that therefore they were entitled to remain in possession as permanent tenants.

[97] This argument rested on an allegation of fact which was held by the lower appellate Court to be not proved. This is sufficient in special appeal to dispose of the argument.

We will now discuss the points of law which have been urged. In the original Court the plaintiffs obtained a decree for a moiety only of the property in suit, on the footing that that was all they were entitled to as representing the branch of Venkatrao.

An appeal was preferred against that decision in which the 4th and 5th defendants, sons of Dashrath, joined with the plaintiffs in urging that the decree should have been passed against the first three defendants for the whole of the property in suit. The fourth ground of appeal was that the lower Court should have awarded to defendants 4 and 5 the half of the lands that it refused to restore to the plaintiffs. This contention was successful in appeal. The lower appellate Court in delivering judgment said: "the lower Court assumes that the claim of defendants 4 and 5 is

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(1) (1908) 35 Cal. 1065.

(2) (1890) 15 Bom. 13.

(3) (1886) 10 Mad. 44.



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time-barred, and it is urged in appeal that the claim is barred as it was not brought within twelve years of the death of the father of defendants 4 and 5. This view is erroneous, plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided; that having been so, defendants 4 and 5 could not, until effecting a partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the plaintiffs' father and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties." For these reasons the decree of the lower Court was amended by a direction that the defendants 4 and 5 should recover their moiety of the property from the defendants 1 to 3.

It has been argued on behalf of the defendants 1 to 3 that this suit is altogether barred because time ran against the plaintiffs and the 4th and 5th defendants from the date of [98] the lease by Venkatrao to the defendants 1 to 3. This, however, is not the law because the property in suit is vatan property which was the subject of the Gordon Settlement of 1864, and it has been laid down by this Court in the case of *Appaji Bapuji v. Keshav Shamray* (1) that "the Gordon Settlement of 1864 was not intended by either party to those settlements to convert the vatan lands into the private property of the vatanlar with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact, as shown by the definition of 'hereditary office' in the declaratory Act III of 1874." The fact that vatan land is attached to the office, deprives it of some of the incidents which would attach to it if it were ordinary land in the possession of a Hindu family. Thus it results from its attachment to the office, according to the decisions of this Court which are recognised in section 5 of the Vatan Act that the vatandar is entitled to alienate the land for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

In the present case the lease was effected with the consent of Dashrath indicated by his signature as an attesting witness, and time would not run against the sons either of Venkatrao or of Dashrath until the expiry of the lives of those two persons. Therefore time for the purposes of this suit will run from the date of the death of Venkatrao, the survivor of the two vatandars. That took place on the 26th of April 1893, and the suit was filed within the period of 12 years, time being allowed for the expiry of the summer vacation of the Court which was in progress on the 25th April 1905.

Then it is said that at least the 4th and 5th defendants are not entitled to any relief in this suit. They have not joined the plaintiffs in suing for possession of the property. They have in fact put forward a case that the persons entitled to the property are the plaintiffs and not themselves. They were not entitled in appeal to come forward with a different case and to [99] ask for a moiety of the property, that they had not asked for in the first instance.

Now the case for the 4th and 5th defendants in the first Court was that there had been a partition between them and the plaintiffs, and that

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(1) (1890) 15 Bom. 18.



at that partition the plaintiffs on the ground of the eldership of their father Venkatrao had been awarded the whole of this vatan property.

The first Court held that the documents relating to this partition not being forthcoming this allegation of the assignment to the plaintiffs by way of eldership was not substantiated, and accordingly, allowed to the plaintiffs only a moiety of the property.

We do not think that the Judge of the appellate Court was in error in allowing the 4th and 5th defendants, after the failure of proof of their case with regard to partition, to fall back upon the necessary alternative that there having been no partition they were entitled to a moiety in right of their father Dashrath, and the only question which could arise, if that point of procedure were decided in their favour, would be whether their claim was barred by the law of limitation.

We have already held that time only began to run from the death of Venkatrao in 1893, and there can be no question that the 4th and 5th defendants were upon the record of this suit as defendants at the date of its institution. Is there then anything in the law of limitation which prevents them from obtaining relief in respect of their share of the property? Section 28 of the Indian Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property, shall be extinguished." It is necessary in order to give effect to this section to supply certain implied conditions; for instance, it would be a condition that the section would operate if the person did not bring a suit within the period prescribed. But would his right be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined? The section does not say so, and we do not think [100] that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within the twelve years in which their rights to a share in this vatan property could be effectually determined as against the defendants 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit; see section 31 of the Civil Procedure Code of 1882 and Order I, Rule 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned Judge of the appellate Court that he, for the purposes of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants.

It has been held in Calcutta in the case of *Nagendrabala Debya v. Tarapada Acharjee* (1), that a party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act apply. In that conclusion we concur. We think that we should exercise our powers of amendment by putting the plaint in the shape in which the learned Judge or the lower appellate Court intended it to be at the time he delivered his judgment.

We direct that the 4th and 5th defendants be entered in the plaint and the decree in the lower appellate Court as co-plaintiffs instead of defendants, this being consented to by their pleader. In other respects we affirm the decree of the lower Court and dismiss this appeal with costs.

*Decree amended and affirmed.*

(1) (1908) 35 Cal. 1065.

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34 B. 101=4  
I. C. 833=11  
Bom. L. R.  
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34 B. 101 (=4 I. C. 833=11 Bom. L. R. 1339).

[101] APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

AHIMKHAN VALAD HYDERKHAN (*Original Plaintiff*), Appellant, v. DADA-MIYA VALAD HYDERKHAN AND ANOTHER (*Original Defendants*),  
*Respondents.*\*

[2nd August, 1909.]

*Hereditary Offices Act (Bom. Act III of 1874), sections 25, 36 (†)—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.*

Section 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under section 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

[Ref : 20 O. W. N. 446=32 I. C. 437=43 Cal. 743.]

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The plaintiff sued for a declaration that he was the eldest son of Hyderkhan deceased, that the deceased who died about 2½ years before the institution of the suit was Vatandar Police Patil of Mouze Makhmalabad and owned an eight annas share in the Vatan and had his name entered in the Government books as such, that though the plaintiff was the eldest son, a dispute [102] having arisen as to seniority between him and his two brothers, defendants 1 and 2, the Assistant Collector ruled on the 11th October 1906 that defendant 1 was the senior of the three, that the Collector, on appeal by the plaintiff, confirmed the order of the Assistant Collector on the 10th September 1906, that the said orders of the Revenue Department had prejudiced the plaintiff's right of *vadalki* (eldership) and that the plaintiff's name could not be entered in the Vatan Register as Vatandar Patil unless and until he established his right as the eldest son and obtained a declaration to that effect from the Civil Court. It was further urged that though the Revenue Authorities were competent to appoint or select any one of the descendants of the Vatandar Police Patil's family for the office and enter the Vatan on his name, still that circumstance did not oust the jurisdiction of the Civil Court to determine which

\* Second Appeal No. 10 of 1909.

(†) Sections 25 and 36 of the Hereditary Offices Act (Bom. Act III of 1874) run as follows :—

25. It shall be the duty of the Collector to determine, as hereinafter provided, the custom of the Vatan as to service and what persons shall be recognized as representative Vatandars for the purpose of this Act, and to register their names.

36. When any representative Vatandar dies, it shall be the duty of the Patil and village accountant to report the fact to the Collector; and the Collector shall, if satisfied of the truth of the report register the name of the eldest son or other person appearing to be nearest heir of such Vatandar as representative Vatandar in place of the Vatandar so deceased. A certificate of heirship or a decree of a competent Court shall, until revoked or set aside, be conclusive proof of the facts stated or determined in such certificate or decree.



of the members of the Vatandar family was the senior and that the plaintiff was officiating as Vatandar at the time of the suit and was deputed to the office by Hyderkhan during his life-time. The suit was filed on the 20th February 1907.

The defendants answered that defendant 1 was Hyderkhan's eldest son and not the plaintiff, that the right to determine which member of a Vatandar's family was *vadil* or senior belonged to the Revenue Department only, that the claim was not cognizable by the Civil Court and that it was time-barred.

The Subordinate Judge found that the suit for the relief claimed was not cognizable by the Civil Court and that the plaintiff was not entitled to any relief. He, therefore, dismissed the suit relying on the decision in *Raoji v. Genu* (1).

On appeal by the plaintiff the District Judge confirmed the decree for the following reasons:—

The case appears to me to be exactly parallel with the case cited by the lower Court, *Raoji v. Genu*, I. L. R. 22 Bom 344. In that case it appears that a Vatan Register had been framed and that the declaration of the Civil Court was sought merely to induce the Collector to enter the name of Raoji rather than of Genu as representative Vatandar in place of Genu's father deceased. This was held not to be admissible under section 25, Act III of 1874. The law being [103] that while it is permissible to sue to prove that I am Vatandar and not an outsider it is not permissible for me who am admittedly a Vatandar to sue that I be declared representative Vatandar.

At first sight it appears as if the legislature intended to exclude the Civil Courts only in the case of the original framing of the Vatan Register. This is what is referred to in section 25. The method in which the register is to be framed is laid down in sections 26 to 32. Sections 33 to 37 seem to refer to questions arising after the framing of the register owing to the death of persons entered in the register.

Under section 36 the Collector has no option as to the person he is to enter in place of Vatandar deceased. He must enter his eldest son or other nearest heir. Decrees and orders of Civil Courts are conclusive proof of the facts declared therein. Such decrees, however, are I suppose decrees in *bona fide* litigation about subjects other than the actual right of succession. It being intended to prevent the evils of litigation about succession to Vatan.

In any case the case quoted above seems to me to bind me as it is as far as I can see exactly on all fours with the present case.

The plaintiff preferred a second appeal.

*N. A. Shiveshvarkar* for the appellant (plaintiff):—Under section 11 of the Civil Procedure Code of 1882, the Civil Courts are bound to entertain any suit of a civil nature unless its cognizance is barred either expressly or by implication by any enactment. In the present case the plaintiff sued for a declaration that he is the eldest son. Such a suit is not barred by the Hereditary Offices Act. The lower Courts relying on the decision in *Raoji v. Genu* (1) held that the suit was not cognizable by a Civil Court. This is a wrong view. The decision referred to has reference to section 25 of the Act. By that section the duty of framing the Vatan Register is cast upon the Collector. The Register having been framed the plaintiff in that suit asked for a declaration that he was the representative Vatandar alleging that the defendant took advantage of the plaintiff's absence and got himself recognized as such by the Collector. That suit was dismissed on the ground that the declaration, if made, would in effect be a declaration of the plaintiff's status as representative Vatandar and this duty was cast upon the Collector by section 25 of the Act and not upon the Civil Court. See the definition of "Representative

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(1) (1896) 22 Bom. 344.



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[104] Vatandar" given in section 4 of the Act. Representative Vatandar is a Vatandar registered by the Collector under section 25. The registration had already been made and the plaintiff wanted to get the registration altered. Such a suit could not be entertained by the Civil Court and it was dismissed. In the present case we do not seek the alteration of the register. Under section 25 our father had been registered as the representative Vatandar and the father having died, we want a declaration by the Civil Court that we are the eldest son, so that, we can, on such declaration being made, apply to the Collector to have our name registered in the place of our deceased father and the declaration would be binding on the Collector : section 36 of the Act. In support of our contention we rely on the unreported decision in second appeal No. 298 of 1903 which is on all fours.

*K. M. Taleyarkhan* for the respondents (defendants):—We submit that a suit like the present is not cognizable by the Civil Court. The duty of conducting all investigations under the Hereditary Offices Act is cast upon the Collector. By section 72 of the Act the Collector acts as a judicial officer as he alone has jurisdiction to investigate the matter: *Khando Narayan v. Apaji Sadashiv* (1). Besides, even if the Civil Court entertained the suit, its decision would not bind the Collector and he need not act upon it. The last paragraph of section 36 merely means that if at the time of the investigation one of the parties produces a certificate of heirship or a decree as mentioned in the section, the Collector need not hold further inquiry but must act upon the certificate or the decree. If such a certificate or decree is subsequently set aside then the Collector would proceed to inquire as to who is the eldest son or nearest heir.

In second appeal No. 298 of 1903 the contention of the plaintiff was that he and defendants 3 and 6 were the heirs and that defendant 1 was not the heir of the deceased Vatandar. Defendant 1's title was thus completely denied. Such a case would clearly be cognizable by a Civil Court. But when there is no [105] dispute as to who should officiate, then the matter is solely within the cognizance of the Collector.

SCOTT, C. J.:—The plaintiff sued for a declaration that he was the eldest son of a deceased Vatandar Police Patil who died two years and a half previously, stating that the cause of the suit was that in a dispute between him and the defendant the Collector had ruled that the defendant was the eldest son and that the plaintiff's name could not be entered as Vatandar Patil unless he established his right as eldest son by a decree of the Court.

It is contended on behalf of the defendant that this suit is not maintainable by reason of the provisions of the Bombay Hereditary Offices Act (Bombay Act III of 1874).

The defendant's contention commended itself to the learned District Judge because he considered himself bound by a decision of this Court in *Raoji v. Genu* (2) to decide that he had no jurisdiction. A reference to that decision will show that the *ratio decidendi* was that the case fell under section 25 of the Hereditary Offices Act under which the duty is imposed upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar, and that the relief asked for in the suit involved the determination by the Civil Court of a question which by the section was expressly reserved for the determination of the Collector.

(1) (1877) 2 Bom. 370.

(2) (1896) 21 Bom. 344.



Section 36 provides that the person who shall be entered as representative Vatandar after the death of a representative Vatandar is the eldest son or other person appearing to be the nearest heir of such Vatandar. The question who is the eldest son is a question of fact. If the fact be established, the Collector has no choice in the matter unless there appears to be a nearer heir. The conclusive determination of the question whether the statutory condition of eldership or heirship is satisfied becomes therefore a matter of importance to a person claiming to be the eldest son or nearest heir, and it is a question which is not by the words of the Act reserved for the exclusive determination of the Collector. This view of section 36 was taken by this Court in *Dalpat Jogidas v. Punja Zipa* (1) when upon review it was held [106] that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative Vatandar was maintainable notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

I, therefore, reverse the decree of the District Judge and remand the case to him for disposal on the merits.

Costs to be costs in the cause.

*Decree reversed.*

34 B. 106 (=11 Bom. L. R. 1122=4 I. C. 255.)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

BAJABA alias BAJIRAO VISHVANATH OKE (Original Plaintiff),  
Appellant, v. TRIMBAK VISHVANATH OKE AND TWO  
OTHERS (Original Defendants), Respondents.\*

[9th August, 1909.]

*Hindu law—Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.*

Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it.

Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property.

*Held*, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition.

[Ref: 59 I. C. 569; 71 I. C. 855=1922 M. W. N. 824.]

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

[107] Suit for partition.

One Vishvanath Ramchandra Oke, father of plaintiff and defendant 1, and Hari Krishna Oke were the representatives of two different branches of Oke family. Disputes having arisen between the two branches

\* Second Appeal No. 1033 of 1908.

(1) S. A. No. 298 of 1903 (Unrep.).



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34 B. 106=11  
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with respect to family property, Hari Krishna's mother, during his minority, filed against Vishvanath Ramchandra a suit which ended in a compromise, dated the 27th April 1867. Under the terms of the compromise Vishvanath Ramchandra was to remain in possession of the property, the subject of the suit, for seven years and then to hand over a moiety of the property to Hari Krishna. Hari Krishna, however, on the 24th September 1873, that is, one year before the expiration of the period of seven years fixed under the compromise, conveyed his moiety to Trimbak Vishvanath, defendant 1, for a consideration of Rs. 500.

In the year 1907 the plaintiff brought the present suit against defendant 1 and his two sons as defendants 2 and 3 for partition of the family property including the moiety purchased by defendant 1 from Hari Krishna in the year 1873. The plaintiff claimed a half share in the entire family property consisting of moveables, immoveables and their profits.

Defendant 1 contended that though he and the plaintiff were brothers, the property in suit was neither ancestral nor joint, that a moiety of the lands in dispute was lost to the family and was subsequently acquired by the defendant for himself with his own money by purchase in the year 1873, that the moiety thus acquired was his self-acquisition he having paid Rs. 500 for its price from his own private earnings and funds without receiving any assistance from the family property, that the plaintiff did not enjoy the profits of the said moiety, that the defendant being plaintiff's elder brother sometimes remitted money to the plaintiff by way of assistance and that the claim for the division of the other moiety was time-barred.

The Subordinate Judge found that the purchase by the defendant of a moiety of the lands in suit was proved and the said moiety was his self-acquired property, that the plaintiff had enjoyed the profits of the lands in suit as a co-sharer during [108] twelve years preceding the suit and that the claim was, therefore, in time. He therefore decreed that the plaintiff's lands be divided into four equal parts—good and bad—and one of the parts be given in the plaintiff's possession as his portion.

The plaintiff having preferred an appeal to the District Judge, the decree was confirmed on the following grounds:—

The question is whether he (defendant) made this purchase in such a way that it became his self-acquisition or whether it continued joint property of himself, father and brother. The lower Court is of the opinion that it was self-acquired and I concur.

It seems to me as if this was an example of the rare case mentioned in the books where a co-parcener by his unaided efforts repels an assault on or recovers seized family property without assistance from the rest of the family or its property and that this repurchase does not necessarily merge in the joint estate.

There is further no sign that the defendant intended to merge those lands in joint family property, on the contrary he seems to have practically excluded the plaintiff from the rest also of the property. His wife managed the whole landed property. He made from time to time small remittances to his brother, not amounting to half the proceeds and he has latterly protermitted these also.

I think then that this acquisition ought to be treated as separate and peculiar property of defendant.

The plaintiff preferred a second appeal.

S. R. Bakhle for the appellant (plaintiff):—The Judge has treated the present case as an instance of a rare case mentioned in the books. Accepting that finding as binding we contend that the Judge was wrong



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in not applying the rule of Hindu law under which the acquirer gets a quarter share in the acquired property in addition to his own share. Setting apart a quarter share for the acquirer the rest of the property is divided equally among the co-parceners: see Mitakshara, chapter 4, section 5, paragraph 3—क्षेत्रे तुरीयांशमुद्धर्ता लभते शेषे तु सर्वेषां सममेव—“In the immoveable property the acquirer gets a fourth share and the rest is taken in equal shares by all.” This rule is based on the *dictum* laid down by Shankha. See also Mayukha, chapter 4, section 7, paragraph 3.

[109] [BATCHELOR, J. :—The rule must have been laid down at the stage of the society when all property was considered as belonging to the family and the self-acquisition by a co-parcener was looked upon with disfavour. How is that rule applicable in the present advanced stage of the society unless it is shown to be justified by equity and good conscience?]

The texts have laid down the rule for the purpose of enforcing it. It may not be justifiable now. It is a rule laid down by Hindu law and it requires to be enforced when the Courts of facts find facts in such a way that its application becomes necessary.

The rule is discussed by West and Buhler in their Digest, page 718 (3rd Edn.). They lay stress on the words हृत (*hrit*=stolen), नष्ट (*nasht*=lost) and उद्धरेत (*uddharet*=may recover) and say that the rule is not applicable to properties withdrawn from the family by voluntary alienation and subsequently recovered. The word हृत (*hrit*=stolen) may imply a sense of violence in withholding the property but the other two words do not imply any violence. We contend that the property alienated voluntarily is property नष्ट (*nasht*=lost) to the family and would therefore be governed by the rule. The rule was considered by the Madras High Court in *Visalatchi v. Annasamy* (1). West and Buhler say that the rule was recognized by the Bombay High Court in *Malhari v. Bhikoji* (2), but a reference to the record of that case shows that the recovery was made with the assistance of joint family funds.

R. R. Desai for the respondents (defendants) was not called upon.

SCOTT, C. J. :—The question is whether certain land forms part of the joint family property of all the members of the Oke family who are the parties to the suit, or whether it is the separate property of the defendants.

According to the findings of the lower appellate Court the land was originally ancestral and was the subject of a suit brought on behalf of one Hari Krishna Oke against the branch of the Oke family to which the parties to this suit belong. The [110] litigation ended in a compromise in 1867 whereby the father of the parties to the suit was to remain in possession of land claimed for seven years, and then to convey it to the other branch. The representative of the other branch on the 24th September 1873 sold his interest which was to come into his possession under the terms of the compromise in the following year to the defendant 1 by a sale-deed for the sum of Rs. 500. It is found as a fact that Rs. 500 was not part of the joint family money but was provided by the defendant 1 on his own responsibility. The learned Judge also found that the defendant 1 did not intend by the purchase to merge this land in joint family property and excluded his brother from it.

It is contended on this state of facts that the defendant 1 is not entitled to the benefit of his purchase, but that he must partition the land

(1) (1870) 5 Mad. H. C. R. 150.

(2) S. A. 534 of 1869 (Unrep.).



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with the other members of his family subject to a right under Hindu law of retaining an additional quarter share for himself. In support of this contention reliance is placed upon certain texts: Mitakshara, chapter I, section 5, paragraph 3; Mayukha, Chapter IV, section 7, paragraph 3. If these texts involve the conclusion contended for by the defendants the result would be anything but equitable.

We however think that the comment upon the texts which is to be found in West and Buhler's Hindu Law (3rd Edn.), page 719, must be accepted as correct. The learned authors say: "It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words 'hrita' (i.e., that which has been taken or seized) and 'nashta' (i.e., that which has been lost) and 'uddharet' (i.e., if he rescue or win back). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased [111] property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy v. Debee Pershad Tewaree* (1)."

This view receives support from the Judges of the Madras High Court, who in *Visalatchi v. Annasamy* (2) said:—"The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time:—"Property unjustly detained which could not be recovered before" is the import of the ordinance of Manu, chapter IX, sl. 209.

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

*Decree confirmed.*

34 B. 111 (=11 Bom. L. R. 1117=4 I. C. 254).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

MARDANSAHEB VALAD GANSUSAHEB RATIMANI AND OTHERS  
(Original Plaintiffs), Appellants, v. RAJAKSAHEB VALAD  
KASHIMSAHEB AND ANOTHER (Original Defendants  
Nos. 2, 4) Respondents.\*  
[10th August, 1909].

*Mahomedan law—Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.*

Under Mahomedan law, a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (i. e., fornication, adultery or incest).

\* Second Appeal No. 740 of 1903.

(1) (1866) 6 W. R. 58 (Civ. Rul.).

(2) (1870) 5 Mad. H. C. R. 150 at p. 157.



*Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1), followed.

[Ref : 22 I. C. 697=1914 M. W. N. 278=26 M. L. J. 260.]

[112] SECOND appeal from the decision of T. D. Fry, District Judge of Bijapur, reversing the decree passed by V. G. Kaduskar, Subordinate Judge of Haveri.

Mardansahab and others filed a suit to recover possession of property which belonged to their uncle Maulasahab.

Their claim was resisted by one Miyasahab (defendant No. 4) who contended that he was the acknowledged son of Maulasahab who had willed the property in his favour.

Miyasahab was born of Jainabi. She was the wife of another ; but she was divorced by her first husband. Miyasahab was born after the divorce and before she was remarried to Maulasahab. It appeared that there existed criminal intimacy between Maulasahab and Jainabi even before remarriage.

The Subordinate Judge decreed the plaintiffs' claim holding that Miyasahab was not the acknowledged heir and son of Maulasahab, and that the will relied on by him was not proved.

The District Judge on appeal reversed this decree and dismissed the plaintiff's claim, holding that the will was proved and that defendant No. 4 was the acknowledged son and heir of Maulasahab. His reasons were as follows :—

“ Mahomedan law no doubt recognizes the rights of a duly acknowledged son but there are restrictions on the power to acknowledge so as to confer these rights.

“ In 15 All. 896 it was held following 10 All. 289 that a Mahomedan could not by acknowledging him as his son render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man.

“ Now when Maula married Jainabi by *nikka*, Jainabi had already given birth to Miyasahab and, if at the time of the birth Jainabi was still the wife of another man then, under the authorities quoted, it will be incumbent on me to hold that the acknowledgment was invalid.

“ By relying for the most part on Exhibits 24, 31 and 32, I hold that even if Jainabi's husband was still living when the child was born he had divorced his wife before that birth.

“ It was thus open to Maula to ‘ acknowledge ’ Miyasahab and in the state of the authorities as they now stand (10 Cal. 663), I should not be prepared to hold the acknowledgment was invalid even if it were proved that at the time of conception Maula was having adulterous intercourse with Jainabi.

[113] “ I hold that the ‘ acknowledgment ’ would not have been invalid in law.”

The plaintiffs appeal to the High Court.

*K. H. Kelkar* for the appellant :—Under Mahomedan law, the doctrine of acknowledgment applies only to cases where the paternity of the child is doubtful and the evidence of marriage inconclusive. Here Miyasahab is born of *zina*: see *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1); *Nagar Mal v. Ali Ahmed* (2). He cannot therefore be legitimated. See *Ashrufud Dowlah Ahmed Hossein v. Hyder Hossein Khan* (3); *Wilson's Anglo-Muhammadan Law*, p. 162 (3rd Edn.); *Ameer Ali*, Volume II, p. 256 (3rd Edn.); *Mahammad Azmat Ali Khan v. Lalli Begum* (4); *Sadakat Hossein v. Mahomed Yusuf* (5); *Baillie's Mahomedan Law*, p. 411; *Huneefa*, p. 414; *Dhan Bib v. Lalon Bibi* (6).

(1) (1888) 10 All. 289.

(2) (1888) 10 All. 396.

(3) (1866) 11 Moo. I. A. 94.

(4) (1881) 8 Cal. 422.

(5) (1883) 10 Cal. 663.

(6) (1900) 27 Cal. 801.

1909  
AUG. 10.

APPELLATE  
CIVIL.

33 B. 111=11  
Bom. L. R.  
1117=4 I. C.  
254.



1909  
AUG. 10.  
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APPELLATE  
CIVIL.  
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33 B 111=11  
Bom. L. R.  
1117=4 I. C.  
284.

*G. S. Mulgaonkar* for the respondent:—When a boy is born before marriage, he can be legitimated by acknowledgment, for there was a possibility of marriage between the parties at the time the boy was conceived. Refers to *Abdool Razack v. Aga Mahomed Jaffer* (1); *Liaqat Ali v. Karim-un-nissa* (2); *Aizunnissa Khatoon v. Karimunissa Khatoon* (3).

CHANDAVARKAR, J.:—It is found by the lower appellate Court that the second respondent, *Miyasaheb valad Maulasaheb*, who was defendant No. 4 in the suit, which has led to this second appeal, was acknowledged by *Maulasaheb* as his son, and that the acknowledgment fulfils all the requirements of, and is therefore valid according to Mahomedan law. This latter finding as to the legal validity of the acknowledgment is impugned before us upon the ground that, on the facts found, the second respondent must be held to have been born of what in Mahomedan law is called *zina*, fornication or adultery, and that such a boy cannot, according to that law, be acknowledged as son.

The findings of the learned District Judge in appeal are not sufficiently clear. He holds upon the evidence that "even if [114] *Jainabi*'s husband was still living when the child was born he had divorced his wife before that birth." But that leaves the question still open whether, at the time of conception, *Jainabi* had been divorced. On that point all the learned Judge says is that he "should not be prepared to hold the acknowledgment was invalid even if it were proved that at the time of conception *Maula* was having adulterous intercourse with *Jainabi*."

It is however, not necessary to send the case back for a finding on that question because even upon the facts, so far found definitely, the acknowledgment cannot be legal, according to Mahomedan law.

*Jainabi*'s marriage with *Maulasaheb* was subsequent to the birth of the second respondent. Whether at the time of conception, she was still the wife of her former husband, not having been divorced by him, or had ceased to be his wife by reason of divorce, the illegitimacy of the respondent in question is a proved fact in either case and he is a child born of *zina*, which includes both fornication and adultery.

In the Full Bench case of *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (4) Straight, J., said (at p. 317):—

"Birth during wedlock, that is to say, legitimate birth necessarily confers a right to inherit, illegitimate birth that is, without wedlock subsisting between the father and mother at the date of the child's begotting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category."

*Mahmood*, J., said (at p. 334):—

"Children born of *zina* (which means fornication, adultery or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a proved and established fact."

This view of the Mahomedan law has been followed in *Liaqat Ali v. Karim-un-nissa* (2) and *Dhan Bibi v. Lalon Bibi* (5). See [115] also Mr. Ameer Ali's *Personal Law of Mahomedans*, Volume II, Edition of 1908, page 256.

(1) (1893) L. R. 21 I. A. 56.

(2) (1898) 15 All. 396.

(3) (1895) 28 Cal. 180.

(4) (1888) 10 All. 289.

(5) (1900) 27 Cal. 801.



The decree appealed from must be reversed and that of the Subordinate Judge restored with costs throughout on the respondents.

*Decree reversed.*

1909  
AUG. 10.

APPELLATE  
CIVIL.

84 B. 115 (=4 I. C. 584=11 Bom. L. R. 1308).

APPELLATE CIVIL.

84 B. 111=11  
Bom. L. R.  
1117=4 I. C.  
254.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

BHIMAPPA bin TAMAPPA (Original Opponent 10), Applicant,  
v. KHANAPPA alias VENKAPPA bin HANMAPPA AND ANOTHER  
(Original Applicant and Opponent 9), Opponents.\*

[11th August, 1909.]

*Curator's Act (XIX of 1841), sections 3, 4, and 14—Oath's Act (V of 1840)—Death of representative Vatandar—Deceased's widow representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male Vatandar for possession—Six months, calculation of—Property claimed by right 'in succession'—Inquiry upon solemn declaration—Affidavit upon solemn affirmation.*

One Kotrappa, representative Vatandar of Deshagat Vatan, died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotrappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that,

(1) Under section 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and

(2) In granting the application the Judge did not follow the procedure which is made imperative by the words of section 3 of the Curator's Act (XIX of [116] 1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant).

*Held*, confirming the order, that,

(1) The decease of the proprietor whose property was claimed by right "in succession" referred to in section 14 of the Curator's Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder.

(2) The Judge having acted upon the application of the claimant in addition to his affidavit or solemn affirmation, the statements in the affidavit, furnished sufficient grounds for action under section 4 of the Curator's Act (XIX of 1841) having regard to the provisions of the Oath's Act (V of 1840).

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of C. E. Palmer, Acting District Judge of Bijapur, in a miscellaneous application under the Curator's Act (XIX of 1841).

One Kotrappa bin Basappa was the last male proprietor of the Deshagat Vatan of Nir Budihal in the Bijapur District. He died on the 2nd June 1892 leaving him surviving a widow Basawa and three daughters. After Kotrappa's death the Deshagat Vatan was transferred to his widow Basawa's name in the Vatan Register and she was in possession and enjoyment of it till her death on the 14th November 1907.

\* Application No. 61 of 1909 under the extraordinary jurisdiction.



1909  
AUG. 11.

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APPELLATE  
CIVIL.  
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34 B. 115=4  
I. O. 584=11  
Bom. L. R.  
1308.

On the 29th November 1907 one Khanappa *alias* Venkappa *bin* Hanmappa Desai applied to the District Judge of Bijapur stating that as he was the nearest male heir of the deceased Kotrappa he was entitled to succeed to the property and prayed for the appointment of a curator on the ground that Tamappa *bin* Balappa and eleven other persons were wasting and misappropriating the property.

The Judge made an inquiry under the Curator's Act (XIX of 1841) and ordered that the possession of the Deshagat Vatan be delivered to the applicant Khanappa. In his judgment the Judge made the following remarks :—

On the 29th November 1907 the petitioner Khanappa applied to this Court to appoint a curator as the opponents were trying to take possession of the property by forcible means, and there was danger that the Deshagat servants would also misappropriate it. This Court was also asked to determine the right to possession. This application was supported by an affidavit and furnished sufficient grounds for action. Confirmation of the truth of the matters stated in the application is afforded by the written statement of opponent 11 (Exhibit 21) in which opponent 11 admitted taking possession of the house and moveables at Nir Budihal immediately after Basawa's death though he has since given up asserting his claim to the property in this miscellaneous proceeding. I see no reason therefore to hold that I was not fully justified in taking action under this Act.

Against the said order one Bhimappa *bin* Tamappa, heir and legal representative of Rangappa *bin* Tamappa who was opponent 10 in the District Court, preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V 1908) urging *inter alia* that the District Judge had no jurisdiction to entertain Khanappa's application under section 14 of Act XIX of 1841, that the Judge erred in putting the Act into operation in the absence of any circumstances proving that the original applicant Khanappa was "likely to be materially prejudiced if left to the ordinary remedy of a regular suit," and that the order of the Judge was based on inadmissible evidence. A *rule nisi* was issued calling on the opponents, that is, the original applicant and the original opponent 9, to show cause why the order of the Judge should not be set aside.

Mulla with G. K. Dandekar appeared for the applicant (original opponent 10) in support of the rule :—The Judge had no jurisdiction to put the Curator's Act in force in the present case. Kotrappa died in 1892. His widow Basawa succeeded him as a Hindu widow and she died in November 1907. The opponent claimed as a reversioner through Kotrappa and not through Basawa. But his application was not made within six months from Kotrappa's death though it was made within that period from Basawa's death. Therefore under section 14 of the Curator's Act the Judge had no jurisdiction to entertain the application.

Even granting that the Judge had jurisdiction, he acted with material irregularity in the exercise of his jurisdiction, because the conditions precedent to give jurisdiction under the Act as laid down in sections 3 and 4 were not satisfied. The inquiry should have been made on solemn declaration by the opponent and by witnesses and documents at the Judge's discretion. He [118] should have satisfied himself with respect to four points mentioned in section 3 before he issued notices of the application. The application was accompanied by an affidavit and the Judge on the very day the application was made, issued notices to us and others. The affidavit cannot be said to be a solemn declaration and the order of the Judge directing notices to issue does not show that he was satisfied as to the four points mentioned in section 3. We have been prejudiced by the



procedure adopted by the Judge: *Sato Koer v. Gopal Sahu* (1), *Krishnasami Pannikondar v. Muthukrishna Pannikondar* (2), *Abdul Rahiman v. Kutti Ahmed* (3).

G. S. Rao appeared for opponent 1 (original applicant):—The Judge says in his judgment that he was satisfied as regards the truth of the allegations made by us in our application. On the day the notices were issued our application was supported by an affidavit and it furnished sufficient ground for action. Basawa was the widow of the last male holder Kotrappa and her status as representative Vatandar was recognized under section 2 of Bom. Act V of 1886. After her death we claimed the property in succession. The widow continues her husband's estate and really the husband's estate is determined by the death of the widow: Phadnis' Vatan Act, p. 132; Mayne's Hindu Law, p. 795 (6th Edn.); *The Collector of Masulipatam v. Cavalry Vencata Narrainappa* (4); *Lallubhai v. Mankuvarbai* (5).

P. D. Bhide appeared for opponent 2 (original opponent 9).

Mulla, in reply.

SCOTT, C. J. :—This is an application under section 115 of the Code of Civil Procedure asking for our interference on the ground that the District Judge of Bijapur has acted without jurisdiction in making an order in a summary suit under section 4 of the Curator's Act XIX of 1841.

The occasion for the application which was made to the District Judge and upon which the order complained of was passed, was the death in 1907 of Basawa the widow of one [119] Kotrappa who died in 1892. Kotrappa was the representative Vatandar of a Deshagat Vatan in Bijapur territory, and on his death his widow Basawa was entered on the register as representative Vatandar and she held the Vatan property until her death. On her death an application was made by one Khanappa who claimed to be the nearest heir of Kotrappa, for possession of the property under the Curator's Act, and that application was granted. It is the order on that application which is now the subject of this proceeding.

Two points have been raised by the applicant. First, he says that under section 14 of the Act of 1841, the provisions of the Act could not be put in force, because Kotrappa died more than six months before the date of the application. It is, however, admitted that the application was within six months of the death of Basawa, and it is contended on behalf of the opponents that the decease of the proprietor whose property is claimed by right "in succession" referred to in section 14, would include the decease of Basawa in the present case, because Basawa was, between the death of her husband and her own decease, the proprietor of the property which is claimed, and it is claimed "in succession" to her, that is to say, the claimant claims to succeed her in the possession of the property. This view of the section is, we think, correct.

The words of the Act appear to have been very carefully chosen. Thus in the beginning of the preamble we find a reference to "pretended claims of rights by gift or succession." Here the expression is "by succession" and is used to express the point of view of the claimant. Then in the second paragraph of the preamble we have "the circumstance of actual possession when taken upon a succession," that is, regarding the succession

(1) (1907) 34 Cal. 929.

(2) (1900) 24 Mad. 364.

(3) (1886) 10 Mad. 68.

(4) (1861) 8 Moo. I. A. 529.

(5) (1876) 2 Bom. 388.

1909  
AUG. 11.

APPELLATE  
CIVIL.

34 B. 115=4  
I. C. 594=11  
Bom. L. R.  
1308.



1909  
AUG. 11.

—  
APPELLATE  
CIVIL.  
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34 B. 115=4  
I. C. 594=11  
Bom. L. R.  
1308.

from the point of view of the Judge and not from the point of view of an interested party.

In the same way in section 14 we think that the words "by right in succession" are chosen to describe the point of view of the Judge and not the point of the interested parties. All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased [120] holder. An application was made to him to come to a decision upon that point within six months of the death of Basawa and we therefore think that he acted with jurisdiction in coming to his decision.

It was next objected that even if he had a right to come to a decision upon an application made to him by the applicant, he did not follow the procedure which is made imperative by the words of section 3 ; for, it is said that he did not inquire upon solemn declaration of the complainant whether there were strong reasons for believing that the party in possession had no lawful title. The materials upon which he came to his decision were the application and in addition to the application an affidavit upon solemn affirmation of the complainant Khanappa to the effect that he alone was the nearest heir to Basawa, that the opponents and distant *Bhaubands* were wasting and misappropriating the property and that this statement was true to his belief and knowledge. The learned District Judge held that the statements in this affidavit furnished sufficient grounds for action under section 4, and we cannot say that he has acted upon materials which are declared to be insufficient by the Act. He has, as it appears to us, entered into the inquiry upon statements made upon solemn affirmation which, having regard to the provisions of Act V of 1840, must be taken to be statements upon solemn declaration. We think there is no ground for interference and we dismiss the application with costs.

Separate sets of costs.

*Application dismissed.*

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34 B. 121 (=4 I. C. 262=11 Bom. L. R. 1137.)

[121] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

REV. ROBERT WARD (*Original Opponent*), Appellant, v.  
VELCHAND UMEDOHAND (*Applicant*),  
*Respondent.\**

[31st August, 1909.]

*Guardians and Wards Act (VIII of 1890), section 9—Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides.*

One Panachand, a Jain inhabitant of Kapadwanj in the Ahmedabad District, lived in his house at that place. He died leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year after him. Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 1906. At Baroda Lallu embraced Christianity and placed his minor brother, who was also baptized, in the American Mission Boarding House at that place. Afterwards Lallu renounced Christianity and in the beginning of February 1909 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad. The minor lived at Ahmedabad till the 15th March

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\* Appeal No. 94 of 1909.



1909 and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the American Mission at that place, and taken to Baroda. On the 29th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor's person. The appellant (opponent) at whose instance the minor was taken back to Baroda contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under section 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain pleader, on his application, as the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction.

*Held*, on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of section 9 of the Guardians and Wards Act (VIII of 1890).

[122] APPEAL against the decision of Dayaram Gidumal, District Judge of Ahmedabad, in the matter of an application for the guardianship of a minor under the Guardians and Wards Act (VIII of 1890).

One Panachand professing Jain religion lived in his house at Kapadwanj within the jurisdiction of the District Court at Ahmedabad. He died at that place leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, all of whom lived in the house. Panachand's widow survived him for about a year and after her death Lallu sold away the house at Kapadwanj and a shop and went to Broach with his minor brother, Wadilal. He lived there for a short time and thence went to Baroda with the minor in May 1906. There he embraced Christianity and became a preacher of the American Mission. The minor was also baptized and Lallu placed him in the Mission Boarding House at Baroda. Afterwards Lallu renounced Christianity and reverted to Jainism, the religion of his birth. The minor Wadilal lived at Baroda in the Mission Boarding House at that place from May 1906 till the beginning of February 1909 when Lallu clandestinely removed him to Ahmedabad and on the 15th February placed him in the Jain Boarding House at the place. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was taken back to Baroda at the instance of Reverend Mr. Ward, a member of the American Mission at Ahmedabad. Thereupon, Lallu, on the 29th April 1909, made an application to the District Court at Ahmedabad for his appointment as the guardian of the person of the minor Wadilal.

The opponent, Reverend Mr. Ward, contended that the Court had no jurisdiction to entertain the application under section 9 of the Guardians and Wards Act (VIII of 1890) inasmuch as the minor's residence was Baroda which was outside the jurisdiction of the Court. He further contended that Lallu was not a fit person for the appointment.

The Judge found that the minor ordinarily resided within the Ahmedabad District, therefore, his Court had jurisdiction to entertain the application. His reason for the finding was that as the minor's father lived and died in his house at Kapadwanj [123] that place was the father's domicile and as the minor lived with his father till his death, the minor's domicile followed that of his father: Story on Conflict of Laws, section 46. Therefore Kapadwanj being the minor's domicile, his domicile was within British India in the Ahmedabad District.

1909  
AUG. 31.

APPELLATE  
CIVIL.

34 B. 121=4  
I. C. 262=11  
Bom. L. R.  
1137.



1909  
AUG. 31.  
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APPELLATE  
CIVIL.  
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35 B. 121=4  
I. C. 262=11  
Bom. L. R.  
1187.

The Judge further found that Lallu was of fickle mind as shown by the change of religions, therefore, he was not fit to be appointed minor's guardian. He therefore made a suggestion that he would consider an application made by any other proper person and rejected Lallu's application. Thereupon Lallu's pleader, Velchand Umedchand, a Jain by religion, presented an application for his appointment as the guardian. The Judge entertained this application in the proceedings started under Lallu's application and appointed Velchand guardian of the minor's person and also of his property because it was alleged that the minor's right to the family house at Kapadwanj had been wrongfully sold.

Against the said order the opponent appealed.

*L. M. Wadia* with *G. B. Rele* for the appellant (opponent):—The case presents three points for consideration. *First*, whether the District Court at Ahmedabad had jurisdiction to entertain Lallu's or Wadilal's application for the guardianship of the minor; *secondly*, whether the minor should be removed from the protection of the Mission at Baroda; and *thirdly*, whether it was not necessary to give us notice of Velchand's application for guardianship.

As to jurisdiction we contend that the District Court at Ahmedabad had no jurisdiction to entertain the application for guardianship. Section 9 of the Guardians and Wards Act lays down that an application for guardianship shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Baroda has been the ordinary residence of the minor since May 1906 up to this day. No doubt he was at Ahmedabad for a short interval of about four weeks, but such a short stay cannot make Ahmedabad the ordinary residence of the minor. Further, when Lallu applied for guardianship on the 29th April the minor was not living at Ahmedabad. He [124] was then living at Baroda. Under section 9 of the Act what is to be considered is the minor's ordinary residence and not his domicile. The Judge was wrong in going into the question of the minor's domicile. Our contention is further strengthened by the expressions used in the previous enactments. Section 4 of the Minor's Act, XX of 1864, refers to the minor's residence. Section 3 of the Indian Majority Act, IX of 1875, refers to the minor's domicile. While the present Act, VIII of 1890, refers to the minor's ordinary residence. If the Legislature contemplated that the minor's domicile should be determined then there was nothing to prevent them from inserting a provision to that effect in the present Act, especially as there was already that provision in the Majority Act. The minor has all along lived at Baroda for three years, therefore, Baroda is his ordinary residence where he is ordinarily to be found, and that being so, the District Court at Ahmedabad had no jurisdiction to entertain the application.

With respect to the second point provision is made in section 17 of the Act. Particular attention is to be directed to the minor's religion and his welfare. We submit that as the minor is a Christian, he should be associated with persons who profess Christianity. He is at present residing with the Missionaries at Baroda and is receiving training in Christian religion. So far as the welfare of the minor is concerned as he has been living in company of the boys in the Mission and has become attached to the Mission, and in fact he says in his affidavit that he is happy in the Mission Boarding House at Baroda and likes to live in it, we submit that he should not be removed from that place. Reverend Mr. Linzell, the Superintendent of the Mission Boarding House, has filed an



affidavit in which he says that the minor is properly provided for and educated in the school and he is quite happy there. Under these circumstances it would not be proper to remove the minor from the Mission Boarding School and to hand him over to the applicant Velchand who is not known to him and whom the minor has never seen. Velchand is an utter stranger to him. In this connection the Judge has referred to the head-note of a case given in Mew's Digest, Infant column 1507. The case is *In re Hunt* (1). That case lays down that if a [125] testamentary guardian, after taking charge of a minor, changes his religion he is liable to be removed from the office of guardian. That case has no bearing at all. It went entirely on its own facts. There are various cases of the High Courts in India and they support our contention. The gist of all those cases is that the welfare of the minor, irrespective of his or her age and irrespective of the parent's right of custody, is the main feature to be considered: *In the matter of Saithri* (2), *In the matter of Joshy Assam* (3), *Mokoond Lal Singh v. Nobodip Chunder Singha* (4), *Bindo v. Sham Lal* (5), *Re Gulbai and Lilbai* (6).

Our third contention relates to want of notice of Velchand's application. When the Court made up its mind with respect to Lallu's application, a hint was thrown that it would consider the application of any other fit and proper person for the guardianship of the minor. Thereupon Lallu's pleader Velchand Umedchand presented an application that he should be appointed guardian of the person and property of the minor and his application was granted. Velchand's application was taken by the Court in the proceedings started under Lallu's application. It is headed "In the matter of the application of Lallu Panachand." Velchand's application could not be entertained in the proceedings under Lallu's application because that application was dismissed. Velchand's application should have been given a separate number and a notice of his application should have been given to us under section 11 of the Act. We had no intimation of the application. We had gone to Court in connection with Lallu's application and Velchand's application came upon us as a surprise. The Judge says that no notice of the application was necessary as the appointment of the Nazir is often made without notice. We submit that a pleader, though he is an officer of the Court to a certain extent, is not in the position of the Nazir. The analogy of Nazir is fallacious.

*Jinnah* with *Motichand* and *Devidas* for the respondent (applicant) —It is not necessary that a minor should reside within [126] the jurisdiction of the Court at the time of the application. The minor in the present case was residing for some time at Ahmedabad, that is, within the jurisdiction of the Court. Further a minor cannot have a domicile of his own, nor can he change his deceased father's domicile which continues in him. It is not contested that Kapadwanj was the domicile of the father.

[SCOTT, C. J.:—The question of domicile is wholly irrelevant. The Act refers to the ordinary residence of the minor.]

We rely on *Sarat Chandra Chakrabati v. Forman* (7) and *Sheikh M. homea Hossein v. Akbur Hossein* (8).

(1) (1843) 2 Con. and Law, p. 378.

(2) (1891) 16 Bom. 307.

(3) (1895) 23 Cal. 290.

(4) (1898) 25 Cal. 881.

(5) (1906) 29 All. 210.

(6) (1907) 32 Bom. 50.

(7) (1889) 12 All. 213.

(8) (1872) 71 W. R. 275 (Civ. Rul.).

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34 B. 121=4  
I. C. 262=11  
Bom. L. R.  
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84 B. 121=4  
I. C. 262=11  
Bom. L. R.  
1187.

Further the Mission Boarding School is located in the Cantonment at Baroda which is admittedly within British Jurisdiction. Therefore the minor would be amenable to the jurisdiction of the Courts in British India. The District Court at Broach would have jurisdiction in the matter.

SCOTT, C. J.:—An application was made by one Lallu Panachand to the District Judge of Ahmedabad under the Guardians and Wards Act, VIII of 1890, that the applicant might be appointed the guardian of the person of his minor brother Wadilal.

As to the main facts there is no dispute. The father of the minor died at Kapadwanj leaving two sons and a widow and property consisting of a house and shop. The sons are the applicant Lallu and the minor Wadilal. The widow was the mother of the minor. Within a year of her husband's death the widow died. Lallu thereupon sold the family house and shop and went to Broach and thence to Baroda where he embraced Christianity and became a preacher of the American Mission in that place. He was then sent as a preacher to Dhola in Kathiawar. He left his minor brother Wadilal in the Mission House. Wadilal remained there from May 1906 until February 1909. In that month he was removed by Lallu without the consent of those in charge of the Mission, Lallu having previously been dismissed from the service of the Mission. Lallu came to Ahmedabad bringing his brother with him and took service in that city. He placed his brother on the 15th of February in a Jain Boarding [127] House. On the 15th of March by the instrumentality of one Mulji, a preacher of the American Mission, he was removed from the Boarding House to the house of Mr. Ward, a member of the Mission residing in Ahmedabad, and the following day was sent to the Mission at Baroda where he has since remained.

The application of Lallu was made to the District Judge on the 29th of April. At that time the minor had, therefore, been living in Baroda for nearly six weeks. For twenty-eight days prior thereto he had been living in Ahmedabad and for the preceding 2½ years or more had been living at Baroda.

The District Judge holding that he had jurisdiction under the Act on the ground that his Court had jurisdiction in the place where the minor ordinarily resides as provided by section 9, passed an order for the appointment of a Pleader of his Court to be guardian of the person and property of the minor.

An appeal has been preferred from that order, the appellant being the representative of the American Mission in face of whose opposition the order was made.

The first point taken on behalf of the appellant is that the District Judge had no jurisdiction in the matter at all, that he would only have jurisdiction if the minor ordinarily resided within the jurisdiction of his Court. It is contended on behalf of the appellant that the minor ordinarily resides where he is ordinarily to be found and he is ordinarily to be found in Baroda. He had been there for six weeks continuously at the date of the application and with the exception of twenty-eight days he had been there for nearly three years.

The learned District Judge did not found his jurisdiction upon the fact that the minor had resided in Ahmedabad between the 15th of February and the 15th of March of this year, but he held that, because the minor's father had up to the time of his death resided in Kapadwanj the



minor's domicile was in British India in the Judicial District of Ahmedabad and that therefore being so domiciled the minor must be taken to ordinarily reside within that district. It is very easy to reduce such an argument as this to an absurdity.

[128] We think that the question of domicile is wholly irrelevant to the question of jurisdiction in such a case as the present. The words of the Act alone have to be construed, and the words of the Act are "that an application must be made to the District Court having jurisdiction in the place where the minor ordinarily resides".

The minor is living in Baroda and he has no other place of residence, and he has, with the exception of twenty-eight days, lived in Baroda for nearly three years. We, therefore, think that Baroda is the place where the minor ordinarily resides within the meaning of section 9.

It is argued on behalf of the respondent (with what correctness we do not know) that the Mission House in Baroda where the minor is living is in British Cantonments and is within the jurisdiction of the Judicial District of Broach. It may be so, but even if it is so, that does not give jurisdiction to the District Judge of Ahmedabad.

We set aside the order of the District Judge and allow this appeal with costs.

*Order reversed.*

34 B. 128 (=11 Bom. L. R. 1315=4 I. C. 595).

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

PARASHARAM VISHNU DABKE AND OTHERS (*Original Plaintiff and Defendants 1—5*), *Appellants*, v. PUTLAJIRAO KALBARAO AND OTHERS (*Original Defendants 6—18*)\*

[15th September, 1909.]

*Bombay Regulation V of 1827, section XV, clause 2—Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.*

A usufructuary mortgage executed in the year 1869 contained the following agreement :—

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, [129] redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

In the year 1906 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage.

*Held*, on second appeal by the plaintiffs, that the mortgage in suit was governed by clause 5, section XV of Regulation V of 1827, and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie.

\*Second Appeal No. 997 of 1908.



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34 B. 123=11  
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1315=41. C.  
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The decree of the appellate Court reversed and that of the first Court restored. *Mahadaji v. Joti* (1) and *Ramchandra v. Tripurabai* (2) followed. *Shah Idrus v. Abdul Rahiman* (3), *Sadashiv v. Vyankatrao* (4) and *Krishna v. Hari* (5), explained.

[Ref. 34 Bom. 462; 35 Bom. 288.]

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, reversing the decree passed by Sheshgiri, R. K., Subordinate Judge of Dapoli.

The property in suit originally belonged to three brothers Kalbarao (father of defendants 6—8), Abajrao and Bajirao. They mortgaged it on the 9th April 1869 to Vishnu Raghunath Dabke, an ancestor of the plaintiffs and defendants 1—5, for Rs. 1,750. The mortgage was usufructuary. The material portion of the deed was as follows:—

Accordingly as abovesaid we all three of us have this day delivered over into your possession for the enjoyment as mortgagee the 33 *thikans* in all of our share consisting of the rice fields and *varkas* lands. You may yourself make the *vahivat* thereof or may give to others on rent and *ghumav*; and whatever rents and profits you will get is to be applied by you towards the satisfaction of interest (i.e., in lieu of interest) and you should pay the Government assessment in the *khata* of Kalbarao, our eldest brother, in whose [130] name the *khata* stands in the Government records. The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall after paying off the said amount of debt after fifteen years from this day redeem our premises. Perhaps any one out of us three might within the period pay off at one time the amount of rupees according to his share you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the rupees received.

In 1880 Vamnaji Vishnu Dabke, a deceased son of the mortgagee, obtained a money decree against Kalbarao. In execution of that decree the mortgaged property was sold and was purchased by Ganesh Vasudev Joshi on the 14th October 1884. On the 5th April 1889 Ganesh Vasudev Joshi sold his title to plaintiff 1.

On the 18th January 1906 the plaintiffs brought the present suit alleging that they were in possession of the mortgaged property by themselves or through tenants till the year 1899 when defendants 6—8 denied the plaintiffs' title and asserted their own and that Rs. 1,975 were due to them under the mortgage. The plaintiffs, therefore, prayed for possession of the property as owners under the purchase from Ganesh Vasudev Joshi or as mortgagees or in the alternative to recover the sum due to them under the mortgage by sale of the mortgaged property.

Defendants 1—5, who were brothers of plaintiffs 1—5 and cousins of plaintiff 6, admitted the plaintiffs' claim. They were joined as defendants because they were unwilling to be joined as co-plaintiffs.

Defendants 6—8 answered *inter alia* that the property in suit was their ancestral estate and the plaintiffs had no interest therein, that the auction sale against their father Kalbarao did not pass more than his individual interest, that the delivery of possession at the auction sale was only nominal and the plaintiffs never got actual possession, that they were all along in possession and the claim was time-barred, and that they did not admit the mortgage transaction and nothing was due under it.

The Subordinate Judge found that the plaintiffs' title as owners was not proved, that they were not in possession within twelve years before the suit, that they were not entitled to [131] possession as purchasers or mortgagees, that the mortgage relied on by the plaintiffs was valid and

(1) (1892) 17 Bom. 426.

(2) (1898) P. J. p. 43.

(3) (1891) 16 Bom. 808.

(4) (1895) 20 Bom. 296.

(5) (1903) 10 Bom. L. R. 615.



proved and that the plaintiffs were entitled to recover Rs. 1,975 under the mortgage. He therefore passed a decree directing the defendants to pay to the plaintiffs and defendants 1—5 Rs. 1,975 with plaintiffs' costs within six months from the date of the decree and in default the amount to be recovered by sale of the mortgaged property or a sufficient portion thereof. The following are some of the observations of the Subordinate Judge in his judgment :—

This is the case of a mortgagee in possession obtaining a money decree and subsequently selling the equity of redemption through a transferee and ultimately buying it himself from the auction-purchaser. If section 99 of the Transfer of Property Act applied such a sale, held otherwise than by instituting a suit, would be void (I. L. R. 12 Mad. 325; I. L. R. 14 Mad. 74; Bombay Law Reporter VII, page 1). The only question is whether the principle of the section would be applicable to the present mortgage, which is of 1969, having regard to clause (c) of section 2 of the Act, which excludes from the operation of the Act, any right or liability arising out of a legal relation constituted before the Act came into force. The case reported at page 129 of I. L. R. 10 Madras is an instance of the section being applied to a mortgage passed before the Act came into force. See also I. L. R. 12 Cal. 533. Besides I. L. R. 1 Cal. 337 was decided before the Act and laid down that a mortgagee is not entitled by means of a money decree obtained on a collateral security to obtain sale of the equity of redemption separately. This case was followed by our own High Court in I. L. R. 4 Bom. 57 and I. L. R. 5 Bom. 5. These authorities lead me to hold that even apart from the Act, the sale held otherwise than by a suit upon a decree obtained by the mortgagee was invalid, and that plaintiffs did not acquire a valid title by their ultimate purchase from the auction-purchaser. It is true the mortgagee transferred his decree before execution, but the transfer was subject to the equities which the mortgagor might have enforced under section 233, Civil Procedure Code, against him (I. L. R. 22 Cal 813).

On appeal by defendants 6—8 the Assistant Judge found that the mortgage sued on was not subsisting, that the plaintiffs were not entitled to recover anything under it, and that the claim was barred by the defendants' adverse possession. He, therefore, reversed the decree and dismissed the suit. In the course of his judgment the Assistant Judge made the following remarks :—

The ruling in *Krishna v. Hari* 10 Bom. L. R. 615, dispels all the delusion on the question of law involved in a case like the present. Exception was taken at the bar to the correctness of the decision on the ground that it is [132] inconsistent with a previous decision of a division bench of our High Court reported at p. 425 of I. L. R. 17 Bom. (*Mahadaji v. Joti*). It was further argued that the last quoted decision was not brought to their Lordships' notice when *Krishna v. Hari* was decided and it was consequently not referred to and considered. I cannot accept this argument as sound. The main test is, whether the property is hypothecated or whether it was the intention of the parties to make the property liable to be brought to sale in case the promised payment was not made. Their Lordships had before them this sound test and they have observed : " We do not find that this document contains anything more than a personal and conditional promise to pay. We do not see any indication that the property was hypothecated or that it was ever the intention of the parties that it should be liable to be brought to sale in case the promised payment was not made." It was therefore absolutely necessary to refer to the ruling in *Mahadaji v. Joti*, 17 Bom. 425, for in that case Candy, J., has distinctly observed " there was a distinct covenant to pay the principal and the land was security for the same," (p. 428) The principle enunciated in the latest ruling cited above has been long ago recognized by our High Court (*Shaik Idrus v. Abdul*, 16 Bom. 303). The reasons given in the full Bench Madras decision (*Kangaya v. Kalimuthu*, 27 Mad. 526) can be very easily refuted. But as there is an express ruling of our High Court it is not necessary to do so.

Even if the mortgage as regards lands were a combination of a simple and usufructuary mortgage the suit having been instituted more than 12 years after the due date has been barred (*Vasudeva v. Srinivasa*, 9 Bom. L. R. 1104).

Plaintiffs and defendants 1—5 preferred a second appeal.

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34 B. 123=11  
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1315=4 I. C.  
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84 B. 123=11  
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1315=4 I. C.  
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*K. N. Koyaji* for the appellants (plaintiffs and defendants 1—5):—The Assistant Judge erred in reversing the decree of the first Court for sale. The present case is governed by Regulation V of 1827, section XV, clause 3. It is a settled law in this Presidency that in cases governed by the Regulation, the mortgaged property is liable to sale where there is promise to pay: *Mahadaji v. Joti* (1), *Yashvant v. Vitthal* (2), *Hemraj v. Trimbak* (3), *Ramchandra v. Tripurabai* (4). In *Shaik Idrus v. Abdul Rahiman* (5) and *Sadashiv v. Vyankatrao* (6) there was no promise to pay, so those cases are inapplicable. The ruling in *Krishna v. Hari* (7) is distinguishable. The judgment in that case proceeded on the basis that there was a conditional promise to pay.

[133] *N. V. Mandlik* for the respondents (defendants 6—8):—The appellants cannot claim the right of sale, the bond being, as found by the lower Court, a purely usufructuary one. The case is governed by the Transfer of Property Act which provides, section 67, that a usufructuary mortgagee is not entitled to get the property sold. Even if the case be governed by Regulation V of 1827, still there is no personal covenant in the deed sued on. The mortgagee is to hold possession of the property only. He has no right of sale: *Sadashiv v. Vyankatrao* (6), *Shaik Idrus v. Abdul Rahiman* (5), *Krishnaji v. Wasudeo* (8), *Jafar Husen v. Ranjit Singh* (9). Even admitting that there is a personal covenant, still that is not sufficient. There must be in addition to that a right of sale specifically given: *Krishna v. Hari* (7), *Kashi Ram v. Sardar Singh* (10), *Shaikh Idrus v. Abdul Rahiman* (5), *Krishnaji v. Wasudeo* (8).

As to hypothecation, the definition of mortgage requires the creation of security or hypothecation; see section 58 of the Transfer of Property Act. A mere hypothecation clause by itself in a usufructuary mortgage does not give the mortgagee a right to sell which, as usufructuary mortgagee, he does not possess. The rulings in *Ramchandra v. Tripurabai* (4), *Yashvant v. Vitthal* (2) and *Mahadaji v. Joti* (1) are inapplicable. In those cases there was a personal covenant and a right of sale was contemplated, while the mortgage in the present case is a simple usufructuary mortgage. The Assistant Judge in appeal was conversant with the language in which the bond is written.

Section 99 of the Transfer of Property Act is applicable, and if it cannot directly apply, it embodies the law as it was administered before its enactment and is not a departure from that law: *Sathuvayyan v. Muthusami* (11), *Durgayya v. Anantha* (12), *Bhugjobutty Dossee v. Shamichurn Bose* (13), *Martand v. Dhondo* (14) [134] and *Chundra Nath Dey v. Burroda Shoonlurny Ghose* (15). In *Husein v. Shankargiri* (16) the facts were altogether different.

SCOTT, C. J.:—The lower appellate Court has reversed a decree for sale obtained by the plaintiffs as mortgagees. The ground assigned for

- (1) (1892) 17 Bom. 425.
- (2) (1895) 21 Bom. 267.
- (3) (1897) P. J. p. 416.
- (4) (1898) P. J. p. 43.
- (5) (1891) 16 Bom. 308.
- (6) (1895) 20 Bom. 293.
- (7) (1908) 10 Bom. L. R. 615.
- (8) (1901) 8 Bom. L. R. 156.

- (9) (1898) 21 All. 4.
- (10) (1905) 28 All. 157.
- (11) (1888) 12 Mad. 325.
- (12) (1897) 14 Mad. 74.
- (13) (1876) 1 Cal. 337.
- (14) (1897) 22 Bom. 624.
- (15) (1895) 22 Cal. 813.
- (16) (1898) 28 Bom. 119.



this decision is that where in the case of a usufructuary mortgage the mortgager agrees to redeem by payment of the principal after a stated period the mortgagee has no higher or better rights than he has under a simple usufructuary mortgage.

The mortgage in question was effected in the year 1869. At that date the right of sale by mortgagees in the mofussil was governed by Regulation V of 1827, section XV, clause 3, which provides that in the absence of any special agreement or recognized law or usage to the contrary either party may at any time by the institution of a civil suit cause the property to be applied to the liquidation of the debt; the surplus, if any, being restored to the owner.

In the case of mortgages prior in date to the time when the Transfer of Property Act was extended to this Presidency, the then existing rights of the parties remain unaffected: section 2 of Act IV of 1882. We are, therefore, in this case only concerned with the law enacted by the Regulation and with the terms of the agreement between the parties.

The instrument of mortgage after providing that the mortgagee in possession should manage the property, taking the profits in lieu of interest, proceeds:

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall after paying off the said amount of debt after 15 years from this day redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

The period of 15 years has long since expired and the question we have to determine is whether there is contained in the words above quoted expressly or by implication any agreement that [135] the property shall not by means of a suit be applied in liquidation of the debt. We think there is not.

The case is very similar to those of *Mahadaji v. Joti* (1) and *Ramchandra v. Tripurabai* (2). There is a distinct covenant to pay after fifteen years, with an option to pay within that period, the money borrowed on the premises.

It is an agreement of a different class from those which were under consideration in *Shaik Idrus v. Abdul Rahiman* (3) and *Sadashiv v. Vyankatrao* (4). In these cases there was no promise by the mortgagor to pay, but it was provided that he should be free to take possession whenever he chose to pay after the fixed period agreed upon for the mortgagee's enjoyment. In the case of *Krishna v. Hari*, (5) relied upon by the learned Judge in the Court below the agreement was of the same kind as that in *Shaik Idrus* case (3).

We reverse the decree of the lower appellate Court and restore that of the first Court with costs throughout other than the costs of cross-objections.

*Decree reversed.*

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34 B. 128=11  
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(1) (1891) 17 Bom. 425.  
(2) (1898) P. J., p. 43.  
(3) (1891) 16 Bom. 303.

(4) (1895) 20 Bom. 296.  
(5) (1908) 10 Bom. L. R. 615.



34 B. 135 (=4 I. C. 595 =11 Bom. L. R. 1312).

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## APPELLATE CIVIL.

APPELLATE  
CIVIL.*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*34 B. 135=4  
I. C. 595=11  
Bom. L. R.  
1312.GANESH NARAYAN SATHE (*Original Opponent*), *Applicant*, v.  
PURUSHOTTAM GANGADHAR KARVE (*Original Applicant*),  
*Opponent*.\*

[23rd September, 1909.]

*Civil Procedure Code (Act V of 1908), section 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a [136] declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable.*

The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause Court for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction.

*Held*, setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of V. V. Tilak, Judge of the Court of Small Causes at Poona.

One Ganesh Narayan Sathe obtained three money decrees Nos. 597, 598 and 599 of 1904, in the Court of Small Causes at Poona against Yamunabai, widow and legal representative of her deceased husband Mahadev Gangadhar Karve. In execution of the said decrees, Ganesh Narayan Sathe attached a sum of Rs. 3,000 lying in deposit in the Court of the First Class Subordinate Judge of Poona as the price of the share of the deceased Mahadev Gangadhar Karve in a certain house. Thereupon Purushottam Gangadhar Karve, the brother of the deceased, applied to the Court of Small Causes as well as to that of the First Class Subordinate Judge for the removal of the attachment, but his applications being rejected, he filed three suits, Nos. 264, 265 and 266 of 1905, in the Court of the First Class Subordinate Judge for a declaration that the sum of Rs. 3,000 was not liable to attachment and for a decree ordering Ganesh Narayan Sathe to refund the money, if any, received by him. The suits were dismissed by the First Class Subordinate Judge, but his decrees were reversed by the District Court in appeals and the decrees of the District Court were confirmed by the High Court in second appeals. In the meanwhile Ganesh Narayan Sathe [137] having recovered the money under attachment, Purushottam Gangadhar Karve applied to the Court of Small Causes for an order directing Ganesh to repay the money into Court for the purpose of depositing it in the Court of the First Class Subordinate Judge.

\* Application No. 120 of 1909 under extraordinary jurisdiction.



The opponent Ganesh Narayan Sathe contended *inter alia* that the Court of Small Causes had no jurisdiction to entertain the application and that it should have been made to the Court of the First Class Subordinate Judge.

The Judge of the Court of Small Causes overruled the opponent's contention and granted Purushottam's application. He passed an order directing Ganesh to refund the money and on his failure to do so, the applicant to apply for the execution of the order for the following reasons:—

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34 B. 138=4  
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It will be observed that the order of attachment was made by this Court and not by the First Class Subordinate Judge. It will also be observed that the three declaratory suits were brought in the First Class Subordinate Judge's Court as this Court has no jurisdiction to entertain such suits. Ganesh argues that this Court not being "the Court of first instance" within the meaning of section 144 of the new Code has no jurisdiction to order refund in pursuance of the decrees of the High Court in the three declaratory suits. But if petitioner applies to the First Class Subordinate Judge his jurisdiction may be questioned on the ground that the order of attachment and the subsequent order of payment to Ganesh were not made by him. It would be absurd to contend that such is the effect of the law as it stands. I think that under section 151 of the new Code I have an inherent right to order refund and to do everything and to make every order fairly and properly consequential on the confirmation by the High Court of the decrees passed by the appellate Court in the three declaratory suits.

The opponent Ganesh Narayan Sathe preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that as Purushottam Gangadhar Karve was not a party to the Small Cause suits, the lower Court erred in exercising the jurisdiction which was not vested in it by law. A *rule nisi* was issued requiring Purushottam Gangadhar Karve to show cause why the said order should not be set aside.

*R. R. Desai* for the applicant (original opponent) in support of the rule:—After the decree of the Small Cause Court was [138] executed by attachment and recovery of the amount deposited in the Court of the First Class Subordinate Judge, the Small Cause Court became *functus officio* and it had no power to make any further order, namely, the order for the refund. This is not a case of restitution. The opponent was not a party to the decrees of the Small Causes Court and no order could be passed on his application to that Court. Section 151 of the Civil Procedure Code has no application to the facts of the case. That section applies to cases in which such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

*M. R. Bodas* for the opponent (original applicant) to show cause:—We contend that the order can be supported under section 151 of the Civil Procedure Code. That section is intended to prevent injustice. If we had applied to the Court of the First Class Subordinate Judge, the present applicant would have objected on the ground that the orders for attachment and payment to him of the money were not passed by that Court and therefore it had no jurisdiction to entertain our application. Moreover, the ends of justice would be equally satisfied whether the amount is refunded by the order of the Small Cause Court or by that of the Court of the First Class Subordinate Judge.

SCOTT, C. J. :—In this case the applicant obtained a decree declaring that an attachment upon certain money effected through the Small Cause Court was invalid and decreeing that the defendant should repay the same to the plaintiff. That was a decree which was confirmed by the High



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Court and would in ordinary course be executed by the First Class Subordinate Judge in whose Court the suit was filed. Instead, however, of proceeding to execute in that Court the opponent proceeded to the Small Cause Court which, prior to the filing of the suit in the First Class Subordinate Judge's Court, had finished with the litigation so far as it was concerned. Notwithstanding the fact that the opponent was entitled to execute the decree obtained by him, the Judge of the Small Cause Court purporting to act under section 151 of the present Civil Procedure Code, directed the applicant, who was the defendant in the First Class Subordinate [139] Judge's Court, to refund the money obtained by him in execution from the Small Cause Court. Such an order could only be made if it was necessary for the ends of justice or to prevent the abuse of the process of the Court. We do not think that it can be said to have been necessary for either purpose because the opponent had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court. We, therefore, set aside the order with costs.

*Order set aside.*

34 B. 139 (=4 I. C. 595=11 Bom. L. R. 1336).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

KRISHNA TANHAJI (*Original Defendant*), *Appellant*, v. ABA SHETTI PATIL (*Original Plaintiff*), *Respondent*.\*

[13th July 1909.]

*Transfer of Property Act (IV of 1882), section 54—Sale—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.*

The terms of a compromise affecting a claim to land of the value of less than Rs. 100 were reduced to writing. The document was not registered, nor was the transaction accompanied by delivery of possession. The material provisions of the deed were as follows :—

"You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give 9 pands more from our share and both of us should put up a bandh (embankment) in the middle of the well, and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused."

The lower appellate Court regarded the transaction as a sale which under the provisions of the Transfer of Property Act (IV of 1882) required delivery of possession in order to validate it.

*Held*, that the terms of the deed did not bring the transaction within the category of a sale, as defined in the Transfer of Property Act (IV of 1882).

[140] *Held*, further, that the document in question merely embodied a compromise between the parties and was in effect an acknowledgment of existing rights; and that therefore no delivery of possession was necessary.

*Rani Mewa Kumar v. Rani Hulas Kumar* (1), followed.

[Ref. 37 Mad. 429; 1 Lah. 109=55 I. C. 865.]

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, modifying the decree passed by R. K. Bal, Subordinate Judge of Sinnar.

\*Second Appeal No. 934 of 1908.

(1) (1874) L. R. 1 I. A. 157 at p. 166.



The plaintiff sued to recover from the defendant a certain piece of land, alleging that it was his ancestral land and had been unlawfully occupied by the defendant.

The defendant pleaded ownership and long possession.

On the 4th August 1902, the parties had entered into an agreement, which ran as follows:—

"You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give you 9 *pands* more from our share and both of us should put up a *bandh* (embankment) in the middle of the well and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused. We have passed this agreement of our free will and pleasure."

This document was not registered, nor was it accompanied by delivery of possession. The value of the land affected by the compromise was less than Rs. 100.

The Subordinate Judge found that the plaintiff had been owner of the land in dispute but that he had given a portion of it to defendant in pursuance of a compromise. He decreed the plaintiff's claim to the lands excepting the portion of it covered by the compromise.

On appeal, the District Judge held that the document was ineffectual as it was not registered and was not accompanied by actual delivery. He therefore awarded plaintiff's claim in full.

The defendant appealed to the High Court.

[141] *R. S. Pandit*, with *Manubhai Nanabhai*, for the appellant.—The transaction does not amount to a "sale" as defined by section 54 of the Transfer of Property Act. No "price" has been paid for the land: see *Thirvengidachariar v. Ranganatha Aiyangar* (1). It is only a compromise. It is based on the assumption of an antecedent title and is acknowledgment of the same: *Rani Mewa Kuwar v. Rani Hulas Kuwar* (2).

Delivery of possession is, therefore, not essential to make the transaction valid. The land being worth less than Rs. 100 the document need not be registered.

*D. A. Khare*, for the respondent.—The words in the deed are:—"he shall give you 9 *pands* more from our share". There being thus no consideration the transaction is a gift. If there is consideration it may amount to an exchange. The transaction cannot stand as the document is neither registered nor accompanied by delivery of possession.

CHANDAVARKAR, J.—The document (exhibit 29) which embodies the terms of a compromise between the parties has been apparently treated by the learned District Judge as a sale, which under the provisions of the Transfer of Property Act requires a delivery of possession in order to validate it. But the terms of the deed do not bring the transaction within the category of a sale, as defined in that Act. The document in question merely embodied a compromise between the parties, and, as held by the Privy Council in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (2), the nature of a compromise is that it is an acknowledgment of the existing rights of the parties. No delivery of possession was necessary in this case in order to give effect to the compromise. That being the only point argued here we reverse the District Judge's decree and restore that of the Subordinate Judge with costs both of the second appeal and the appeal in the lower Court on the respondent.

*Decree reversed.*

(1) (1903) 13 Mad. L. J. R. 500.

(2) (1874) L. R. 1 I. A. 157 at p. 166.

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## [142] APPELLATE CIVIL.

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CIVIL.*Before Sir Basil Scott, Kt., Chief Justice. and Mr. Justice, Batchelor.*34 B. 142=11  
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PURUSHOTTAM HARGOVANDAS, LEGAL REPRESENTATIVE OF DECEASED  
GIRDHARLAL HARGOVANDAS (*Original Plaintiff, Judgment-Creditor*),  
*Appellant*, v. RAJBAL, LEGAL REPRESENTATIVE OF DECEASED  
THAKORE HIRAJI DOLATSANG (*Original Defendant*,  
*Judgment-Debtor*), *Respondent*.\*

[1st September, 1909.]

*Civil Procedure Code (Act XIV of 1882), sections 235, 320—Gujarat Talukdar's Act (Bom. Act VI of 1888), sections 28, 29B and 29E (†)—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under section 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer.*

When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal [143] representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882).

*Hirachand Harjivandas v. Kasturchand Kasidas* (2), explained.

The effect of section 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarat Talukdar's Act (Bom. Act VI of 1888) it may then proceed with the execution.

The expression 'managing officer' in section 29E of the Act is merely a compendious term for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the

\* First Appeal No. 196 of 1908.

(†) Sections 28 and 29 B, E of the Gujarat Talukdar's Act are as follows :—

28. (1) With the sanction of Government, the Talukdari Settlement Officer or any other officer appointed by Government for this purpose may, upon the written application of a talukdar in this behalf, take charge of such talukdar's estate and keep the same under his management for such period as may be agreed upon.

(2) Where a talukdari estate is held by co-sharers in undivided shares, an application signed by co-sharers holding an aggregate interest of not less than three-fourths of the whole estate shall, for the purposes of sub-section (1), be deemed to be an application by a talukdar in respect of such estate.

29B. (1) Where any talukdari estate has been taken under management by Government Officers under section 26 or 28, the Managing Officer may publish in the *Bombay Government Gazette* and in such other manner as the Governor in Council may by general or special order direct, a notice in English and also in the Vernacular, calling upon all the persons having claims against such talukdar or his property, to submit the same in writing to him within six months from the date of the publication of the notice.

(2) Where the Managing Officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of expiry of the period fixed therein; but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission

(2) (1898) 18 Bom. 224.



same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the 'managing officer,' is merely a synonym for 'Talukdari Settlement Officer.'

[144] Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Talukdari Settlement Officer is also the managing officer.

[Ref. 35 Bom. 324; 68 I. C. 487=24 Bom. L. R. 762=46 Bom. 993]

FIRST appeal against the decision of Chunilal Lallubhai, First Class Subordinate Judge of Ahmedabad, in an execution proceeding, Darkhast No. 549 of 1896.

One Girdharlal Hargovan filed a suit, No. 63 of 1893, in the Court of the First Class Subordinate Judge of Ahmedabad to recover on the mortgage of the Bhatkonda Taluka the sum of Rs. 8,935 from Thakore Hiraji Dolatsang and his four co-sharer Talukdars of the Bhatkonda Taluka in the Ahmedabad District. The Subordinate Judge dismissed the suit. On Appeal, No. 14 of 1894, the High Court, on the 26th August 1895, reversed the decree and allowed the plaintiff's claim. By consent of parties the High Court passed a decree against Thakore Hiraji Dolatsang alone.

On the 25th June 1896 the plaintiff Girdharlal presented an application, Darkhast No. 549 of 1896, for the execution of the decree seeking to recover the decretal debt, Rs. 8,935 and costs, Rs. 1,373, in all Rs. 10,308 by sale of the mortgaged property. On the 8th July 1896 the Court passed an order for the sale of the mortgaged property and transferred the execution proceedings to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). The Collector forwarded the proceedings to the Talukdari Settlement Officer who was invested with the powers of the Collector under the said section.

In the year 1905 the Gujarat Talukdar's Act (Bom. Act VI of 1888) was amended by Act II of 1905. Under the powers conferred by section 29B, which was added by the amending Act, the Talukdari Settlement Officer published notices in September 1905 calling upon the creditors of the Bhatkonda estate to submit their claims to him, (as he had

(3) Every claim against such talukdar or his property (other than a claim on the part of Government) not submitted to the Managing Officer in compliance with the notice published under sub-section (1), or allowed to be submitted under sub-section (2), shall, save in the cases provided for by section 29F, sub-section (2), clause (c) and by sections 7 and 13 of the Indian Limitation Act, 1877, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged, unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1).

29E. (1) On the publication of a notice under section 29B, sub-section (1), no proceeding in execution of any decree against the talukdar whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree-claim has been duly submitted, or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree.

(2) Any person holding a decree against such talukdar or his property shall be entitled to receive from the Managing Officer, free of cost, the certificate required by sub-section (1).

(3) \*

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already taken up the management of the whole of the Talukdari estate by a previous notification), within the six months prescribed by the section. In the month of January 1907 and before the expiration of the period of six months from the date of the notification the [145] judgment-debtor Thakore Hiraji Dolatsang and his son Rajaji Hiraji died leaving them surviving Bai Rajba, widow of Rajaji and daughter-in-law of Hiraji. In the meanwhile, that is, between the date of the notification and the death of the judgment-debtor, the judgment-creditor had presented two applications to the Court for the execution of the decree and those applications were forwarded by the Court to the Talukdari Settlement Officer with its endorsement that the execution should proceed.

On the 3rd July 1907 the judgment-creditor applied to the Court that Bai Rajba was the legal representative of the deceased judgment-debtor and prayed that the execution proceedings be carried on against her. The Court forwarded this application also to the Talukdari Settlement Officer who filed it along with the papers relating to the execution of the decree in his office.

On the 5th July 1907 the judgment-creditor, in compliance with the notices published by the Talukdari Settlement Officer under section 29B of the Gujarat Talukdar's Act (Bom. Act VI of 1888), submitted his claim to that officer and applied that it may be registered under the section. But the Talukdari Settlement Officer on the next day rejected the application on the ground that it could not be registered as it was not made within six months of the publication of the notices, and along with the application sent back the whole record of the execution proceedings to the Subordinate Judge.

Being dissatisfied with the order of the Talukdari Settlement Officer, the judgment-creditor urged objections against it before the Subordinate Judge who dismissed the application for execution on the grounds that the legal representative of the deceased judgment-debtor could not be brought on the record of the existing proceedings and that the application could not be continued as a certificate under section 29E was not produced by the judgment-creditor. The following are extracts from the Subordinate Judge's judgment:—

Now the first point is whether the legal representative of the deceased judgment-debtor Hiraji can be brought on the record in this execution matter. I. L. R. 18 Bom 224 shows that sections 361 to 372, Civil Procedure Code, do [146] not relate to proceedings in execution between the judgment-creditor and judgment-debtor and that the course open to the judgment-creditor is by way of application to execute the decree against the legal representative of the deceased as provided for by section 924 of the Civil Procedure Code. Thus the legal representative of the deceased Hiraji cannot be brought on the record in his darkhast matter and the darkhast cannot proceed, there being no one on the record to represent the deceased's estate. The next question is regarding the certificate. Section 29E of Act VI of 1888 provides:—(1) On the publication of a notice under section 29B, sub-section (1) no proceeding in execution of any decree against the talukdar whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer, that the decree claim has been duly submitted or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate accompanied by a certified copy of the decrees, &c. Thus the production of certificate from the managing officer is necessary for continuance of the darkhast.

The plaintiff's own conduct shows that the estate is under the management of the Talukdari Settlement Officer and that he had not submitted his claim within six months of the publication of the notice. The certificate sent by this Court when the



executive matter was transferred to the Collector cannot be held as submission of the plaintiff's claim within the meaning of section 29B of the Talukdari Act. The pending of the execution-matter before the Talukdari Settlement Officer also cannot form any excuse for not submitting the claim. The claim is required to be submitted to the Manager and not to the agent of the Collector executing the decree. Thus the pending of the darkhast before the Talukdari Settlement Officer cannot excuse the plaintiff and the darkhast cannot be continued without the managing officer's certificate. The managing officer did not allow the plaintiff's claim to be submitted after the expiration of six months. Under section 29B (2) of the Talukdari Act no suit or proceeding is instituted by the plaintiff in respect of the claim not allowed to be submitted by the managing officer and I do not think I am justified in deciding the question as to the inability of the plaintiff to comply with the notice.

The judgment-creditor appealed.

*L. A. Shah* for the appellant (judgment-creditor).—The Subordinate Judge has held that as the judgment-debtor died after the application for execution was presented and proceedings in execution had commenced, the proceedings could not be continued against his legal representative relying on the ruling in *Hirachand v. Kasturchand* (1). But the effect of that ruling [147] has been misunderstood. The proceedings can be continued against the legal representative and the name of the legal representative is not required by law to be brought on the record. Sections 361 to 372 have been held not to apply to execution proceedings. Section 234 of the Civil Procedure Code gives the right to continue the proceedings against the legal representative: *Hirachand Harjivandas v. Kasturchand Kasidas* (1), *Jeshankar v. Pandya Fulia* (2).

After the execution proceedings were transferred to the Talukdari Settlement Officer under section 320 of the Civil Procedure Code, the Gujarat Talukdar's Act was amended in 1905 by Act II of 1905, so that when sections 29A to 29E added by the amending Act, came into force, the proceedings were pending before him and he had notice of our claim; so, no further submission was necessary. We further rely on two applications made by us to the First Class Subordinate Judge which were duly forwarded by him to the Talukdari Settlement Officer before the expiry of the six months from the date of the notifications. On coming to know of the notifications we made an application as required by section 29B but the Settlement Officer rejected it as beyond time. An issue was raised in the lower Court as to whether there was sufficient excuse for the delay, but no finding was recorded on the issue. We submit that our claim was already before the Talukdari Settlement Officer by reason of the execution proceedings pending before him at the date of the notifications and the two applications mentioned above were a sufficient compliance with requirements of section 29B. That section does not require the submission to be made in any particular form.

In the present case the Talukdari Settlement Officer was himself the Managing Officer referred to in section 29B. Even as Talukdari Settlement Officer he had to manage the estate and he had already taken up the management. Though the designations are different, the two capacities were merged in the same individual and our claim was lying before him either as Managing [148] Officer or Talukdari Settlement Officer. We rely on *Purshottam v. Harbhamji* (3).

*Coyaji with R. W. Desai* for the respondent (legal representative of the deceased judgment-debtor).—Section 234 of the Civil Procedure Code under which the case was decided contemplates a fresh application to be

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(1) (1893) 18 Bom. 224.

(2) (1900) 2 Bom. L. R. 887.

(3) (1909) 33 Bom. 443.



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made by the judgment-creditor when the judgment-debtor is dead and the decree is sought to be executed against his legal representative. No such application was made in the present case. The judgment-creditor sought to continue the same proceedings against the legal representative by having recourse to the provisions of sections 361 and 372 of the Civil Procedure Code. This could not be allowed. The ruling in *Hirachand Harivandas v. Kasturchand Kasidas* (1) shows that those two sections do not relate to proceedings in execution. The language of section 234 shows that the application must be made to the Court which passed the decree and not to the Court executing the decree. The ruling in *Jeshankar v. Pandya Fulia* (2) has reference to a judgment-creditor and not to a judgment debtor.

It was argued that as the proceedings were already pending before the Talukdari Settlement Officer, no further submission was necessary. This argument is based upon an assumption that when the amending Act was passed or when the notifications were issued the proceedings were lying before the Talukdari Settlement Officer. About that time all the papers in the case were either in the Courts at Ahmedabad or in the High Court in connection with the litigation relating to the *quantum* of the judgment-debtor's share. The two applications relied on were made after the notice was issued under section 29B, so they cannot affect the case.

It is only an accident that the Talukdari Settlement Officer happened to be the Managing Officer. Under section 230 of the Civil Procedure Code several matters are sent to the Talukdari Settlement Officer for execution. The duty of the Managing Officer is a branch of the work of the Settlement Officer. It [149] cannot be expected that whenever proceedings are sent to him under the Civil Procedure Code, he should at once make inquiries and find out whether such proceedings refer to any managed estates and see whether they amount to notice.

Under section 29E the execution proceedings can neither be commenced or continued without a certificate from the Managing Officer. If any proceeding is sent to him under section 320 of the Civil Procedure Code, he would return it to the Court and the decree-holder must produce a certificate. In the absence of such certificate, the execution cannot even continue.

*Shah* in reply.

SCOTT, C. J. :—The appellant applied to the First Class Subordinate Judge for the disposal of an application for execution of a decree obtained by him so long ago as the 26th of August 1895. The application for execution was made on the 25th of June 1896. The mode in which the assistance of the Court was sought was by sale of the right, title and interest of the mortgagor in the mortgaged property which was the subject of the suit. On the 8th of July 1896 an order for sale having been passed the proceedings were transferred to the Collector for execution under section 320 of the Code and by him to the Talukdari Settlement Officer upon whom the powers of the Collector under that section had been conferred. The judgment-debtor was a Talukdar having a small share in a Talukdari estate, and it was in order to have that share realised by sale that the application had been made for execution.

In the month of September 1905, under the provisions of the Gujarat Talukdars Act (Bombay Act VI of 1888), section 29B, a Notification was issued stating that the whole of the Talukdari estate had been taken into

(1) (1893) 18 Bom. 224.

(2) (1900) 2 Bom L R 887.



the management of the Talukdari Settlement Officer and that persons having claims upon Talukdars or their property should submit the same in writing to the Talukdari Settlement Officer. Previous to the date of that Notification the Talukdari Settlement Officer had taken the estate into his management under the provisions of section 28 (2) of the Act. Before six months had expired from the date of the Notification under section 29B, the judgment-debtor died. The date of his [150] death was 21st January 1907. Between the date of the Notification and the date of the death of the judgment-debtor two applications were made to the Court by the judgment-creditor that the execution of the decree might be carried out, and those applications were forwarded by the Court to the Talukdari Settlement Officer with endorsements directing that the execution should proceed.

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On the 3rd of July 1907, the plaintiff applied to the Court stating that the present respondent was the legal representative of the deceased judgment-debtor and praying that execution might be proceeded with against her. That application was forwarded by the Court to the Talukdari Settlement Officer and was filed by him in the file of documents relating to the execution of the decree in his office.

On the 5th of July 1907 the plaintiff applied to the Talukdari Settlement Officer to have the claim registered under section 29B of the Act, but the Talukdari Settlement Officer replied the following day that the claim could not be registered as it was not made within six months of the publication of the notice under section 29B. Having come to this conclusion that Officer returned the whole of the documents filed by him to the Subordinate Judge stating that under the provisions of section 29B the claim of the judgment-creditor must be deemed to have been satisfied, and that therefore nothing more could be done under the execution proceeding.

The plaintiff objecting to that decision of the Talukdari Settlement Officer complained to the Subordinate Judge.

The Subordinate Judge has held that the plaintiff cannot succeed in his application for two reasons : first, because, the application cannot be proceeded with as the judgment debtor is dead : and secondly, because, no certificate under section 29E of the Talukdars Act has been filed.

As regards the first point, the conclusion arrived at by the Subordinate Judge is stated by him to be based upon the authority of the case of *Hirachand Harjivandas v. Kasturchand Kasidas* (1). When that case is examined it will be found that it is [151] no authority for the conclusion arrived at by the learned Judge. It decides that sections 361 to 372, Civil Procedure Code, do not relate to proceedings in execution, and that therefore it is not necessary that the records of the suit should be amended on the death of the defendant after decree, but it also shows that where the judgment-debtor dies after decree the proper course is to apply under section 234 to the Court which passed the decree for liberty to continue the execution proceedings against the legal representative of the judgment-debtor. This is exactly the course which had been followed by the plaintiff in the present case by his application of the 3rd July 1907.

No authority has been cited to us in support of the contention that execution proceedings already commenced cannot be continued after the death of the judgment-debtor by substitution of the name of the legal

(1) (1893) 18 Bom. 224.



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representative in place of that of the judgment-debtor in the application for execution.

We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under section 235.

The second point upon which the Subordinate Judge came to a decision adverse to the appellant is the point based upon the fact that no certificate of the managing officer such as is contemplated under section 29 E of the Talukdar's Act has been filed in the Court.

This section provides that before execution can be proceeded with, one of two things must have happened ; either a certificate from the managing officer that the claim has been duly submitted must be filed, or one month must have elapsed from the date of receipt by the managing officer of the written application for such certificate accompanied by a certified copy of the decree.

One of the points which was made on behalf of the respondent in supporting the judgment of the lower Court was that the managing officer mentioned in section 29E is a different officer from the Talukdari Settlement Officer who has the charge of the proceedings in execution and therefore a claim which came to his knowledge as the officer charged with the execution of the decree would not be within his knowledge as managing officer. The [152] "managing officer" is however merely a compendious term used in the Act for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the "managing officer" is merely a synonym for "Talukdari Settlement Officer."

It was next contended on behalf of the respondent that section 29E gives to the officer, whether he be the managing officer, as distinct from the Talukdari Settlement Officer, or to the Talukdari Settlement Officer, the sole right of deciding whether or not a claim has been duly submitted in reply to a notice issued under section 29B.

As the result of the non-submission of the claim would be a statutory discharge under section 29B (3) of the claim of the decree-holder, if such a power were put into the hands of the officer whose duty it is to manage the estate and free it from its liabilities, it would have the effect of making that officer a judge in his own cause. This is a result which can hardly have been intended by the legislature, and we think, therefore, that section 29E must mean that before execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If, however, he does not certify that it has been duly submitted the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that a claim has been duly submitted in accordance with the provisions of section 29B, it may then proceed with the execution. The section cannot mean that a decree-holder without making any attempt to submit a claim may apply to the managing officer for a certificate that he has submitted a claim and after waiting a month may go to Court and demand execution of his decree. The construction which we put upon the section is one which attributes to the legislature both fairness and common sense.



The next question which we will consider is, whether in the present case a claim has been submitted to the Talukdari [153] Settlement Officer in accordance with the provisions of section 29B. That section provides that the officer may call upon persons having claims to submit the same in writing to him within six months from the date of the publication of notice. The group of sections to which it belongs provides machinery for the ascertainment of the liabilities of Talukdars whose estates are taken under management.

It is not contended that the officer has issued any requisition under section 29C, therefore all that the plaintiff must show is that he has within six months submitted his claim in writing.

Now we know that the plaintiff's claim for execution of the decree has actually been before the Talukdari Settlement Officer from the month of July 1896, that is to say, for a period of 13 years, and we know that two written applications were made by the plaintiff within six months of the date of the issue of the Notification under section 29B, and were in the ordinary course of execution proceedings forwarded by the Subordinate Judge to the Talukdari Settlement Officer. It is contended on behalf of the plaintiff that either of those applications is a written notice of the claim.

No form of Notification of claim is prescribed by the Act, and as the only object aimed at by the legislature is that the officer should be informed of claim against the estate, there is no reason why any written notice of claim, which is submitted to the managing officer should not be held to comply with the requirements of the section.

In our opinion the applications, dated the 6th October 1906 and the 22nd of December 1906, are sufficient notices in writing of the plaintiff's claim.

The plaintiff, although he has thus satisfied us that he has submitted notice in writing of his claim in compliance with the provisions of section 29B, has not been able to show us that he has obtained a certificate from the officer or has applied for one more than a month before the date of his application to the Court. We think that we ought to give him an opportunity, now, of applying for a certificate from the managing officer, and we think that having satisfied us that a claim has been made [154] under section 29B, he will be entitled to receive a certificate from that officer. If, however, he does not receive it we direct the Subordinate Judge, after the expiry of one month from the date of the application for certificate, to proceed with the execution of the decree.

We reverse the order of the lower Court and send back the case for disposal in accordance with this judgment.

We think there ought to be no costs of this appeal as the appellant has not produced the certificate and the respondent has failed in his contentions.

The other costs will be costs in the execution.

*Order reversed.*

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34 B. 142=11  
Bom. L. R.  
1353=1 I. C.  
839.



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SEP. 14.

APPELLATE  
CIVIL.

34 Bom. 154 (=4 I. C. 842=11 Bom. L. R. 1369).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*34 B. 154=4  
I. C. 842=11  
Bom. L. R.  
1369.CHHAGANLAL BHAGWANDAS (*Original Opponent No. 2*), Appellant  
v. PRANJIVAN SHIVLAL AND OTHERS (*Original Petitioners and  
heirs of original Plaintiff*), Respondents.\*THE COLLECTOR OF SURAT (*Original Opponent No. 1*), Appellant v.  
PRANJIVANDAS SHIVLAL AND OTHERS (*Original Petitioners, Respondents.\**)

[14th September, 1909.]

*Pensions Act (XXIII of 1871), sections 6, 8, 11—Toda giras allowance—Purchase of  
the rights to receive allowance at a Court sale—The allowance entered in the  
name of the purchaser—Application by heirs of the purchaser to receive arrears of  
allowance—Certificate of Collector.*

It was directed by a decree that the purchaser at a Court sale of a Toda Giras allowance should recover from the Collector the amount due for arrears of the allowance from the date of his purchase. An application to execute this decree was made in 1864, in consequence of which the decree-holder's name was entered in the Collector's books as the person entitled to the allowance in question, and the arrears up to 1864 were paid. In 1903, the decree-holder's heirs applied to the Court to recover the arrears of allowance that had remained unpaid since 1896. The Collector contended that the application could not be entertained in the absence of a certificate from the Collector under the provisions of section 6 of the Pensions Act, 1871.

[155] *Held*, overruling the contention, that the power of the Collector under the Act had been exhausted and there was no discretion for that officer to exercise either under the Act or the rules, so far as the applicant's right to recover the arrears that had become due in the life-time of the last holder, was concerned.

*Held*, further, that if those amounts remained unpaid, the Collector held them for and on behalf of the last holder, as moneys due to him, and as moneys therefore recoverable on his death by his heirs independently of any question which might arise under the Pensions Act 1871, or the rules framed thereunder.

APPEAL from the decision of Dayaram Gidumal, District Judge of Surat.

Execution proceedings.

The decree sought to be executed was passed on the 22nd February 1860 by the Judicial Committee of the Privy Council. The judgment is reported in 8 Moore's I. A., p. 1.

A money decree was passed against one Utodia Bharmalsingji Kooversingjee, who was entitled to two annual Toda Giras allowances. In execution of this decree the allowances were put up to sale at a Court auction and purchased by Shambhulal Girdharlal on the 24th December 1839. Under the deeds of sale, the purchaser was to receive every year the amounts of the said Giras from the Government Treasury and no one was to object thereto.

Shambhulal Girdharlal then tried to get the payments made to himself, but failed. Eventually he filed a suit in 1843 against the Collector of Surat, whereby he prayed (*inter alia*) that the Collector might be ordered to enter the said Giras allowance in the plaintiff's name and pay over to him the arrears thereof. The case was finally decided in the Privy Council. The decree directed, among other things, that—

\* Joint Appeals Nos. 70 and 107 of 1906.



"All the moneys which have been paid into the Zillah Court of Surat, or the Sudder Dewanee Adalat by the respondent, the Collector of Surat, or by the Government on his behalf on account of the Toda Giras payable from Purgunna Olpad, together with all accumulations thereof ought to be paid or transferred to the appellant and in case no such payments shall have been made into the Zillah Court of Surat or the Sudder Dewanee Adalat on such account, then that the Collector of Surat ought to be ordered to pay forthwith to the said appellant the amount due for arrears of the Said Toda Giras [156] from the time of the purchase thereof by him, together with simple interest thereon according to the usual rate allowed by the said Court."

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Shambhulal having died, his son Lalbhai, the manager of his firm, applied in 1864 to recover the arrears of the Toda Giras allowance. The arrears up to 1864 were paid to him and Lalbhai's name was entered as the person entitled to the Toda Giras.

To recover further arrears, Lalbhai applied again and recovered them up to 1895.

Lalbhai died in 1895. At his death, the Collector entered the name of his son Bhagwandas; but the latter also died and further arrears remained unpaid.

In 1903, the surviving members of Shambulal's firm applied to the Court to recover the arrears of the allowance from 1896 to 1902. They also prayed that their names should be entered as the persons entitled to the allowance.

This application was resisted by the Collector of Surat who contended *inter alia* that the applicants were not entitled to prefer the application in the absence of a certificate under the Pensions Act 1871.

The District Judge overruled the contentions set up by the Collector and ordered payment into Court as follows:—

(1) of Rs. 2,423 plus  $\frac{1}{2}$  of 791-3-10 (arrears of the allowance from 1896—1902);

(2) of the amounts due for the Hak after 1902 with interest up to the date of the order; and

(3) of the amounts that might become annually payable after the date of the order.

The opponents appealed to the High Court.

G. S. Rao, Acting Government Pleader, for the appellants (opponents).

Branson (with M. N. Mehta) for the respondents (applicants).

CHANDAVARKAR, J.—The first point argued in support of these appeals is that the order of the District Judge, directing the Collector to pay the amount mentioned in the *dharkast* into Court is not sustainable, having regard to the Pensions Act and [157] the rules framed under it. This argument rests upon a misapprehension of the nature of the liability of the Collector, which is in dispute, and of the payment into Court which he has been directed to make. It is admitted before us, and, indeed, the Court below has found upon unchallenged evidence, that the amount, which is named by the applicants in the present *darkhast*, had become payable to the deceased Bhagwandas during his life-time, because he had been recognized as holder of the Hak by the Collector under the Pensions Act. The power of the Collector under the rules framed under the Act had been exhausted, and there was no discretion for that officer to exercise, either under the Act or the rules, so far as Bhagwandas' right to receive the allowance for the years in dispute was concerned. If the amounts somehow remained unpaid, the Collector held them for him and on his behalf, as monies due to him, and as monies therefore recoverable on his



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death by his heirs, independently of any question arising under the Pensions Act or the rules under it.

The District Judge has gone beyond the *darkhast* in making an order in his decree as regards the amounts that may become annually payable after the date of his order. The question was not raised, and indeed could not be raised, by the present *darkhast* with reference to these amounts. They stand upon a footing different from that of the arrears claimed in the *darkhast*. Presumably and indeed probably these amounts payable in future would be recoverable on Bhagvandas' death by the person recognized by the Collector according to law. Whether that is so or not we do not decide, but that is a question which cannot be decided unless it arises actually for adjudication. This direction in the decree ought to be struck out.

The order as to interest cannot be interfered with, because there can be no doubt that the amount was wrongly withheld. As to the rate of interest, that is entirely a matter of discretion.

The learned Government Pleader also addressed us on a question as regards the rights of the co-sharers *inter se* with reference to the amount which the District Judge has directed to be paid into Court. The District Judge has merely directed the payment of the amount into Court without deciding the rights of the [158] claimants and their co-sharers *inter se*. The question as to what is to become of that amount after payment into Court has been made, that is, to what particular person it is to be paid, has yet to be decided. Therefore we say nothing upon that point. The decree will be modified by striking out the portion relating to amounts that may become annually payable. In other respects it is confirmed. Each party will bear his own costs of this appeal.

The same order governs First Appeal No. 107 of 1906.

*Decree modified.*

34 B. 158 (= I. C. 563=11 Bom. L. R. 1285).

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

NAVLAJI SARDARMAL (Original Defendant), Appellant, v. RAMA DHONDI (Original Plaintiff), Respondent.\*

[27th September, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15D, clause (3) (†)—Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation*

\* Second Appeal No. 89 of 1909.

(†) Section 15D, clauses (1), (2) and (3) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) run as follow:—

15 D. (1) Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount.

(2) When any such suit is brought the amount (if any) remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt.

(3) At any time before the decree in the suit is signed, the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee, if he would then have been entitled to sue for foreclosure or sale, may apply to the Court to pass a decree for foreclosure or sale (as the case may be), instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application.



In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court found that a [159] sum of Rs 100 was due by the plaintiff to the defendant. The defendant appealed. The appellate Court, on the plaintiff's application that his suit should be treated as one for redemption, passed a decree for redemption on payment of Rs. 49-2-0 by the plaintiff to the defendant.

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The defendant preferred a second appeal contending that the words "the decree in the suit" in section 15D, clause (3) of the Act meant decree in the original Court and not of the Court of Appeal.

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I. C. 583=11  
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*Held*, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Nasik with appellate powers, varying the decree passed by V. D. Joglekar, Subordinate Judge of Pimpalgaum.

The plaintiff sued under the provisions of section 15D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for an account of the amount due on a registered mortgage bond for Rs. 160, dated the 3rd April 1897.

The defence was that the profits of the land were not sufficient to cover even the interest due on the principal.

The Subordinate Judge took the account and found that Rs. 100 were due by the plaintiff to the defendant under the mortgage. He, therefore, made a declaration accordingly.

The defendant appealed and at the hearing of the appeal, the plaintiff (the present respondent) applied to the Court that his suit should be treated as one for redemption and a decree should be passed for the redemption of the mortgaged property. The appellate Court granted the application and passed a decree in the following terms:—

The decree of the Lower Court is varied and it is hereby directed that the plaintiff do pay to the defendant Rs. 49-2-0 (forty-nine rupees and two annas) and his costs in both the Courts on 12th April 1909 and the defendant do deliver possession of the plaint lands to the plaintiff on the date aforesaid, free from all incumbrances, that the defendant do deliver such documents as he may have relating to the lands, that in default of the plaintiff making the payment on the due date, the defendant may apply for a proper order under paragraph 2 of section 15B of the Dekkhan Agriculturists' Relief Act, that [160] the sum of Rs. 49-2-0 shall bear interest at 12 per cent. from 12th April 1909 till satisfaction and the defendant shall be liable to render accounts of the profits, &c., till delivery of possession. The plaintiff (respondent) bears his costs throughout.

Defendant preferred a second appeal.

*R. R. Desai* for the appellant (defendant):—This was originally a suit for account 'under section 15D, clause (1) of the Dekkhan Agriculturists' Relief Act and the amount due under the account was declared by the first Court in its decree. The plaintiff was satisfied with that decree and he did not appeal against it, nor did he present an application to the first Court under section 15D, clause (3) of the Act. The words in the clause are specific—"before the decree in the suit is signed" which cannot mean a decree in appeal.

[BACHELOR, J.:—What benefit is there to the defendant whether the decree for redemption is passed in the present suit or in some other suit?]

Under the Act the defendant is not liable for the surplus profits and if he continues in possession until the result of a separate suit he will be benefitted to the extent of the profits which he will get till then. We want to take advantage of this peculiarity though it may be apparently unfair.



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*M. R. Bodas* for the respondent (plaintiff):—The words "the decree in the suit" in clause 3 of section 15D of the Dekkhan Agriculturists' Relief Act do include the decree of the appellate Court because an appeal is a continuation of the suit. Those words mean any final decree whether of the first Court or of the appellate Court.

SCOTT, C. J.:—The only point which we are called upon to decide in this appeal is whether the learned Judge of the appellate Court was right in passing a redemption decree for the plaintiff on his application when the case came before him in appeal.

It is argued on behalf of the appellant that the words of section 15D, clause (3) of the Dekkhan Agriculturists' Relief Act are only susceptible of the interpretation which he contends for, namely, that "the decree in the suit" means the [161] decree of the original Court and not of the Court of appeal. It would follow that if the Court of appeal reversed the decree of the lower Court and passed an entirely new decree it would not be "the decree in the suit" though it would be the only existing decree capable of execution. If the words had been "a decree" there would have been more force in the argument. When the decree of the lower Court is reversed in appeal, or varied in appeal, the decree of the lower appellate Court becomes the decree in the suit which is to be executed in execution proceedings. We, therefore, think that the learned Judge of the lower Court acted within his powers in granting the application of the plaintiff for a decree for redemption.

We dismiss the appeal with costs.

*Appeal dismissed.*

34 Bom. 161 (=4 I. C. 583=11 Bom. L. R. 1283)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

SHANKAR RAMKRISHNA CHOLKAR (*Original Plaintiff*), Appellant,  
v. KRISHNAJI GANESH BADE AND OTHERS (*Original Defendants*),  
*Respondents.\**

[28th September, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2, clause 2 (†)—Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit for account—Agriculturist.*

The plaintiff whose land and residence was in Ratnagiri District executed a mortgage in the year 1881. The Dekkhan Agriculturists' Relief Act (XVII [162] of 1879) which extended to the districts of Poona, Satara, Sholapur and Ahmednagar, was not applicable to the Ratnagiri District in the year 1881. In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of section 15 (D) of the Act (XVII of 1879) and contended that he was an agriculturist in 1881, that is, when the liability under the mortgage was incurred.

\* First Appeal No. 106 of 1908.

(†) Section 2, clause 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) runs as follows:—

2. In construing this Act, unless there is something repugnant in the subject or context, the following rules shall be observed namely:

1st

*Second.*—In Chapters II, III, IV and VI, and in section 69, the term "Agriculturist," when used with reference to any suit or proceeding, shall include a person, who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.



Held that the plaintiff could not sue under section 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881).

The expression "then defined by law" in section 2, clause 2 of the Act (XVII of 1879) relates to the time when any part of the liability was incurred.

FIRST appeal from the decision of V. N. Rahurkar, First Class Subordinate Judge of Ratnagiri, in Suit No. 108 of 1906.

The plaintiff, who alleged himself to be an agriculturist within the meaning of section 2, clause 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), brought the present suit under section 15D of the Act for an account of seven mortgages ranging from the year 1835 to 1881. The first six mortgages were passed by the ancestors of the plaintiff and the seventh was passed by the plaintiff himself on the 4th November 1881. The plaintiff alleged that he was an agriculturist both when he executed the last mortgage and when the suit was instituted in 1906.

The defendants' creditors denied the plaintiff's status as an agriculturist.

The Subordinate Judge found that the plaintiff was not an agriculturist either at the time of the suit or at the time when the liability was incurred within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He, therefore, dismissed the suit as the same could not be entertained under section 15D of the Act. The following were his reasons:—

In determining the status the income of the family must be taken into consideration. The non-agricultural income derived by the family is Rs. 720 a year and the agricultural income is Rs. 165. The principal source of livelihood at the time of the suit was evidently other than agriculture. Plaintiff was not an agriculturist at the institution of the suit. It is contended that the plaintiff can come in under clause 2 of section 2 of the Dekkhan Agriculturists' Relief [163] Act and was an agriculturist at the time when the liability was incurred, *i. e.*, at the time of the mortgage of the 4th November 1881.

The suit for account under section 15 D falls under Chapter III. It is one of the suits referred to in clause 2 of section 2. The term agriculturist when used with reference to such a suit includes a person, who, when any part of the liability, which forms the subject of the suit, was incurred, was an agriculturist within the meaning of that word as then defined by law.

The term 'agriculturist' has undergone several changes. It was by Act XXII of 1882 that the person, who was an agriculturist at the time when the liability was incurred, was included in the term 'agriculturist.' The person had to establish his status of an agriculturist as defined by that Act. If a person incurred a liability in 1880 he had to prove that he came within the definition given in the Act of 1882. To avoid the inconvenience and hardship the present wording was introduced in 1895 by Act VI of 1895. The words "within the meaning of that word as then defined by law" were substituted for the words "as defined in the first rule". Thus if a liability was incurred in 1880 the status in 1880 could be established according to the definition given in the Dekkhan Agriculturists' Relief Act in force in that year and not in the year of suit.

From the history of the use of the words "as then defined by law" at the end of clause 2 it is evident that by 'law' is meant the Dekkhan Agriculturists' Relief Act and not any other Act.

On the date of the mortgage of 1881 the Dekkhan Agriculturists' Relief Act as amended by Act XXIII of 1881 was in force in the four districts of Poona, Satara, Sholapur and Nagar. An agriculturist within the meaning of that Act must have earned his livelihood by agriculture carried on within the limits of the said four districts. Plaintiff did not carry on agriculture in any one of the said four districts. He cannot therefore come in under clause 2 of section 2 of the Dekkhan Agriculturists' Relief Act. The result of this construction is that a person residing outside the four said districts and wishing to come in under clause 2 must have incurred the liability subsequently to the extension of the Dekkhan Agriculturists' Relief Act to his district. Plaintiff carried on agriculture in Ratnagiri District to which a part of the Act was

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extended in 1905. He cannot come under clause 2 and consequently was not an agriculturist at the time when the liability was incurred within the meaning of section 2.

The plaintiff appealed.

*D. A. Khare* for the appellant (plaintiff).—The lower Court erred in holding that we are not agriculturist. We are agriculturist now. Our income from agriculture exceeds our income derived from other sources. We were agriculturist when the mortgage of 1881 was executed. No doubt when the mortgage [164] liability was incurred the Dekkhan Agriculturists' Relief Act was not in force in the Ratnagiri District but it is clear from the language of section 1 of the Act that the provisions of sub-section 2 of clause (b) of section 2 will cover the present case. The ruling in *Mahadev Narayan v. Vinayak Gangadhar* (1) does not apply. That case was from the Poona District in which the Act came into force in 1879 and the liability was incurred prior to the passing of the Act.

*P. B. Shingne* for respondents 1, 3, 7 and 8 (defendants 1, 3, 7 and 8): and

*P. D. Bhide* for respondents 2, 4, 11 and 13 (defendants 2, 4, 11 and 13) were not called upon.

SCOTT, C. J.:—[His Lordship, after dwelling on another part of the case not material to this report, continued:—]

It is said that, at all events, with regard to one of the mortgages in suit, namely, that executed in the year 1881, the plaintiff is entitled to maintain this suit because the second clause of section 2 of the Dekkhan Agriculturists' Relief Act provides that "the term 'agriculturist' when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law. "Then defined by law" relates to the time 'when' any part of the liability was incurred. We, therefore, have to look to the definition of the word 'agriculturist' in the year 1881, the date of the mortgage in question.

"Agriculturist" by Act XXIII of 1881 amending the principal Act was defined to be "a person who, when or after incurring any liability, the subject of any proceeding under this Act, by himself, his servants or tenants earned or earns his livelihood, wholly or partially, by agriculture carried on within the limits of the said districts." In order to ascertain what is meant by 'the said districts' we turn to section 1 of the Act which in the year 1881 provided that the rest of the Act extends only to the districts of Poona, Satara, Sholapur and Ahmednagar. It follows [165] that the plaintiff whose land and whose residence was in Ratnagiri was not an agriculturist within the meaning of Act XXIII of 1881.

For these reasons we affirm the decree of the lower Court and dismiss this appeal with costs. Only one set of costs.

*Decree affirmed.*

(1) (1909) 83 Bom. 501.



34 B. 165 (=11 Bom. L. R. 1291=4 I. C. 584).

## APPELLATE CIVIL.

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584.*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*PILU BIN APPA NALVADE (original Plaintiff), Appellant, v. BABAJI BIN  
NARU MANG AND ANOTHER (Original Defendants), Respondents.\*

[1st October, 1909.]

*Hindu Law—Alienation by widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow.*

The general principle which prohibits a Hindu widow's alienation of immovable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity.

*Bajrangi Singh v. Manokarnika Bakhsh Singh* (1) and *Vinayak v. Govind* (2) followed.

The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate.

[Diss. 16 I. C. 710=23 M. L. J. 363=1912 M. W. N. 1223; 10 I. C. 421=22 M. L. J. 483; Ref. 34 I. C. 596; 34 All. 129; 37 Bom. 251; 50 I. C. 493=36 M. L. J. 493=17 A. L. J. 536=21 Bom. L. R. 640=1919 M. W. N. 262=43 Mad. 523=46 I. A. 72 (P. G.)=10 L. W. 105; 64 I. C. 214; 68 I. C. 394, cf. 69 I. C. 212; Diss. 1912 M. W. N. 753=16 I. C. 498; Ref. 39 All. 1; 39 Bom. 87; 53 I. C. 386=37 M. L. J. 384=1919 M. W. N. 716=42 Mad. 854; cf. 1923 All. 410; 1922 Bom. 346; 27 C. W. N. 521; 33 I. C. 763; 60 I. C. 635=1920 M. W. N. 679.]

SECOND appeal from the decision of C. Roper, District Judge of Satara, confirming the decree of V. V. Tilak, First Class Subordinate Judge of Satara.

[166] One Appa Nalvade died in the year 1899 leaving him surviving two widows Kondai and Chima, and Tanu, daughter by Chima. Tanu had a son Narayan and a daughter Mukta. In the year 1903 the two widows made a gift of four-fifths of their husband's property to Tanu and retained one-fifth for their maintenance. Tanu's son Narayan consented to the gift. After the gift Chima died during the same year. In the year 1904 Tanu mortgaged the property given in gift to her to Babaji bin Naru Mang to defray the expenses of legal proceedings instituted by the present plaintiff, the son of a separated nephew of Appa, for obtaining a succession certificate on the ground that he was adopted by Appa. The widows denied the adoption and the plaintiff's attempt to obtain the succession certificate failed. In October 1904, Kondai, the surviving widow, adopted the plaintiff who in June 1907 instituted the present suit to recover possession of the property, the subject of the gift to Tanu. The suit was brought against the mortgagee Babaji bin Naru as defendant 1 and against Tanu as defendant 2. The plaintiff alleged that he had been in possession of the property as owner but that defendant 1 as mortgagee of defendant 2 had brought a possessory suit against him and dispossessed him in October 1906.

Defendant 1 set up his title as mortgagee in possession under defendant 2.

\* Second Appeal No. 183 of 1909.

(1) (1907) 30 All. 1.

(2) (1900) 25 Bom. 129.



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Defendant 2 denied the plaintiff's title and possession and contended that the plaintiff's adoption was illegal inasmuch as Kondai had no authority to adopt. She further asserted her ownership under the gift by Kondai and Chima.

The Subordinate Judge found that the plaintiff was the legally adopted son of Appa but he was not entitled to the property. The suit was therefore dismissed on the following grounds:—

It will be observed that plaintiff's adoption took place after the gift to defendant 2 and after the mortgage to defendant 1. The defendant 2 is in possession through defendant 1 of the land in dispute if not of any other property comprised in the gift and the question is whether plaintiff is entitled to set aside the gift.

Although a son when adopted by a widow enters at once into the full right of a natural born son, his rights cannot relate back to any earlier period, that is [167] to say, they do not relate back to the death of the adoptive father: Mayne, 7th edition, p. 259, and I. L. R. 5 Bombay 630.

An adopted son is bound by an alienation made by his adoptive mother before his adoption with the consent of persons who, at the time of such alienation, were the next heirs and competent to give validity to the transaction: Mayne, 7th edition, pages 260, 857 and 858, I. L. R. 25 Bombay 129, and 9 Bombay Law Reporter, p. 1348.

The alienation in the present case is a gift made not to a stranger but to a daughter, who was the next reversionary heir, and the consent of the daughter's son was, I think enough, there being no other member of the family likely to be interested in disputing the transaction.

On appeal by the plaintiff the District Judge confirmed the decree observing:—

The authorities are, I think, quite clear and consistent, Mr. Patwardhan (plaintiff appellant's pleader) mainly relies on a very recent case reported at 10 Bom. L. R. 1029, but it does not in my opinion avail his client.

It is not disputed that the gift by plaintiff's adoptive mother received the express or implied consent of all persons who were likely to dispute the transaction. The donee was defendant No 2, the daughter of Appa, to whom plaintiff was adopted.

On the demise of plaintiff's adoptive mother, Appa's estate would in the ordinary course have devolved absolutely on his daughter. Both the latter and her son have consented to the gift.

Hence no question of necessity arises. See 9 Bombay L. R. 1848. This view is consistent with everything laid down in 10 Bombay L. R. 1029. The widow's estate no doubt terminated on her adopting plaintiff but he is bound by any prior alienation consented to by the reversionary heirs of Appa.

The plaintiff preferred a second appeal.

*P. D. Bhide*, for the appellant (plaintiff):—The lower Court was wrong in relying on *Bajrangji Singh v. Manokarnika Bakhsh Singh* (1). It does not apply, as in that case there was no adopted son's rights to be considered. The daughter's consent to the alienation was useless: *Varjivan Rangji v. Ghelji Gokaldas* (2). The consent of the daughter's son was also useless. He was a reversioner but not the only reversioner as in *Vinayak v. Govind* (3).

[168] *P. B. Shingne*, for the respondents (defendants):—The intervention of the adopted son makes no difference. He has to accept alienations made by the adopting widow when they are either necessary or proper: *Collector of Masulipatam v. Cavalry Vencata Narraiah* (4), *Raj Lukhee Deba v. Gokool Chunder Chowdhry* (5). When the next reversioner consents, the alienation is proper: *Bajrangji Singh v. Manokarnika Bakhsh Singh* (1). In the present case the daughter's son assented

(1) (1907) 30 All. 1.  
(2) (1881) 5 Bom. 568.  
(3) (1900) 25 Bom. 129.

(4) (1861) 8 Moo. I. A. 529.  
(5) (1869) 13 Moo. I. A. 209.



to the gift, hence the ruling in *Varjivan Rangji v. Ghelji Gokaldas* (1) does not apply. The decision in *Vinayak v. Govind* (2) does not affect the present case, as here the next reversioner after the daughter had consented to the alienation within the meaning of *Bajrangi Singh v. Manokarnika Bakhsh Singh* (3). Moreover, there is an acceleration in this case in favour of the next reversioner. The case was therefore properly decided by the lower Court.

BATCHELOR, J.:—In this second appeal the facts are these. One Appa died in or about the year 1899 leaving two widows, Kondai and Chima, and a daughter by Chima, namely, the second defendant. The second defendant has a son, Narayan. In February 1903 the two widows made a deed of gift of four-fifths of their husband's property in favour of the second defendant, reserving the other fifth for their own maintenance. In October 1904 Kondai adopted the plaintiff, who is the son of Appa's separated nephew.

The question is whether the plaintiff is bound by the alienation made prior to his adoption. The gift was consented to by the defendant 2, the actual donee, and by her son, Narayan. The Courts below have accepted this consent as a sufficient consent on behalf of the reversioners likely to be interested in disputing the gift, and upon this ground dismissed plaintiff's suit. But we are of opinion that this ground cannot serve to sustain the decree.

The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is, no doubt, relaxed in cases where the consent of the whole body [169] of persons constituting the next revision has been obtained: see the judgment of the Judicial Committee in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (3), which refers with approval to the decision of this Court in *Vinayak v. Govind* (2). Now in *Vinayak's* case the reason of the relaxation, as the law has always been understood in this Presidency, is referred to this principle, that the consent of the persons who would be interested in disputing the transfer, affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. If that is the reason of the rule, it is clear that its operation must ordinarily be limited to transfers for consideration, and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for the theory of legal necessity. We may add that we have been referred to no case where the Courts have applied the rule to a gift.

That is one reason why in our opinion the rule upon which the Courts below have relied is inapplicable to the present facts. And upon another ground also it seems to us that this case falls outside the rule. For, whether the consent required be more accurately defined as the consent of the whole body of persons constituting the next revision, as it was expressed in *Bajrangi's* case, or as the consent of all those persons who would be likely to be interested in disputing the alienation, as it is put in other decisions, it is clear that the requirements of the rule have not been satisfied here. For the only consent which the present defendants can call in aid is that of the second defendant and of her son, Narayan. But the second defendant, in addition to being the actual recipient of the gift, is a Hindu woman, and the presence or absence of her consent is, in the words of Jenkins, C. J., in *Vinayak v. Govind* (2) "absolutely immaterial";

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(1) (1881) 5 Bom. 163.

(2) (1900) 25 Bom. 129.

(3) (1907) 30 All. 1.



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nor can the acquiescence of her son carry the defendants' case any further. That being so, it is not possible to hold that we have here the consent of "such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one": that is how the rule was put by Ranade, J., in *Vinayak v. Govind* (1) and the passage was cited without disapproval by [170] Sir Andrew Scoble in delivering their Lordships' judgment in *Bajrangji's case* (2). Applying this principle we find that there is nothing in the consent of the second defendant and her son which can properly deprive the plaintiff, another reversioner, of the right to question the alienation.

Then it was sought to save the decree by reference to the rule which allows the Hindu widow to accelerate the succession by relinquishing her own interest to the next reversioner. But here again it appears that an essential condition of the rule is absent in this case, where the widows relinquish only a four-fifths part of the estate such a relinquishment does not satisfy the requirements of the rule, which was expressed in the following words by the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal* (3): "It may be accepted", said Lord Morris, "that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances". Here the retention of the one-fifth part of the estate in the widow's hands takes the case out of the rule, and not the less so because the retention of 1/5th part of the life estate is described as a provision for maintenance. It was suggested by the defendants' pleader that Mr. Justice Chandvarkar's decision in *Hunsraj v. Bai Moghibai* (4) proceeded on a different principle, but if that case be examined, we think that it will be found to lend no support to the defendants. For, so far from diverging from the rule in *Behari Lal's* case (3), the learned Judge expressly cites that case as his authority, and in conformity with it holds no more than that the widow "can, during her life-time, convey the estate absolutely to him who is the next reversioner". The question, indeed, there was, not whether a particular relinquishment of the estate would be binding on the reversioner, but whether the widow had authority "to convey more than the estate she [171] has"; and that question was decided on the ground that the widow there was bound by the special agreement of which specific performance was sought against her. The decision is, therefore, no authority for extending the carefully guarded rule laid down by the Privy Council to cases where the widow has made only a partial relinquishment of the estate.

For these reasons we reverse the decree of the lower appellate Court and decree the plaintiff's suit with costs throughout.

*Decree reversed.*

(1) (1900) 25 Bom. 129.

(2) (1907) 30 All. 1.

(3) (1891) 19 Cal. 286 at p. 241.

(4) (1905) 7 Bom. L. 622.



34 B. 171 (=4 I. C. 830=11 Bom. L. R. 1330).

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Heaton.

MAHARANA SHRI DAVLATSINHJI, THAKORE SAHEB OF LIMDI  
(Original Defendant 1), Appellant, v. KHACHAR HAMIR MON  
(Original Plaintiff), Respondent.\*

[5th October, 1909.]

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*Provincial Small Causes Courts Act (IX of 1887), sections 16, 27, 32, Schedule II, Clauses (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.*

A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887).

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.

[172] Held, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction.

*Ledgard v. Bull* (1) and *Meenakshi Naidoo v. Subramaniya Sastri* (2) referred to.

Decree of the District Court reversed and that of the first Court restored.

[Not Fol. 37 I. C. 991=1 Pat. L. W. 282; Dist. 66 I. C. 207=14 L. W. 349=42 M. L. J. 118.]

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad, with appellate powers, reversing the decree of C. H. Vakil, Subordinate Judge of Dhandhuka.

The plaintiff sued to recover from the defendants Rs. 12-11-6 representing his share in the various items of the revenue of the village of Khambhada, alleging that some part of the land of the village was mortgaged to defendant 1, Thakore Saheb of Limdi, that the lands in the village were managed by the plaintiff and other sharers jointly with defendant 1, that defendant 1 paid to the plaintiff and other sharers their dues up to Samvat year 1955, paid nothing in Samvat 1956 owing to famine and appropriated all the proceeds for Samvat 1957, and that he had not paid the plaintiff his share.

Defendant 1, Thakore Saheb of Limdi, did not admit that the plaintiff had a particular share in the revenue of the village of Khambhada and contended that the land of the village was not mortgaged to him, that the plaintiff had no voice in the management of the lands in the village, that there was misjoinder of parties and causes of action and that the frame of the suit was bad as it was not brought in the name of the state of Limdi.

Defendants 2, 3 and 5 admitted the plaintiff's claim.

\* Second Appeal No. 598 of 1907.

(1) (1886) L. R. 13 I. A. 184.

(2) (1887) L. R. 14 I. A. 160.



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Defendants 4, 6—20 were absent though duly served.

Defendants 20—25 were originally plaintiffs but they were afterwards made defendants at their own request.

The Subordinate Judge dismissed the suit.

The plaintiff appealed and the appellate Court found that the frame of the suit was not defective and sent back the case to the Subordinate Judge for fresh findings on the issues involved in [173] the case after admitting on behalf of the plaintiff certain documentary evidence which was originally excluded. On the remand the Subordinate Judge found that the plaintiff's share was proved and certified his findings on the issues to the appellate Court which reversed the decree of the Subordinate Judge and allowed the plaintiff's claim to the extent of Rs. 11-8-0 with costs against defendant 1.

Defendant 1 preferred a second appeal.

G. S. Rao for the appellant (defendant 1).

G. K. Parekh for the respondent (plaintiff).

SCOTT, C. J.—The plaintiff in this case sued the defendant for Rs. 12-11-6 representing his share in the produce of certain immoveable property of the value of Rs. 45-0-9 which was collected and lawfully received by the defendant 1 in the Samvat year 1957 but which in accordance with the practice of previous years it was his duty to distribute partly to the plaintiff.

The case is in all respects similar to that of *Damodar Gopal Dikshit v. Chintaman Ralkrishna Karve* (1).

It is a suit for money had and received to the plaintiff's use. It does not fall under clause (4), Schedule 2 of Act IX of 1887, in that it is not a suit for possession of immoveable property or for recovery of an interest in such property, nor does it fall within clause (31) because it is not alleged that the produce was unlawfully received by the defendant. That being so the suit was cognizable by the Court of Small Causes.

Section 16 of the Provincial Small Causes Courts Act provides that "save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits."

By section 32 of the same Act it is provided that so much of Chapters III and IV as relates to the exclusion of the jurisdiction of other Courts in suits cognizable by Courts of Small Causes applies to Courts invested by or under any enactment for the [174] time being in force with the jurisdiction of a Court of Small Causes.

The plaint in the present suit was filed in the Court of Second Class Subordinate Judge of Dhandbuka and Gogha who was invested with the jurisdiction of a Judge of the Court of Small Causes. He tried the suit and passed a decree in favour of the defendants. That decree under section 27 of the Provincial Small Causes Courts Act was final.

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad. The Judge remanded the case and after the remand order had been complied with again entertained the appeal and passed a decree in favour of the plaintiff for Rs. 11-8-0 and costs.

From that decree an appeal was preferred to this Court. But on the appeal coming on for hearing the pleader for the defendants submitted that the decision of the Second Class Subordinate Judge was final under section 27 of the Provincial Small Causes Courts Act, and that therefore

(1) (1892) 17 Bom. 42.



the appellate Court of Ahmedabad had acted without jurisdiction in disposing of the appeal and asked that his second appeal might be taken to be an application under section 115 of the Civil Procedure Code in revision.

It has been contended on behalf of the respondent that a second appeal does lie and that it lies by reason of the conduct of the parties, that as the defendants had not objected to the jurisdiction of the Ahmedabad Court in appeal it was too late for them now to take the point that there was no appeal from the judgment of the first Court, and in support of that argument reference was made to *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1) and *Parameshwaran Nambudiri v. Vishnu Embram-dri* (2).

It appears to us that having regard to the decision of the Judicial Committee in *Ledgard v. Bull* (3) and in *Meenakshi Naidoo v. Subramanaya Sastri* (4), we must accept the argument of the appellant and we must hold that the lower appellate Court had no jurisdiction to try the case and, that the conduct of [175] the parties could not give it jurisdiction. The Judicial Committee in the second of the above-mentioned cases at page 166 say: "It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v Bull* (3)".

Now we hold upon the words of section 32 of the Provincial Small Causes Courts Act that the exclusion of the jurisdiction of all Courts not vested with Small Cause Court powers is indicated in express terms, and the position of the appellate Court in Ahmedabad was that it was a Court where, in the words of the Judicial Committee, no jurisdiction existed.

We, therefore, set aside the decree of the lower appellate Court and restore that of the Second Class Subordinate Judge, but having regard to the conduct of the appellant we make no order as to costs.

*Decree reversed.*

34 B. 175 (=12 Bom. L. R. 143=5 I. C. 866).

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.*

GANGABAI AND ANOTHER (*Original Plaintiffs*), Appellants, v.  
BASWANT BIN BALLAPPA (*Original Defendant*), Respondent.\*

[6th October, 1909].

*Regulation XVI of 1827—Transfer of Property Act (IV of 1882), section 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.,*

A mortgagee of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the

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\* First Appeal No. 75 of 1907.

(1) (1893) 21 Cal. 249.

(2) (1904) 27 Mad. 478.

(3) (1886) L. R. 13 I. A. 134.

(4) (1887) L. R. 14 I. A. 160.



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[176] life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagee having claimed to hold the property against the heir of the mortgagor,

*Held*, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor.

[Dist. 36 Bom. 510; Ref. 31 Mad. 159; 48 I. C. 228=1918 Pat. 278=5 P. L. W. 219; 63 I. C. 552=6 P. L. J. 317; 75 I. C. 579=10 O. L. J. 424.]

FIRST appeal from the decision of M. R. Nadkarni, First Class Subordinate Judge of Belgaum, in Suit No. 38 of 1902.

The plaintiff Haribarrav Nagnath, who died while the suit was pending in the Subordinate Judge's Court, sued to recover from the defendants possession of the land in dispute with arrears of rent and mesne profits, alleging that he held the land as mortgagee in possession and had let it out to defendant 1 under a rent-note and that the defendant held over the land after the termination of the tenancy.

Defendant 1 admitted the rent-note and stated that about a month after the execution of the rent-note the plaintiff told him that he had no right to the land and desired the defendant to attorn as tenant to one Mamad Isakh walad Gowaskhan Desai, that he accordingly executed a rent-note to Mamad Isakh and paid him rent every year, that the plaintiff fraudulently retained the rent-note executed in his favour by the defendant and that the defendant was not liable to the plaintiff for possession, rent or profits of the land.

Mamad Isakh being joined as defendant 2 on the contention of defendant 1 answered that the land in dispute was not mortgaged to the plaintiff and was never in his possession, that defendant 1 held a portion of the land as the yearly tenant of defendant 2 and that the plaintiff not having produced his mortgage-deed, nor having given any description of it in the plaint he was unable to say anything with regard to the alleged mortgage.

The Subordinate Judge found that the plaintiff was mortgagee of the land in suit and that he was not entitled to recover possession or the arrears of rent claimed. He, therefore, rejected the suit and directed the parties to bear their own costs.

[177] In his judgment the Subordinate Judge made the following observations :—

The mortgage-deed, exhibit 190, and the exhibits 238, 239 and 240 from the Revenue records show that the plaint land is a part and parcel of the Desbhat Vatan of the second defendant's family. The mortgage, exhibit 190, was effected while sections 19 and 20 of Regulation XVI of 1827 were in force and therefore it was void after the death of the mortgagor, the second defendant's father, who died on the 29th June 1890 (*vide Kahu Narayan v. Hanmapa bin Bhimapa*, I. L. R. 5 Bombay, 435; *Ravlojirav v. Balvantrac*, I. L. R. 5 Bombay, 487; and *Padappa v. Swamirao*, I. L. R. 24 Bombay, 556). The Sanad is not forthcoming and from the endorsement, exhibit 238's original, it seems that on 21st of May 1894 a note was made on the Sanad in accordance with the Government Resolution No. 4277 of the 19th June 1890 to the effect that the said lands shall be continued for ever without increase of the land tax or Nazrana over the said fixed amount and without objection or question on the part of Government as to the rights of any rightful holders thereof whether such rights shall have accrued by inheritance, adoption, assignment or otherwise.

The mortgage, exhibit 190, ceased to be valid on the death of the second defendant's father, the mortgagor, in June 1890 as against the second defendant and the subsequent correction of the Sanad in 1894 by the addition of the note mentioned above cannot operate to render it valid beyond the mortgagor's life-time.



The representatives of the deceased plaintiff appealed.

*Inverarity* with C. A. Relé for the appellants (plaintiffs).

*Raikes* with N. A. Shiveshvarkar for the respondents (defendants).

The appeal was argued before Scott, C. J., and Heaton, J., and it was then contended on behalf of the appellants that the Subordinate Judge ought to have raised an issue as to whether the land in suit, though originally a Deshgaṭ Vatan, continued to be so during the life time of the mortgagor or whether and if so when it became alienable. The following issues were therefore referred for trial to the Subordinate Judge with liberty to the parties to adduce fresh evidence :—

"(1) Whether the mortgage was a subsisting mortgage of the plaint property after the death of the mortgagor ?

(2) Whether the property ceased to be a Deshgaṭ Vatan or inalienable beyond the life of the mortgagor in his life-time or if so, when ?"

[178] The findings of the Subordinate Judge on both the above issues were in the affirmative. He held that the lands ceased to be inalienable from 1862 and that the mortgage was a subsisting mortgage after the death of the mortgagor for the following reasons :—

The mortgagor, who was owner in 1862, submitted an application (exhibit 260) to Government testifying his willingness to pay annas 3 in the rupee as Judi in consideration of the commutation of the right of service and in order that the Vatan may be continued permanently and that permission to adopt may for ever be granted.

Government began to levy Judi accordingly but a Sanad was at first issued in which there was the usual provision restricting alienation. He urged that he was entitled to the property free of any restriction. The matter went up to Government and the Legal Remembrancer has in his report (sanctioned and adopted by Government) given a full history of the case and gave his opinion that since 1862 Government treated the property as the private property of the man. Under orders (exhibit 262) from Government the Sanad originally tendered to the Vatandar was amended and the clause restricting alienation was dropped. The Sanad as it now reads does not contain any restriction against alienation.

It is urged for defendant No. 2 that the Sanad itself describes the property as Vatan and that it has been so treated in the records of Government (*vide* exhibit 239). As to this it appears that Government does not mean to say that the property has ceased to be Vatan, but by special agreement entered into in 1862 Government has removed the restriction against alienation. Government has the power to make such agreements under section 15 of Bombay Act III of 1874.

Reliance is placed on an order of the Deputy Collector (exhibit 258) ruling that the property could not be alienated beyond the life-time of the then holder. That order was, however, set aside by the Collector (exhibit 249).

Against the findings of the Subordinate Judge the respondents (defendants) preferred cross-objections.

*D. A. Khare* with C. A. Relé for the appellants (plaintiffs) :—The Subordinate Judge has returned his findings in our favour. Therefore the decree should be reversed and our claim for possession should be awarded with arrears of rent.

*Robertson* with N. A. Shiveshvarkar for respondent 2 (defendant 2) :—We have taken objections to the findings of the Subordinate Judge and we contend that those findings cannot [179] stand. The facts are all admitted and there now remains a question of law.

The mortgage was executed by defendant 2's father in the year 1850. What was then mortgaged was Deshgaṭ Vatan. At the time of the transaction, sections 19 and 20 of Regulation XVI of 1827 were in force. They were repealed by the Hereditary Offices Act III of 1874. Therefore the mortgage which was effected while the provisions of the said regulation were in force, was void against the heir of the mortgagor: *Padapa v.*

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*Swamirao* (1), *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa* (2). The mortgagor died on the 29th June 1890. Till then the mortgage was perfectly good under those provisions. It was on the death of the mortgagor that we could question the validity of the mortgage and the possession of the mortgagee began to run against us adversely from that time. But before the adverse possession could ripen into ownership, we got into possession and we have a right to tack it on to our title. The mortgagee cannot now question our right to such possession.

The Subordinate Judge held that the land, though originally inalienable, ceased to be so from 1862, and for that reason the mortgage continued to subsist after the death of the mortgagor. For his conclusion the Subordinate Judge has relied upon three things, namely (1) the application of defendant 2's father in the year 1862, exhibit 260, (2) the report of the Legal Remembrancer on that application, and (3) the ultimate resolution passed by Government in the year 1890, a few days before the death of the mortgagor. We contend that the report of the Legal Remembrancer was not admissible in evidence and any finding based thereon is bad. Moreover, the construction which the Subordinate Judge has put on exhibit 260 is wrong. That application shows that our father did not ask that the Vatan should be made his absolute private property and the Government resolution granting the application says that a Sanad should be granted in the terms of the application.

Even assuming that exhibit 260 is capable of the construction put upon it and that the mortgaged property was subsequently [180] enlarged by the said resolution, still the mortgagee would not be entitled to that enlarged estate. In 1850, when the mortgage was effected, the mortgagee was aware that the land was inalienable beyond the life time of the mortgagor under the provisions of Regulation XVI of 1827. He can get what he then contracted for and not more.

We further contend that our father's application, exhibit 260, and the Government resolution based thereon cannot validate what was in its inception void. The view taken by the Subordinate Judge is erroneous.

*D. A. Khare*, in reply :—We contend that the property mortgaged was not Vatan. The mortgage-deed does not describe it as such. Even assuming that the property was originally Vatan, we contend that on the application, exhibit 260, made by defendant 2's father, it was converted into private property. Therefore defendant 2 cannot now say that it still continues to be Vatan property. The opinion of the Legal Remembrancer is admissible. In construing a Sanad correspondence may be looked to : *Gulabdas Jaggivandas v. The Collector of Surat* (3). *Dosibai v. Ishwardas Jaggivandas* (4). The letter of the Legal Remembrancer forms part and parcel of the Government Resolution No. 4277 of the 19th June 1890, and the Sanad was issued in the terms of the resolution.

The findings recorded by the Subordinate Judge are correct. The enlargement is an accession to the mortgaged property and such accession enures to the benefit of the mortgagee. Long before defendant 2 was born, the estate was made transferable. The Sanad was accepted by the Nazir as the guardian of defendant 2 during his minority and this acceptance was not impugned by defendant 2 on his attaining majority.

The orders of the Revenue Courts holding that the property became the private property of the mortgagor and that the mortgage was binding on defendant 2 were not sought to be set aside, exhibit 249.

(1) (1900) 24 Bom. 516.

(2) (1879) 5 Bom. 485.

(3) (1878) 8 Bom. 186 at p. 189.

(4) (1865) 9 Bom. 561 at p. 567.



What is made void under the Regulation of 1827 is the alienation of the allowance attached to the Vatan: *Padapa* [181] v. *Swamirao* (1) and *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa* (2) were not cases of settlement. The ruling in *Appaji Bapuji v. Keshav Shamrao* (3) lays down that a particular settlement may remove a restriction against alienation. In the present case there was a settlement of that description and it had the effect of making the previous alienation (mortgage) valid and binding on the heirs of the mortgagor.

SCOTT, C. J. :—The consent in this appeal is between the representatives of a mortgagee and the heir of a mortgagor.

The mortgage in question was of a certain Deshgat Vatan property effected in the year 1850 between the holder of the Vatan who was the father of the defendants and the person under whom the plaintiffs claim. The property mortgaged is described as *amchi khasgat deshgate paiki jamin* (land out of our private Deshgat or property attached to our hereditary office). The mortgage being ostensibly of land attached to an hereditary office was under the rule enunciated in *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa* (2), approved of by the Privy Council in *Padapa v. Swamirao* (1), in its inception void against the heir of the mortgagor by reason of the provisions of Regulation XVI of 1827.

It is contended, however, on behalf of the mortgagee's representatives that by reason of a certain settlement effected between Government and the mortgagor subsequent to the year 1861, the estate of the mortgagor was enlarged into an estate similar to that of any owner of private property and that therefore the mortgagee's representatives are entitled to claim to hold the mortgaged property under the mortgage against the heir of the mortgagor. It is argued that the settlement which is evidenced by an application in the year 1862, a Government Resolution in the year 1890 and Sanad in the year 1894 issued subsequent to the death of the mortgagor had the effect of converting the property into his absolute estate.

[182] Without admitting that the interpretation sought to be put upon those documents on behalf of the appellants is correct, but assuming for the purpose of argument that it is so, we think that the altered position cannot affect the representative of the mortgagor. At the date of the mortgage in 1850, the mortgagee knew that the property which was being made over to him in mortgage was land appurtenant to an hereditary office. He knew or ought to have known that by reason of the provisions of the regulation of 1827, that land was inalienable beyond the life of the incumbent. He therefore cannot allege that he has any title by estoppel under which any enlarged estate coming to the mortgagor subsequent to the mortgage would enure to the benefit of the mortgagee, for a title by estoppel rests upon representation made by the grantor and acted upon by the grantee; see *Mussamat Udey Kunwar v. Mussamat Ladu* (4), and section 43 of the Transfer of Property Act. We hold therefore that the mortgagee took merely such estate as the holder of the Vatan property was capable of conveying to a mortgagee in 1850, and that being so he cannot claim to hold under the mortgage after the death of the mortgagor.

We affirm the decree of the lower Court with this variation that the plaintiffs do bear the costs throughout.

*Decree affirmed.*

(1) (1900) 24 Bom. 556.

(2) (1879) 5 Bom. 435.

(3) (1890) 15 Bom. 13.

(4) (1890) 6 Ben. L. R. 283 at p. 291.

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## APPELLATE CIVIL.

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829.*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.*BAI DIVALI (*Original Plaintiff*), *Appellant*, v. SHAH VISHNAV  
MANORDAS AND OTHERS (*Original Defendants*), *Respondents*.\*

[9th October, 1909].

*Civil Procedure Code (Act V of 1908), section 93, Order XX, Rules 6 and 7—Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding Decree—Appeal.*

In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff [183] did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal.

On second appeal by the plaintiff,

*Held*, that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred.

[Fol. 37 Bom. 480; Ref. 16 I. C. 45=1912 M. W. N. 1122; 37 Bom. 60; 62 I. C. 537=68 I. C. 869=42 M. L. J. 372=15 L. W. 537=1922 M. W. N. 269=45 Mad. 449; 76 J. C. 1014=25 Bom. L. R. 826.]

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the order of N. V. Desai, Subordinate Judge of Dhanduka, appointing receivers in an administration suit.

The plaintiff sued to have accounts taken of the estate of her deceased father Madhavji Damodar and then to have the said estate administered under the orders of the Court. The plaintiff alleged that her father made his last will on the 10th May 1899 and died on the 12th September 1902, that under the will the testator disposed of his moveable and immoveable properties in favour of the parties, that is, the plaintiff and defendants 1—5, that the will appointed defendants 1—4 executors, and they had taken possession of the properties, that the executors declined to give anything to the plaintiff or to show her the accounts of the estate and that they did not carry out the several directions contained in the will. Hence the suit.

Defendants 1—4 contended *inter alia* that the plaintiff was entitled only to a one-fourth share of the estate, that defendant 5, the widow of the testator, was wrongly joined, that excepting certain properties which were devoted to charities and also those to which the plaintiff was not entitled under the will, the rest of the moveable and immoveable properties were in the possession of the plaintiff and defendant 5, that defendant 1 never declined to show accounts to the plaintiff, and that the plaintiff should obtain probate.

Defendant 5, the widow of the testator, answered *inter alia* that defendants 1—4 had wrongly taken possession of the bonds and other documents to which she was entitled during her life-time under the will, that the will gave her Rs. 300 per annum for her maintenance which should be charged upon some [184] property yielding an income equal to that amount, and the said property be handed over to her, and that under the will Rs. 3,000 in cash were bequeathed to her, but defendants 1—4 deceitfully took Rs. 2,500 from her; therefore they should be ordered to restore that sum.

\* Second Appeal No. 431 of 1909.



The Subordinate Judge framed 14 issues in all and out of them on issues 3 and 5 he found as follows:—

"3. The whole of Madhavji's moveable and immoveable property of any sort whatever has been disposed of by his will."

"5. It is necessary to appoint a Receiver or Receivers to take charge of the estate and to manage the same till this suit is finally disposed of."

He therefore nominated the Nazir of his Court and defendant 1, Vishnav Manor, as fit persons to be appointed receivers of the estate. The nomination was made under section 505 of the Civil Procedure Code (Act XIV of 1882) and was submitted to the District Court for the necessary sanction. The District Judge having confirmed the nomination, the Subordinate Judge passed the following order:—

I appoint the Nazir of this Court and Vishnav Manor (defendant 1) to be joint receivers of the estate of deceased Madhavji, Vishnav Manor to give a security of Rs. 5,000 duly to account for what he shall receive in respect of the property and to work without remuneration while the Nazir will work without security and shall be paid a reasonable remuneration to be fixed hereafter.

I authorise these receivers to take possession and manage the whole estate moveable and immoveable of deceased Madhavji except what his widow is entitled to keep with her during her life-time under clause (12) of the will, exhibit 28. I further grant to these receivers all the powers of an owner specified in clause (d) subject to the condition that they shall at no time keep in their possession without this Court's previous permission any sum exceeding Rs. 200 uninvested, and that they shall invest all the moneys that have to be invested in some safe security with the permission of this Court. They should keep regular accounts of their management and should submit them annually for scrutiny by this Court on 1st July. Each of them shall be responsible for any loss occasioned to this estate by their wilful default or gross negligence.

In case of any disagreement between them on any point they should refer the matter for orders to this Court. The security required from Vishnav to be given by him within a week. That being done this joint appointment will come into operation. If he fails to give the security as required within the [185] time named the Nazir alone to be a receiver upon the conditions and terms mentioned above.

On appeal by the plaintiff against the appointment of defendant 1 as receiver and against the finding on issue 3, the defendants raised a preliminary objection which the District Judge embodied in the following issue:—

"Does an appeal lie?"

On the said issue the Judge found in the negative for the following reasons:—

Whether under the old Code (section 213 and schedule IV, form 130) or under new (order XX, rule 13) it is necessary in every administration suit to draw up a preliminary decree and against it there is an appeal. Under section 213 the Court was to "order such accounts and inquiries to be taken and made and give such other directions" as it thought fit. Under rule 13 of order XX the Court is bound to pass a preliminary decree "ordering such accounts and inquiries to be taken and made and giving such other directions as it thinks fit." Now in the present case no decree whatsoever has been drawn up and the judgment itself does not order such accounts and inquiries to be taken and made as are mentioned in schedule IV, form 130 of the old Code. In the old Code as well as in the new the word "formal" in the definition of decree is, I think, important. Mr. Ameer Alli at page 36 of his commentary quotes the opinion of Pigot, J., in 19 Calcutta 452 which shows that this term is not to be ignored, for that learned Judge said: "I must add that had the point been raised I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree and not embodied in a separate form, is within the terms of the Code of Civil Procedure a decree at all." In 29 Calcutta, 758—760 the Calcutta High Court advised mofussil Courts to draw up a formal preliminary decree and was apparently of opinion that a paragraph in a judgment was not a decree—that case was expressly followed in X Bom. L. R. 514 on the question which it decided, namely, that it is open to an appellant in an appeal against the final decree, in a partition suit to question

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the correctness of the preliminary order or decree for partition when no appeal has been preferred against such order within the time allowed by law. The reasoning of Heaton, J., shows that the word "formal" in the definition of decree is important, for he says: "It is alleged that there was a decree dated the 31st July 1906 and consequently there should have been an appeal. Now as a matter of fact there was no decree of that date, though there was a judgment. It is argued that there ought to have been a decree . . . . The judgment dated the 31st July determined (by finding on a particular issue) that the plaintiff was entitled to a certain share of two houses. Had the decree followed this judgment it would have been that the plaintiff must get such share in the two houses."

[18.] Mr. Rao referred to I L.R. 22 Bom. 933 but in that suit there was not only a finding that the estate consisted of certain properties but the amount of the liabilities and outstandings was determined and there was an order that the defendant was to pay a certain amount within two weeks. The High Court also said that the lower Court had drawn up a kind of preliminary decree. In the present case no such decree has been drawn up and had any been drawn up embodying merely the finding on issue 3 it would not have been the preliminary decree which the Code orders to be drawn up in administration suits.

Mr. Mulla at page 7 of his commentary on the new Code refers to order 20, rules 12, 13, 14, 15, 16 and 18 and order 31, rules 2, 3 and rules 4, 5, 7 and 8 as instances of preliminary decrees. The Code itself directs in these rules that certain preliminary decrees shall be framed and I take it, therefore, that in the suits mentioned in these rules no other preliminary decrees are permissible.

There are many conflicting rulings under the old Code as to the meaning of the words "decree". In several of them the term "formal" has been ignored and the word "rights" has been given an extended meaning. Messrs. Woodroffe and Ameer Ali write at page 58: "There can, we think, be little doubt that what the legislature originally meant by these words (the rights of the parties) to refer to were rights of a substantive as distinguished from rights of a merely procedural character."

In the present case no doubt a right of a substantive character has, from one point of view, been determined. But the Code does not give a right of appeal against every finding regarding such a right. It has stated what the preliminary decree is to be and I find no such decree in this case. I hold therefore that no appeal lies against the finding on issue 3.

Having thus disposed of the preliminary point, the District Judge found that the Subordinate Judge had exercised a wise discretion in the appointment of receivers and thus confirmed the order.

The plaintiff preferred a second appeal.

G. S. Rao for the appellant (plaintiff):—The only question is whether the finding recorded by the Subordinate Judge on issue 3 amounts to a preliminary decree and therefore one from which an appeal lies. We instituted the suit for accounts and partition of our share in our deceased father's property which was disposed of by him under his will. The principal point in the case was about the construction of the will. The Subordinate Judge took evidence and recorded his judgment on the point and that judgment practically decided the case. The other questions in the case related merely to details. We appealed to the District [18.] Court and our appeal was rejected on the ground that no appeal lay at that stage. We submit that the adjudication by the Subordinate Judge on issue 3 amounted to a preliminary decree within the meaning of the term "decree" as defined in section 2 of the Civil Procedure Code. It was an adjudication and, so far as the Subordinate Judge was concerned, it conclusively determined the question.

[HEATON, J.:—There is no decree and there is no final adjudication. The lower Court merely recorded a finding but a paragraph in the judgment is not a decree: section 53 of the new Code.]

We submit that that section applies to a final decree and not to a preliminary decree.



[HEATON, J.:—Where does the Code say that no final decree is required to be drawn up in the case of a preliminary decree.]

We submit even if it is necessary, it is a mistake of the Court and such a mistake should not be allowed to operate to our prejudice.

*Branson* with *T. R. Desai* for the respondents (defendants) was not called upon.

SCOTT, C. J.:—In this case the Subordinate Judge in an administration suit upon issue No. 3 decided in effect a substantial question of right between the parties, and having so decided he appointed receivers of all the property in question in the suit.

An appeal was preferred from his judgment to the District Judge and it was sought to challenge in appeal the finding upon the third issue on the ground that it was a decree. It was, however, objected that there was no decree and the learned District Judge held that there was no decree which could be the subject of an appeal. He therefore disposed of the appeal confining the objections of the appellant to the order for the appointment of receivers.

Against his decision with reference to the appointment of receivers, no second appeal would lie, but the appellant comes here in second appeal contending that there has been a decree with reference to the question raised in the third issue, and that [188] the learned District Judge was wrong in declining to hear the appeal with reference to it. Now a "decree" under the Civil Procedure Code means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and it may be either preliminary or final.

It was apparently the opinion of the learned District Judge that if the decision upon the third issue had been embodied in a formal expression, such as is contemplated by the Code and called a decree, still no appeal would have been maintainable. Without saying that we agree with the Judge in his hypothetical opinion, we think the appeal to this Court cannot be entertained because there is in fact no formal decree. A reference to Order XX will show that a decree is something different from a judgment. The decree has to agree with the judgment and Rule 6 and Rule 7 prescribe what the decree shall contain. Section 33 also leads to the same conclusion, for it provides that the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follow; that judgment may be either preliminary or final.

The appellant has only herself to thank for this result. If, as the unsuccessful party, she had directed her agent to apply that a decree should be drawn up against which an appeal could have been preferred the result might have been different. But we cannot allow the provisions of the Civil Procedure Code to be disregarded by appellants who seek to take advantage of the rule which allows of appeals from decrees. We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

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[189] APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

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NATHUBHAI KASANDAS (*Original Plaintiff*), Appellant, v. PRANJIVAN  
LALCHAND AND OTHERS (*Original Defendants*), Respondents.\*  
[22nd November, 1909.]

*Limitation Act (XV of 1877), Article 179—Decree—Execution—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law.*

A decree was passed on the 30th June 1900 whereby partition of immoveable property was ordered: but the execution of the decree was made conditional on the payment of the proper Court fees. On the 29th June 1903 an application to execute the decree was made, but it was dismissed as it was not accompanied by payment. A second application to execute the decree was presented on the 27th June 1906: it was accompanied by payment. The lower Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 was not one in accordance with law as required by Article 179 of Schedule II to the Limitation Act, 1877.

*Held*, that the first application was made in accordance with law, for, upon that application, it was competent for the Court to order that the execution should begin on the Court fees being paid within a certain date.

*Held*, further, that the second application was within time.

*Per Curiam*:—An application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by M. H. Vakil, Subordinate Judge of Ankleshwar.

Proceedings in execution of a decree.

The decree was passed on the 30th June 1900. It ordered a partition of immoveable property in possession of the defendant and directed that before the plaintiff could recover his share by partition he should pay the amount of Court fee leviable on his claim.

The plaintiff applied on the 29th June 1903 to execute the decree but the Court dismissed the application as it was not accompanied by payment of Court fees.

[190] A second application, accompanied by the payment, was made on the 27th June 1906,

The lower Courts dismissed the application on the ground that it was barred, inasmuch as the first application not having been accompanied by payment was not made in accordance with law as required by Article 179 of the Limitation Act, 1877.

The plaintiff appealed to the High Court.

M. N. Mehta for the appellant.

L. A. Shah for the respondent.

CHANDAVARKAR, J.:—The decree, execution of which has been held by both the lower Courts to be barred by the Law of Limitation, was one for partition of immoveable property passed on the 30th of June 1900, and directed that the plaintiff should not be entitled to execute it until he had paid Court fees. The present application for execution was made on the 27th of June 1906 by the plaintiff, who with it paid the Court fees into Court in fulfilment of the condition precedent to his right to execution. *Prima facie* the application is barred, having been

\* Second Appeal No. 367 of 1908.



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made more than three years after the date of the decree. But the application is sought to be brought within time by reason of an application made for execution on the 29th of June 1903. The lower Courts have held that that application does not help the plaintiff, because it was not one made in accordance with law, as required by Article 179 of Schedule II to the Limitation Act. In the present case what the decree directed was that the plaintiff should not be entitled to execution—that is, to the partitioning off of his share and its allotment to him—unless he paid the Court fee on that share. The payment was prescribed as a condition of the partition, not to the making of an application for it. There was nothing in the decree to prevent the plaintiff from applying for execution on one day and paying the Court fee on any day subsequent before the disposal of the application by the Court. The application itself cannot be said to have been not in accordance with law merely because it was not accompanied by a payment of the Court fee. This is in accordance with the principle of the decision of this Court in *Narain Govind v. [191] Anandram Kojiram* (1), which is followed by the Madras High Court in *Syed Hussain Saib Rowthen v. Rajagopala Mudaliar* (2).

But it is urged for the respondents that the application of the 29th of June 1903 was not in accordance with law, because it asked the Court to do what it was not competent to do—that is, it asked the Court to order partition to be effected without payment of the Court fee directed by the decree as a condition of such order. And in support of this argument *Chattar v. Newal Singh* (3), *Munawar Husain v. Jani Bijai Shankar* (4), *Langiu Pande v. Baijnath Saran Pande* (5) are cited. It is true that, according to these decisions, as also according to *Pandarinath Bapuji v. Lilachand Hatibhai* (6), an application for execution, which asks the Court to do what it has no power under the decree to do, is no application for execution at all. The reason is that an application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it. Applying that test here, what the plaintiff asked the Court to do by his application of the 29th of June 1903 was not outside the decree. It was within the competence of the Court to order partition on Court fee being paid as directed by the decree. The decree directed that no partition should be effected in execution unless Court fee were paid. Upon the plaintiff's application it was competent for the Court to order that the execution should begin on Court fee being paid within a certain date. No doubt the Court passed no such order but dismissed the application for execution on the ground that Court fee had not been paid; but all the same it was competent to the Court to pass an order for payment prescribing a date for it. On these grounds the *darkhast* must be held to be within time. The decree is reversed and the *darkhast* remanded for disposal according to law. Costs of the *darkhast* hitherto incurred including those of this second appeal to be paid by the respondents.

Mr. Shah argues that the point on which I have held that the present *darkhast* is not barred by limitation is *res judicata* [192] inasmuch as this very point was substantially decided by this Court against the present appellant in Second Appeal No. 119 of 1904. That second appeal arose out of an application for execution of this very decree, which both the Courts below had dismissed because the appellant had not paid

(1) (1891) 16 Bom. 480.

(2) (1906) 30 Mad. 28.

(3) (1889) 12 All. 64.

(4) (1905) 27 All. 619.

(5) (1906) 28 All. 387.

(6) (1888) 13 Bom. 237.



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the Court fee. The second appeal was decided by Crowe, J., and myself and we confirmed the order of the lower Courts dismissing the application. There is no written judgment. Mr. Markhand Mehta for the appellant reminds me that the ground on which Crowe, J., and I confirmed the order was that the plaintiff had no right to execution without payment of Court fee. And it was so, if I re-collect rightly. That was no adjudication either that the application then made or any previous application was not in accordance with law for the purposes of limitation or that the condition in the decree as to Court fees was of such a character that the Court fee must be paid *first* and the application for execution could only be made *afterwards*.

*Decree reversed.*

24 B. 192 (=11 Bom. L. R 335=2 I. C. 475).

ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

P. R. & Co., Appellants and Plaintiffs, v. BHAGWANDAS  
CHATURBHUI, Respondent and Defendant.\*

[10th March, 1909.]

*Suit for price of goods bargained and sold—Cause of action—Indian Contract Act (IX of 1872), sections 39, 73, 123—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908,) section 128.*

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *induitatus* count; thus the court lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case [193] both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

In section 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under section 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

*Per BATCHELOR, J.:*—Section 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.

**APPEAL** from the judgment of Knight, J.:—

On the 3rd September 1907 the defendants agreed to purchase from the plaintiffs 440 cases of Turkey red goods on the terms of a written

\* Appeal No. 65. Suit No. 619 of 1908.



contract. There arose a dispute between the plaintiffs and the defendants as to whether the goods which the plaintiffs tendered under the contracts were equal to sample and after certain correspondence between the parties the defendants agreed to take delivery of the goods on getting certain allowances at various rates in respect of different goods. The defendants having failed to take delivery or to pay for the goods the plaintiffs claimed to recover from the defendants the price of the goods save as to 22 cases which did not arrive within contract time after deducting the allowances aforesaid.

At the hearing seventeen issues were raised of which sixteen were on questions of fact and were found in the plaintiff's favour. The other issue, viz., whether the plaintiffs could sue for the price of the goods was found in the defendant's favour and the suit was dismissed with costs, Knight, J., holding that though the [194] property in the goods had passed to the defendant and he was bound to pay for the goods a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the rate at the date of the defendant's failure to take the goods they could not recover. Against this decision the plaintiffs appealed.

*Strangman*, Advocate General, and *Inverarity* for the appellants:— We submit that the view taken by the Court below is not correct. In the first instance the Contract Act is not exhaustive. Its preamble says that it defines and amends certain parts of the law relating to contract, it does not consolidate the law. The Privy Council judgment in *Irrawaddy Flotilla Company v. Bagwandass* (1) lays down that the Act is not exhaustive. The rulings of the Privy Council cited by the learned Judge do not seem to support the inferences drawn from them. We therefore submit that although the Contract Act does not anywhere specifically provide for a suit being filed by the vendor for the price, it does not by implication or otherwise exclude that remedy. The Act was passed in 1872 but in the Civil Procedure Code of 1882 forms of plaints are given (Forms 10 and 12) for a suit by a vendor for the price of goods sold but not accepted or taken delivery of by the purchaser. The same forms are reproduced in the new Civil Procedure Code of 1908 (Forms 3 and 6).

*Buchanan v. Ardall* (2) and *Prag Narain v. Mul Chand* (3) support the view that a suit for the price can be maintained in India, both these cases had been disallowed by the learned Judge, the first on the ground that it was before the passing of the Specific Relief Act 1877, section 21 of which prohibits a suit for specific performance of a contract wherein monetary compensation would be an adequate relief: and the second on the ground that it hardly applies to the case. As regards the first case the learned Judge's argument may be met by the answer that although in 1876 the Specific Relief Act was not passed yet the principle laid down in section 21 of that Act was not a new rule of [195] law enacted in 1871, but it was only the codification of the English principle or rule of equity then in existence and applicable to Courts in British India and secondly the learned Judge does not say that section 21 of the Specific Relief Act bars this suit, but says that the Contract Act does not allow it. The decision in *Buchanan v. Ardall* (4) is after the passing of the Contract Act and entitled to weight. As regards section 120

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84 B 12=11  
Bom L. R.  
385=2 L. C.  
475.

(1) (1891) L.R. 18 I A 121.

(2) (1875) 15 Bom. L. R. 276 at p. 292.

(3) (1897) 19 All. 535.

(4) (1875) 15 Bom. L. R. 276.



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84 B. 192=11  
Bom. L. R.  
388=2 I. C.  
478.

of the Contract Act we submit the learned Judge has misunderstood it. We submit that section 120 relates to the cases of what is known in the English law as "anticipatory breach". The words in the section are "refuses to accept" not "refuses to take delivery". If a buyer says that he will not accept the goods sold then the vendor is immediately entitled to treat this as a breach of the contract, he need not wait till the time of performance, i.e., the taking of the delivery arrives, he may treat the refusal as a breach and may rescind the contract and sue for damages at once, that is, he may exercise the power given to him by section 39 of the Act; see illustration (c) to section 73. But we submit the vendor is not bound to do so. He may not choose to rescind the contract (the words in section 39 are "may" put an end to the contract) and enforce whatever remedies he has. If for some reason the remedy of resale cannot be validly made we submit that the vendor is not compelled by the Contract Act to rescind the contract; for if the learned Judge's view is correct it comes to this that a vendor must either resell or if he cannot do it he must rescind the contract. We submit the Act does not compel him to do so. Nor is section 120 intended to have that effect. If he is not bound to rescind and if he has not resold or cannot validly resell, it is his remedy to sue for the price. If the Contract Act had not been passed and the English Common Law had applied he would certainly have sued for the price. Is his right taken away by the Contract Act? As stated above the Act not being a consolidation of the law of contract but meant only to define some parts thereof we submit the right is not taken away.

*Setalvad* and *Desai* for the respondent:—In India having regard to the provisions of the Indian Contract Act if a purchaser wrongfully refuses to take delivery of the goods the vendor of the goods cannot sue the purchaser for the price of the goods sold but not delivered whether the property or the goods has passed to the purchaser or not. The vendor's only remedy is to sue for damages for breach of contract. If the vendor has exercised the power reserved to him by section 107 of the Contract Act and resold the goods on account of the purchaser the measure of damages would be the difference between the contract price and the prices realised at the resale, but if the vendor has not exercised or could not exercise the power of resale the damages would be the difference between the contract price and the market price of the goods at the date of the breach. The vendor has no other remedy. We rely on sections 120 and 73 of the Indian Contract Act. The Common Law of England allowed a vendor to sue for the price of goods bargained and sold but not delivered when the property in the goods had passed to the purchaser and the same rule of law was codified by section 49 of the Sale of Goods Act, 1893. When the Contract Act was passed in 1873, this rule of the English law was not embodied in it. The Contract Act is exhaustive and therefore the legislature must be deemed to have excluded this remedy in India.

See *Gokul Mandar v. Pudmanund Singh* (1), *Mohori Bibee v. Dharmodas Ghose* (2).

*Strangman* in reply.

SCOTT, C. J.:—On the 3rd of September 1907 the defendant agreed to purchase from the plaintiffs 440 cases of Turkey Red goods on the terms of a written contract. Disputes arose as to whether the goods tendered by the plaintiffs were equal to sample and eventually the defendant

(1) (1902) L. R. 29 I. A. 196 at p. 202.

(2) (1908) 80 Cal. 539 at p. 548.



agreed to take the goods subject to certain allowances. The defendant afterwards failed to take delivery or to pay for the goods and the plaintiffs brought this suit to recover the amount payable under the contract less the said allowances amounting with interest to the date of suit to Rs. 1,11,573-4-9.

[197] The learned Judge of the lower Court found that the property in the goods had passed to the defendant and that he was bound to take delivery and pay for the goods but being of opinion that a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the market rate at the date of the defendant's failure to take the goods he dismissed the suit with costs.

The reasoning by which the learned Judge arrived at the conclusion that a suit for the price of goods sold is not maintainable is briefly as follows :—

The English Sale of Goods Act, 1893, explicitly provides that where the property has passed to the buyer and he neglects to pay the seller may maintain an action for the price. The Indian Contract Act does not contain any such provision. The Indian Contract Act is exhaustive of the law of India relating to the sale of goods ; therefore such an action is since the passing of the Indian Contract Act no longer maintainable in India.

I think it can be demonstrated that this inference as to the intention of the Indian legislature is erroneous.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count (Bullen & Leake's Precedents of Pleadings, 2nd Edn., p. 29) ; thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

Counsel for the respondent in supporting the judgment of the lower Court was driven to contend that since the passing of the Indian Contract Act the only money claim possible under a contract is a claim for damages for breach and that no claim for [198] debt can arise out of contract. He contended for example that a suit for the price of goods sold and delivered which he admitted to be maintainable was really a claim for compensation for breach of contract. That this was not the view of the legislature is apparent from the schedule of forms prescribed by section 644 of the Code of Civil Procedure of 1882 in which Part A relates to claims for debts and liquidated demands mostly arising out of contract and part B to claims for compensation for breach of contract. Forms 10 and 12 are forms of plaints for the price of goods sold of which delivery has not been taken.

In section 198 (f) (i) of the Civil Procedure Code, 1908, which was passed some months before this suit was heard though it did not become law until the 1st of January last, it is provided rules may be made for summary procedure in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied.

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31 B 192=11  
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34 B. 192=11  
Bom. L. R.  
836=2 L. C.  
478.

Here we have a reproduction with certain immaterial changes due to altered circumstances of the words of section 25 of the Common Law Procedure Act, 1852. which, as can be demonstrated from the forms of pleading in schedule B, Nos. 1 and 36, included suits for the price of goods bargained and sold.

I take it therefore that in section 128 of the Code of 1908 we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The conclusion is that the Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands.

The fact that a party to a contract may under section 39 when the other side has refused to perform it put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

BATCHELOR, J. :—By a contract made between the parties the plaintiffs agreed to sell and the defendants agreed to buy 440 [199] cases of Turkey Red goods valued at over a lakh of rupees. The defendants on various grounds declined to take the delivery of the goods, and the plaintiffs brought this suit to recover the price with interest at six per cent.

Several questions of fact were raised by the defendant at the trial and were all decided by Knight, J., in the plaintiff's favour; with these questions, however, we have no further concern, as the lower Court's findings are accepted by counsel for the respondent. It will be enough to observe that the state of facts on which this appeal is to be decided is that the defendants had no excuse or justification for refusing delivery of the goods offered, and that the property in these goods had passed to the defendant. Despite these findings the learned Judge conceived himself obliged to dismiss the suit on the ground that a suit for the recovery of the price was not maintainable; the plaintiff's sole remedy being a claim for compensation in damages estimated at the difference between the agreed price and the price at which the plaintiffs could have sold the goods to another person. The question to be determined is whether this view is correct, or whether the plaintiffs are entitled to sue for and recover the full agreed price.

Briefly stated the learned Judge's opinion is based upon the view, urged now by Counsel for the respondents, that the Indian Contract Act is exhaustive, and that by virtue of sections 120 and 73 of the Act the plaintiffs' sole remedy was a suit for compensation for any loss or damage caused to them by the defendants' breach of the contract. It is the admitted fact that the Indian Contract Act does not specifically authorise a suit to recover the price of goods sold even where the property in the goods has passed to the buyer. Moreover, as the learned Judge below has pointed out, it has been laid down by their Lordships of the Privy Council that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and that it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction. See *Gokul Mandar v. Pudmanunt Singh* (1) and the judgment of Lord Herschell in *Bank of England v. Vagliano Brothers* (2).

(1) (1904) L. R. 29 I. A. 198 at p. 202.

(2) [1891] A. C. 107 at pp. 144-45.



The case is carried a step further in *Mohori Bibee v. Dharmodas Ghose* (1) where the Judicial Committee in dealing with this particular Act pronounce that so far as it goes it is exhaustive and imperative.

That, as I understand it, is a fair statement of the case for the respondents. The answer to it appears to me to be that this is not a suit for compensation upon the breach of the contract, but is a suit in debt for money owing. *Ex concessis* the property in the goods had passed to the buyers, and that being so, the agreed price became, I think, a sum of money due and owing to the sellers. True, the buyers were guilty of a breach of the contract as defined in section 120 of the Act, but that circumstance did not impose on the sellers an obligation to accept the breach and sue in damages. It was, I conceive, still open to them to affirm the contract and claim the price which had become due under it. That remedy, it is admitted, would have been available to them in Bombay under the English common law before the introduction of the Indian Contract Act of 1872, as it would be available to them now in England under section 49 (1) of the Sale of Goods Act, 1893. It is urged that since no such remedy is provided in the Indian Contract Act, it must be taken to have been excluded on those principles of the construction of a Code to which I have made reference. But the argument is beside the point, if my view of the true character of this suit is right, for in that case the relief claimed is outside the ambit of section 73. That section prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy. Though the debt is, no doubt, owing upon a contract, it is owing upon a still affirmed contract, [201] and the suit is in debt and not in damages. Of the principles applicable to such a suit there is no reason to suppose that the Contract Act is the repository, still less that it is the sole repository, for the Act does not purport to do more than "define and amend certain parts of the law relating to contracts." Further room for this opinion is made by the decision of the Privy Council in *Irrawaddy Flotilla Company v. Bugwandass* (2) where their Lordships say that "the Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. . . There is nothing to show that the Legislature intended to deal exhaustively with any particular Chapter or sub division of the law relating to contracts."

As to illustration (h) to section 73, I do not think that it advances the case either way, for, first, we are not told that the property in the iron sold had passed to the buyer, B, and, secondly, A's suit was expressly a suit brought under section 73, and the illustration merely describes the method in which the compensation should be reckoned.

Then I was much impressed by the Advocate General's argument that even in the case of goods sold and delivered the Act makes no provision for a suit to recover the price, though admittedly such a suit would be perfectly good. Counsel for the respondents endeavoured to meet this point by the contention that there the agreed price would be identical

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(1) (1903) 30 Cal. 539 at p. 548.

18 Cal. 620 at p. 628.

(2) (1891) L. R. 18 I. A. 121 at p. 129;



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338=2 I. O.  
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with the compensation defined in the section. That may be so, but I am not the less of opinion that the ground of the recoverability would be that the money was a debt due upon a contract still subsisting *quoad* the plaintiff; that seems to me both a simpler and a truer account of the case than to regard the price as the "compensation for loss or damage caused which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." To my mind the mere recital of these words of the section suggests that it was never intended, and is not appropriate to govern such a suit, but has reference only to the question of computing the amount of damages allowable in a suit where a party damaged [202] by a breach of contract seeks only to be indemnified. That, I think, is not the case here: the plaintiffs do not ask the Court to assess in money the damage suffered by them in consequence of the defendant's breach of the contract: that has already been done by the parties themselves, and the plaintiffs only seek to obtain that particular sum of money which by the terms of the contract is now money belonging to them in the hands of the defendants.

Forms 10 and 12 of Schedule IV of the Code of Civil Procedure of 1882, which was in force when the suit was instituted, afford further support to the view that the Legislature never intended or attempted to invalidate a suit for the price of goods bargained and sold.

The plaintiffs' suit is admittedly good unless it is prohibited by virtue of section 73 of the Contract Act. For the foregoing reasons I am of opinion that it is not so prohibited, and I therefore agree that the appeal should be allowed with costs.

*Appeal allowed.*

Attorneys for appellants : *Messrs. Payne and Co.*

Attorneys for respondents : *Messrs. Daphtary, Ferreira and Divan.*

34 B. 202 (= 4 I. C. 588=11 Bom. L. R. 1321).

#### APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

PARASHARAMPANT SADASHIVPANT (Original Plaintiff), Appellant v.  
RAMA bin YELLAPPA AND ANOTHER (Original Defendants), Respondents.\*

[1st October, 1909.]

*Registration Act (III of 1877), sections 17 and 49—Release—Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to effect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration.*

A release whereby a father transferred all his rights of ownership in his immoveable and moveable property in favour of his son was registered not in [203] Book No. 1, but in Book No. 4, that is to say, not in the Book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act (III of 1877).

*Held*, that the release must be considered as having been duly registered. The father's property was capable of identification and the error of the registrar in registering the document in Book No. 4 should not be allowed to affect the parties prejudicially.

*Sorabji Edalji v. Ishwardas Jagjivandas* (1) followed.

\* Second Appeal No. 8 of 1909.

(1) (1892) P. J. p. 5.



An endorsement made by a mortgagee (on the back of the mortgage-deed) releasing the mortgaged property in consideration of a cash payment of Rs. 800 is a document which requires registration, and not being registered was not admissible in evidence either of the redemption of the property or of the real nature of the original transaction between the parties.

[Ref; 24 M. L. J. 664=1913 M. W. N. 525=20 I. C. 385 (registration in wrong book-  
validity; Cf 16 I. C. 108; 26 I. C. 52; 24 I. C. 451;

Ref: 40 I. C. 893=1917 M. W. N. 447 (unregistered endorsement.)]

SECOND appeal from the decision of A. D. Brown, Assistant Judge of Dharwar, reversing the decree of T. V. Kalsulkar, Subordinate Judge of Hubli.

The plaintiff sued to recover possession of the land in dispute together with mesne profits alleging that the defendant's father sold the land to plaintiff's grandfather Antajipant on the 24th March 1879 and that the defendants took wrongful possession seven or eight years before suit. The suit was filed in May 1914.

The defendants replied *inter alia* that the plaintiff had no right to institute the suit so long as plaintiff's father was alive, that the defendants' father mortgaged the land in suit to plaintiff's grandfather on the 24th March 1879 for Rs. 300, that the transaction was really a mortgage though in form a sale, that it was orally agreed that Antajipant should enjoy the land for interest on Rs. 300, that Antajipant was in possession and enjoyment through tenants including the defendants, that the defendants redeemed the land on the 2nd October 1894 on payment of Rs. 300 to plaintiff's uncle Dattopant who endorsed the receipt of the amount on the back of the deed that since then the defendants had been in possession as owners.

The Subordinate Judge found that the sale-deed passed by the defendants' father to the plaintiff's grandfather was not in reality a mortgage, that there was no redemption as alleged by [204] the defendants, that the suit was maintainable and that the plaintiff was entitled to recover mesne profits from date of suit to date of possession. He, therefore, passed a decree awarding the claim for possession with mesne profits.

With respect to the defendants' contention that the plaintiff was not entitled to maintain the suit because his father was alive the Subordinate Judge found that the plaintiff's father had, on the 2nd June 1903, passed a release to the plaintiff relinquishing his rights to the property in plaintiff's favour. The Subordinate Judge made the following observations with reference to the release:—

The defendants' pleader contended that the release is void as no description of the property is given as stated in section 21 of the Indian Registration Act. I do not think so, as no particular land is mentioned but all lands which can be identified when necessary by other evidence. Defendants' pleader also contended that as the release was registered in book No. 4 and not in book No. 1, it should not affect immovable property. I think that the error of the Sub-Registrar should not be prejudicial to the public and that the release should be considered to be duly registered (*vide Sorabji Edalji v. Ishwardas Jagivandas*, P. J. 1892, p. 5). Plaintiff and his father were owners. As plaintiff's father gave his interest to plaintiff, plaintiff became full owner and hence he is entitled to maintain the suit.

On appeal by the defendants the Assistant Judge reversed the decree and dismissed the suit holding that it was bad for non-joinder of plaintiff's father, that the defendant was entitled to have the sale (exhibit 49) treated as a mortgage and nothing was due to the plaintiff on account of redemption. The following were some of his reasons:—

Plaintiff claims that under exhibit 38, dated 2nd June 1903 he is the exclusive owner of the property in suit and that his father lost all interest in the property on the execution of that release.

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1821.

But exhibit 38 contains no description whatever of the lands which it purports to transfer and therefore under section 21 of the Registration Act it could not be registered as a document affecting immoveable property.

The case differs from *Sorabji v. Ishwardas*, P. J. 1892, p. 5 quoted by the Sub-Judge. In that case the land was described and the entry of the document in Book IV instead of Book I, was entirely the mistake of the Sub-Registrar. It was held that the mistake did not invalidate the registration. But in that case the document should have been entered in Book I. In the present case the document ought not to have been accepted for registration at all. In *Barj [205] Nath v. Sheo Sahay* it was held by the Calcutta Full Bench (18 Cal. 556) that a false or insufficient description rendered the registration void. In *Narasamma v. Subbarayudu* (18 Madras 366) the document appears to have been very similar to that in the present case. The executant of the release subsequently sold the land covered by the deed of release. It was held that the registration was not valid against the purchaser. If that is the law, a purchaser from plaintiff's father would be able to contend successfully that his title was not affected by exhibit 38. Plaintiff might be able to enforce the agreement against his father, but the record shows that the present plaintiff's father disputes the agreement (exhibit 62) and is in actual possession of a large part of the family land, as admitted by plaintiff (exhibit) 77. Under these circumstances I find that plaintiff's father is not proved to have parted with his interest in the land in suit and should have been made a party to this suit.

All these reasons seem to justify the conclusion that the transaction was one of mortgage. The endorsement on exhibit 19 not being registered the release cannot be strictly proved. But in view of the Dekkhan Agriculturists' Relief Act the point is not important. For, if an account be taken, defendants can prove the payment of the principal and as nothing then remains due they are entitled to possession.

The plaintiff preferred a second appeal.

*D. A. Khare* for the appellant.

*N. A. Shiveshvarkar* for the respondents (defendants).

SCOTT, C. J.:—The plaintiff sued the defendants for possession of certain land alleging that the defendants' father had sold it to the plaintiff's grandfather in 1879.

The defendants resisted the claim contending that the alleged sale was a mortgage which had been redeemed in 1894 by payment of Rs. 300 to the plaintiff's uncle Dattopant and that the defendants had since then been in possession as owners.

It was found by both the Courts that the defendants had been in possession as tenants of Dattopant, the plaintiff's uncle, prior to 1894, the date of the alleged redemption.

The defendants set up a case of possession since 1893. The suit was filed in May 1904; so that upon the defendants' case no question of limitation arises.

The Subordinate Judge found that the defendants' story of redemption by payment of Rs. 300 in 1894 was false and that [206] the endorsement appearing upon the sale-deed was not a genuine endorsement, and passed a decree in favour of the plaintiff for possession.

An appeal was preferred to the Assistant Judge who held first, that the plaintiff was not entitled to maintain the suit on the ground that he did not prove that he was the exclusive owner of the property claimed, since it was not shown that his father, who was still alive, had lost his interest therein; secondly, he held that the deed of 1879, though on its face a sale-deed, was really a mortgage, and he came to that conclusion in consequence of the weight he attached to the endorsement upon the sale-deed purporting to be made by Dattopant admitting the receipt of Rs. 300 in 1894 and releasing the property. He therefore came to a different conclusion on the question of fact to that arrived at by the Subordinate Judge and in second appeal we are, so far as his finding upon the facts is



material, bound to accept his decision. We will take the two points decided in favour of the defendants in order.

The plaintiff claims to be entitled to maintain this suit alone without the co-operation of his father by reason of a release executed by his father in his favour on the 2nd June 190 : whereby he became the owner of the whole of the property in suit. By that document his father purported to transfer to him all his rights of ownership which he had in his immovable and moveable property. The document was presented for registration and was accepted by the Registrar but it was registered not in Book No. 1 but in Book No. 4, that is to say, not in the Book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act. It is on the ground of the want of registration that the defendants contend that the plaintiff cannot be held to be the sole owner of the property in question assuming that his case is in other respects a true one. The learned Subordinate Judge held that the error of the Sub-Registrar ought not to prejudice members of the public and that the release should be considered to be duly registered upon the authority of *Sorabji Edalji v. Ishwardas Jagjivandas* (1). His [207] decision upon the point was reversed by the Assistant Judge relying upon the case of *Baij Nath Tiwari v. Sheo Sahoy Bhagut* (2) and *Narasamma v. Subbarayudu* (3).

In our opinion the view taken by the Subordinate Judge should prevail. The property of the plaintiff's father is capable of identification, and the case in so far as it involves a discussion of the applicability of sections 21 and 22 of the Registration Act is on all fours with that of *Narasimha Nayanevaru v. Ramalingam Rao* (4), in which it was held that the words "my family property" were sufficiently precise to entitle the document to registration. The error of the Sub-Registrar in registering the document in Book No. 4 instead of Book No. 1 should not be allowed to prejudice the plaintiff. In this connection the remarks of their Lordships of the Privy Council in *Sah Mukhun Lall Panday v. Sah Koondun Lall* (5) are appropriate. Their Lordships say :—

"Now, considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in section 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertance of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be ; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is [208] in consequence of it to be treated as a nullity, they may be deprived of their just rights."

(1) (1892) P. J. 5.

(2) (1891) 18 Cal. 556.

(3) (1895) 18 Mad. 364.

(4) (1899) 10 Mad L. J. R. 104.

(5) (1875) L. R. 2 I. A. 210 at p. 216.

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34 B. 202=4  
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34 B 202=4  
I. C. 188=11  
Bom. L. R.  
1321.

We, therefore, hold as was held in the case of *Sorabji Edalji v. Ishwardas Jagjivandas* (1), above referred to, that the document must be considered as having been duly registered. It follows, therefore, that the plaintiff is entitled to maintain this suit alone.

The next point to be considered is whether the Assistant Judge was justified in admitting as evidence the endorsement purporting to be made by Dattopant releasing the property in consideration of a payment of Rs. 300 in 1894. It is clear that a release in consideration of a payment of Rs. 300 is a document which requires registration and this endorsement has not been registered. The learned Assistant Judge seems to have been aware of the difficulty, for, he says "the endorsement on Exhibit 49 not being registered the release cannot be strictly proved. But in view of the Dekkhan Agriculturists' Relief Act the point is not important. For, if an account be taken, defendants can prove the payment of the principal and as nothing then remains due they are entitled to possession." These remarks appear to be irrelevant because it was not proved in the case that the defendants were agriculturists to whom the Dekkhan Agriculturists' Relief Act applied.

We, therefore, hold that having regard to the provisions of section 49 of the Registration Act, the endorsement was not admissible in evidence of either the redemption of the property or the real nature of the original transaction between the parties. That being so, we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with costs throughout.

*Decree reversed.*

34 B. 209 (= 5 I. C. 594=12 Bom L. R. 1).

[209] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

JETHABHAI KEVALBHAI (Original Defendant), Appellant, v. CHORALAL CHUNILAL AND ANOTHER (Original Plaintiffs), Respondents.\*

[6th October, 1909.]

*Will—Executor—Testator's direction to carry on his trade—Loss suffered in the course of the business—Mortgage—Liability of the executor—Testator's assets liable.*

One Gordhandas made a will and died leaving him surviving his widow, a daughter and her husband and two grandsons by the daughter. Under the will the testator appointed his widow and the daughter's husband executrix and executor and directed among other things that in order to perpetuate his name his business should be carried on by the executor so long as it could be carried on at a good profit but, should it appear that the trade will serve so as to destroy his reputation, the executor should stop it. At the time of his death the testator possessed *inter alia* a cotton ginning factory. The executor and executrix carried on the business in the testator's name for some time and having found that large liabilities were incurred in the course of the business the factory was mortgaged to J. with co-cession. The mortgage was executed by the testator's widow as owner of the firm of Gordhandas and by her daughter. The fact of the will was denied in the mortgage conveyance. The ladies executed the mortgage by affixing their marks and their names were written by the executor. J. sued the mortgagor ladies and the executor to recover the mortgage-debt and obtained a decree. The executor died while the suit was pending. The mortgage property was sold under J's decree and was purchased by him at the court-sale. In the meanwhile the beneficiaries under the will, that is, the two grand-

\* Second Appeal No. 703 of 1908.

(1) (1892) P. J. 5.



sons of the testator and the sons of the deceased executor, brought a suit against J for a declaration that the property was not liable to be sold under the defendant's mortgage-deed and that the defendant had obtained by his purchase no right as against the plaintiffs' rights in the property.

*Held*, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner, the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business. The mortgage was therefore valid and binding on the executor as principal.

*Juggeewundas Keeka Shah v. Ramdas Brijbookun-Das* (1) followed.

A mortgage by a trader under a testamentary trust of the testator's property is referable to his implied authority as a trustee and not to his position as executor.

[210] *Devitt v. Kearney* (2) followed.

An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

The trustee, though personally liable for the debts which he contracts in the course of his business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

SECOND appeal from the decision of W. Baker, District Judge of Surat, reversing the decree of J. E. Modi, First Class Subordinate Judge. Suit for a declaration.

One Gordhandas Ambaidas died on the 3rd June 1896 after having made a will dated the 27th May 1896. He left him surviving his widow, Fulkore, a daughter, Rukhmini, and her husband, Chunilal, and two grandsons by Rukhmini and Chunilal, namely Chotalal and Maganlal. In his will Gordhandas appointed Fulkore and Chunilal managers of his estate and gave his property to Fulkore for her life and after her to the two grandsons. Paragraph 7 of the will ran thus:—

7th. At present I am carrying on my trade (and) business in cotton—in seed, cotton, gin (ning-business), dealings and transactions, &c—in my (own) name; and after my death, the same shall, in order to perpetuate my name, be continued (to be carried on) in my name by my son-in-law Chunilal Tribhuwandas, and such trade shall be continued (to be carried on) so long as it could be carried on at good profit. Should it appear that the trade would suffer in such a way as to destroy my name (reputation) the said Chunilal Tribhuwan shall cease to carry on trade in my name because it is my wish that it should not so happen after my death as to injure my name in any way. The said Chunilal Tribhuwan is even at present carrying on the vahivat in respect of my trade and business. He is acquainted (with the same) in every way.

Chunilal and Fulkore accordingly carried on the business of the testator in his name as the Firm of Gordhandas Ambaidas for some time and having incurred liabilities in the course of their management they mortgaged with possession a ginning factory of the testator to one Jethabhai Kevaldas for Rs. 13,000. The [211] mortgage was dated 29th February 1899 and was executed by Fulkore and her daughter Rukhmini. They executed the document by affixing their marks, and their names were written by Chunilal. The document denied the fact of the will in the following terms:—

Further we have not mortgaged, sold or made a gift of the said property to any other person. Similarly the deceased Gordhandas Ambaidas also has not made a gift of, or sold the said mortgaged property or any other property belonging to himself: nor has the said deceased made even any will of his own property. Consequently no person other than ourselves has a right (and) claim to the same; nor has any one a

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(1) (1841) 2 Moo. I. A. 487.

(2) (1888) 13 L. R. Ir. 45 at p. 52.



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part or share therein. In spite of this should any mortgagee, claimant or co-sharer or any other person come forward and lay claim or title, we shall be duly responsible for the same.

The signatures of the two ladies were written thus :—

The signature of Bai Fulkore, widow of Gordhandas Ambaidas and owner of the Firm of Gordhandas Ambaidas : I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai ; and the Bai has made the mark with her own hand.

The signature of Bai Rukhmini, daughter of Gordhandas Ambaidas. I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai ; and the Bai has made the mark with her own hand.

In the year 1900 the mortgagee Jethabhai brought a suit, No. 158 of 1900, on the mortgage against Fulkore and Rukhmini and also against Chunilal as executor of the will of Gordhandas to recover the mortgage-debt and while the said suit was pending Rukhmini brought a suit No. 171 of 1900, against the mortgagee Jethabhai for the cancellation of the mortgage on the ground that it was not binding on her or her sons. The latter suit was dismissed. While the mortgagee's suit was pending, defendant Chunilal died and the mortgagee obtained a decree against Fulkore and Rukhmini for the recovery of the mortgage-debt, namely Rs. 13,000, from the surviving defendants and, in default of payment by them within six months, by the sale of the mortgaged property. The decree was dated the 21st November 1902.

On the 23rd August 1903 Chotalal and Maganlal, the two grandsons of Gordhandas, brought the present suit against Jethabhai, alleging *inter alia* that the defendant had knowledge [212] of the fact and the contents of the will of Gordhandas because he was instrumental in getting it executed, that the defendant's conduct in taking the mortgage from the two ladies was fraudulent and that the plaintiff further impeached the mortgage because (1) it was not for a consideration binding on the estate of the testator, (2) the will gave no power to any one to make such alienation to the detriment of the plaintiffs' reversionary rights and (3) the plaintiffs' maintenance depended upon the mortgaged factory and there was no other property available for the purpose.

The plaintiffs, therefore, prayed for a declaration that the property was not liable to be sold under the defendant's mortgage decree and for an injunction restraining the defendant from selling the property, or in the alternative, if the sale was allowed to take place, for a declaration that the sale was to hold good only during the life-time of Fulkore and even then was subject to the plaintiffs' right for maintenance and that after Fulkore's death, the plaintiffs were the full owners of the property.

The Court of first instance, the District Court and the High Court, having declined to grant an interlocutory order staying the sale, the property was sold pending the hearing of the suit and was purchased by the defendant. Owing to this circumstance, the plaintiff asked for a further declaration that the defendant had obtained by his purchase no right against the plaintiffs' aforesaid rights in the property.

The defendant answered *inter alia* that the plaintiffs' mother Rukhmini having failed in her suit, No. 171 of 1900, which she had filed for herself and on behalf of her minor sons (the present plaintiffs) for the cancellation of the mortgage, the present suit was not filed by the plaintiffs in good faith and they should not be allowed to prosecute it, that the



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defendant had merely attested the will of Gordhandas and did not know the contents thereof, that Chunilal, Fulkore and Rukhmini fraudulently concealed the will and represented to the defendant, that the will was destroyed by the deceased during his life-time, that the deceased was indebted at the time of his death and for the purpose of paying off his debts as well as those incurred after his death Fulkore [213] and Rukhmini borrowed Rs. 13,000 from the defendant on the mortgage of the factory, that the mortgage-debt being incurred by Chunilal, Fulkore and Rukhmini for carrying on the trade and for the benefit of the family was valid, that it was not true that the plaintiffs had no means of subsistence and that the claim was time-barred.

The Subordinate Judge found that the suit was not time-barred as the plaintiffs were minors when the suit was filed, that the mortgage transaction was not brought about by any fraud on the part of the defendant, that the decree in the defendant's suit, No. 158 of 1900, was binding on the plaintiffs so far as their rights were concerned under the will and was also binding on the estate of the testator, that the defendant was informed that the will had been destroyed, that the suit was brought in good faith, that the defendant was an alienee who took in good faith and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

On appeal by the plaintiffs the District Judge found that the mortgage was not valid. He therefore reversed the decree and granted relief to the plaintiffs in the following terms :—

I reverse the finding of the lower Court and grant the declaration sought for, viz., that the alienation to defendant holds good only during the life-time of Fulkore, and is subject to plaintiffs' right of maintenance, that plaintiffs are the full owners of the property and that defendant had obtained by his purchase no rights against the plaintiffs' above-mentioned rights in the property.

In view of the fact that I have found that the defendant was not a party to the fraud and was without notice of the will, and that he is not to blame for the injustice done to the minors, I think it would be hard to saddle him with the costs of this suit. I therefore direct that each party should bear its own costs.

In the judgment the District Judge made the following observations:—

From the evidence recorded it appears that Gordhan owed some money at the time of his death, and that after his death further large liabilities were incurred by Fulkore and Chunilal in the conduct of his business. The will contains a prohibition of alienation, but it also contains a direction to carry on the testator's business but not as to incur a loss.

In this connection reference is made on behalf of appellants to Williams on Executors (9th edition), Volume 2, pages 1664, 1681, 1684, 1815, 1900.

[214] It is argued that the executor who carries on the business of the testator makes himself personally liable for all debts so contracted and it makes no difference that he avowedly acts as executor (page 1816). The remedy of a creditor of the business for a debt incurred since the death of the testator is against the executor personally and not against the estate of the deceased. But when the executor properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be otherwise properly applied for the purposes of the business (page 1900).

Again executors have no authority in law to carry on the trade of the testator and if they do so, unless under the protection of the Court of Chancery, they run great risk, even though the will contains a direction that they should continue the business of the deceased. If the trade be beneficial the profits are applicable to the purposes of the trust and if it proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death (page 1682). In the present case we have a direction in the will that the executors should carry on the business of the testator, but on page 1689 of Williams there is a case reported very similar to the present one (*M'Neillie v. Acton & De G. M.*



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and G. 741) in which it was held that a direction in a will that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on.

It might be argued that in the present case the ginning factory was employed in the trade, but in view of the prohibition of alienation in the will and of the principles referred to above, I think that Fulkore as executor had no authority to mortgage the property in dispute for the debts incurred in carrying on her husband's business, and though the transaction may be binding on her, a point which has been already judicially decided and with which we are not now concerned, in my judgment she had no authority as executor to bind the minors and, viewed from this standpoint, the transaction is not binding on them.

The defendant preferred a second appeal.

*Coyaji* with *L. A. Shah* for the appellant (defendant).

*Setalvad* with *M. N. Mehta* for the respondents (plaintiffs).

SCOTT, C. J.:—The material facts of this case are as follows:—Gordhan Ambaidas died in June 1896 leaving him surviving his wife Fulkore, his daughter Rukhmini, her husband Chunilal and two grandsons, children of Chunilal.

[215] By his will, dated the 27th of May 1896, he appointed Chunilal and Fulkore his executor and executrix and, after charging his estate with the maintenance of his widow, daughter and grandsons and providing for the performance of certain funeral ceremonies, directed that his business in cotton, cotton-seed and cotton-ginning should, in order to perpetuate his name, be carried on by Chunilal so long as it could be carried on at a good profit but should it appear that the trade would suffer so as to destroy his reputation Chunilal should stop it. The testator then gave his widow Fulkore a life-interest in all his property with a prohibition against alienation with remainder as to his property which might remain over after her death to his grandsons.

At the time of his death the testator possessed *inter alia* a cotton-ginning factory at Sabergaum in the Surat District which was used in his business.

After his death Chunilal and Fulkore carried on the business in the testator's name. In February 1899 having, as is found by the lower appellate Court, incurred large liabilities in the conduct of the business they mortgaged the ginning factory with possession to the defendant Jethabhai for Rs. 13,000 and interest thereon at 9 per cent. per annum. The mortgage, in consequence perhaps of a desire on the part of Chunilal to escape liability as a mortgagor, was executed by Fulkore described "as owner of the firm of Gordhandas Ambaidas dealing in cotton" and Rukhmini described as "daughter of Gordhandas Ambaidas of the same estate." The ladies executed the mortgage by affixing their marks, and their names were written by Chunilal. The mortgage was attested by four witnesses.

The mortgage stated that the deceased Gordhandas had not made any will of his property and consequently no one but the ostensible mortgagors had any right or claim to the same. The consideration was stated to be received as follows:—Rs. 6,909-3-3 claimable by the firm of Motibhai Ambaidas from the firm of Gordhandas Ambaidas paid off by the defendant; Rs. 2,709 claimable by Jagjivandas Bhagwandas from the aforesaid firm paid by the defendant; Rs. 764-8-0 claimable by Motibhai Lalbhai from the said firm paid by the defendant; and Rs. 2,616-9-4 received in cash in order to pay off other debts of the firm.



[216] The lower appellate Court has found that the consideration was paid substantially as stated in the mortgage deed and that the defendant was deceived by the misrepresentations of Fulkore, Chunilal and Rukhmini into the belief that the will of the testator had been destroyed.

In the year 1900 the defendant brought a suit on the mortgage against Fulkore and Rukhmini, Chunilal being joined as a defendant as executor under the will. About the same time Rukhmini, without joining her sons as parties, sued the present defendant for a declaration that the mortgage did not affect her rights or those of her sons. Her suit was dismissed for want of parties, but in the mortgagee's suit a decree was in November 1902 passed in favour of the present defendant against Fulkore and Rukhmini, Chunilal having died *pendente lite*. The decree was for payment of Rs. 13,551 and interest at 9 per cent. per annum and costs, and in default of payment within six months, for sale of the mortgaged property. It was confirmed on appeal to this Court. The property was sold under the decree and was purchased by the mortgagee for Rs. 11,000, leaving a balance due to him of upwards of Rs. 8,000. The present suit was instituted by the sons of Chunilal before the sale took place praying for a declaration that the property was not liable to be sold under the mortgage decree and for an injunction restraining the defendant from selling the property or in the alternative, if the sale was allowed to take place, then for a declaration that the alienation was to hold good only for and during the life-time of Fulkore and even then was subject to the plaintiffs' right of maintenance and that after Fulkore's death the plaintiffs were the full owners of the property.

As the Court of first instance, the District Court and this Court successively declined to grant an interlocutory order staying the sale, the plaintiffs added a prayer for a further declaration that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property. In the first Court the Subordinate Judge dismissed the suit, but in the District Court the decree was reversed and a declaration was made that the alienation holds good only during the life-time of Fulkore and is subject to the plaintiff's right of maintenance, [217] that the plaintiffs are the full owners of the property, and that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property.

From this decree the defendant has appealed.

Although both Fulkore and Chunilal were joined as party defendants to the mortgage suit, it has not been contended that the estate and the beneficiaries are bound by the mortgage decree.

For the respondent it has not been suggested that the continuance of the business was unauthorised in the events which had happened. Chunilal was indeed under the will the only person who could decide whether or not the business should be stopped.

It is well established that an executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

In *Ex parte Garland* (1) Lord Eldon, discussing the position of an executor carrying on his testator's trade under such a trust, said: "The case of the executor is very hard. He becomes liable, as personally

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(1) (1804) 10 Ves. Jun. 110 at pp. 119-120.



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responsible, to the extent of all his own property ; also, in his person ; and as he may be proceeded against, as a bankrupt ; though he is but a trustee. But he places himself in that situation by his own choice ; judging for himself, whether it is fit and safe to enter into that situation, and contract that sort of responsibility.....As to creditors, subsequent to the death of the testator.....it is admitted, they have the whole fund, that is embarked in the trade; and in addition they have the personal responsibility of the individual, with whom they deal; the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon anything else : nor have creditors in other cases a lien upon the effects of the person, with [218] whom they deal; though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien."

*Ex parte Butterfield* (1) shows that the introduction into the business by the trustee executor of a co-executor not authorised to carry on the trade does not affect the rights of the trade creditors. In that case a sole trader directed by his will that it should be lawful for his widow to employ £6,000 in continuing his business and he appointed her and his son executors. After the testator's death his widow and son continued his business and became bankrupt. A person beneficially interested in the assets which had been employed by the bankrupts sought to prove in respect thereof against their joint estate but it was held that to the extent of £6,000 no such proof could be allowed, for the employment of the £6,000 was authorised by the will.

The nature of the trade creditor's right against the assets properly employed by a trust trader is thus stated by Sir George Jessel in *In re Johnson* (2) : "The creditor who trusts the executor has a right to say 'I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract, because he trusted the trustee or executor : he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; . . . the Court puts the creditor, so to speak, as I understand it, in the place of the trustee."

In *Strickland v. Symons* (3) Lord Selborne, referring to *Ex parte Garland* and *Ex parte Johnson*, states the principle to be that the trustee though personally liable for the debts which he [219] contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

If this principle is borne in mind, a brief re-statement of the main facts of this case will show that the plaintiffs' suit must fail.

Chunilal, the trust trader, in conjunction with his co-executrix Fulkore, lawfully carries on the testator's business and employs therein the trade assets. In order to pay off trade debts he obtains money from the

(1) (1847) De Gex. 570.

(2) (1880) 16 Ch. D. 548 at p. 552.

(3) (1884) 26 Ch. D. 245 at p. 248.



defendant on the security of the ginning factory used in the business. The ginning factory is worth less than the sum advanced by the defendant. The plaintiffs, as beneficiaries of the testator, seek to deprive the defendant of the benefit of the assets so come into his possession.

The argument advanced on behalf of the plaintiffs was really an attempt to take advantage of the fraud perpetrated on the defendant by the plaintiffs' father who was personally liable for the debts which the defendant was induced to pay off. It was argued that the defendant took nothing by the mortgage since the ostensible mortgagors as widow and daughter took no interest in the property, Gordhandas having died testate; that Fulkore's interest as beneficiary under the will was subject to a restraint upon alienation; and that as executrix she could only mortgage the testator's property in conjunction with her co-executor Chunilal because she had not taken out probate and so could not act alone under section 92 of Act V of 1881. In our opinion the existence of the mortgage-deed strengthens rather than weakens the defendant's case.

The mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner Chunilal who had the implied authority of the testator to deal with the ginning factory in the ordinary course of business. The mortgage was therefore valid and binding on Chunilal as principal: see *Juggeewundas Keeka Shah v. Ramdas Brijbookun Das* (1). A mortgage by a trader under a testamentary trust of [220] the testator's factory is referable to his implied authority as a trustee and not to his position as executor. See the judgment of May, C. J., in *Devitt v. Kearney* (2).

We set aside the decree of the District Court and dismiss the suit with costs throughout on the plaintiffs.

*Decree set aside.*

34 B. 220 (=4 I. C. 843=11 Bom. L. R. 1372.)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

SIVLAL JETHABHAI, Plaintiff, v. BHIKA RAMJAN, Defendant.\*

[15th October, 1909.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—Retrospective effect—Indebtedness existing at the date of the passing of the Act as well as future indebtedness.*

The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provisions including sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—

"Whether section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?"

\* Civil Reference No. 5 of 1909.

(1) (1841) 2 Moo. I. A. 487.

(2) (1883) 13 L. R. Ir. 45 at p. 52.



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*Held* in the affirmative that section 13 of the Act is retrospective.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness.

[221] REFERENCE under Order XLVI, Rule I of the Civil Procedure Code (Act V of 1908), by J. N. Bhatt, Subordinate Judge of Borsad in the Ahmedabad District.

Small Cause suit.

The plaintiff sued the defendant, who was an agriculturist, to recover Rs. 48 including interest due on a money bond for Rs. 31, dated the 17th May 1904, passed in adjustment of an existing debt. The original advances amounted to Rs. 21-3-9 in 1896 and they were followed by further advances.

Section 13 and several other sections of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Ahmedabad District on the 15th August 1905 and the present suit was instituted on the 26th March 1909.

As the advances which resulted in the passing of the bond were made before the application of sections 12 and 13 of the Act to the Ahmedabad District, the Subordinate Judge referred the following question for an authoritative decision under Order XLVI, Rule I of the Civil Procedure Code (Act V of 1908):—

"Whether section 13 of the Dekkhan Agriculturists' Relief Act is retrospective so as to apply to the case of transactions entered into before the date of its extension to this district but the suit in respect of which is instituted after that date?"

The opinion of the Subordinate Judge was in the affirmative. In making the reference he observed as follows:—

If section 13 were to apply and account taken in the manner laid down by it the plaintiff cannot recover more than Rs. 25-8-0. If it were not to apply, the plaintiff would be entitled to recover Rs. 48, the full amount of the claim.

The plaintiff's pleader relying on I. L. R. 31 Bom. 630 contends as follows:—

1. As section 13 of the Dekkhan Agriculturists' Relief Act is held not to be retrospective, it cannot apply to the case of a transaction entered into before the date of its extension to this district, notwithstanding the fact that the suit was instituted considerably after the date of the extension of the section. The Full Bench ruling in I. L. R. 31 Bom. 630 decides that the last sixteen words in section 13 of the Dekkhan Agriculturists' Relief Act 'and secondly with a view to taking an account between such parties in manner hereinafter provided,' and sections 13 and 71A are not retrospective and do [222] not apply to suits instituted before the Dekkhan Agriculturists' Relief Act came into force. This is the rationale of the decision as appears from the fact that when the case was being argued, Chandavarkar, J., remarked that the sections in question did not merely affect procedure but that they affected rights and so could not have retrospective effect. Knight, J., also said that the taking of account might be a matter of a procedure but that the enforcing of accounts was not. These remarks in effect upheld the opinion of the Subordinate Judge at Thana to the effect that the provisions in question should not have "retrospective effect or apply to pending suits," as the creditor had certain vested rights under the law in force before the extension of the Dekkhan Agriculturists' Relief Act.

2. There is no reason why the case of a pending suit should be distinguished from one in respect of which no suit was pending, if the transactions in both the cases were entered into before the date of the application of the Act. Broom in his Legal Maxims (page 34, 7th Edition) when discussing the maxim "*Nona constitutio*



*inturis formam imponere debet non prateritis* " says that " every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective in its operation." This is the meaning of the word retrospective. There is no reason, therefore, why I. L. R. 31 Bom. 630 should not apply to this case.

3. Even a statute against wagering contracts was held not to apply retrospectively to such contracts entered into before the statute came into force, as appears from the following passage at page 211 in I. L. R. 2 Bom. 148 :—

" Hence in *Moon v. Durdan* (2 Ex. 22) the majority of the Court held that a right of action fully acquired before the passing of the Wager's Act was not extinguished by the words, ' no action shall be brought or maintained ' on a wager. The public interest was manifestly the motive of the law, yet as between private parties it was not allowed to affect the consequences of acts not at the time they were entered on, forbidden, and capable in themselves at the time of generating a legal right and corresponding obligation."

4. On the analogy of rules contained in clauses C and E and the last paragraph of section 6 of the General Clauses Act (X of 1897) the plaintiff has a vested right to have his case decided according to law as it existed before the coming into force of sections 12, 13 and 71 A of the Dekkhan Agriculturists' Relief Act in this District.

The defendant who is in gaol was not represented by a pleader, owing probably to poverty. The Government Pleader represented the plaintiff. As *amicus curiae* Mr. Bhanabhai argued the case for the defendant as follows :—

[223] 1. The ruling in question (I. L. R. 31 Bombay 680) is not correct. Looking to the course of decisions as to the retrospectivity of section 174 of the Bengal Tenancy Act, time would come for overruling this decision. The question whether section 174 of the Bengal Tenancy Act was retrospective, was first answered in the negative by a Full Bench of the Calcutta High Court in I. L. R. 14 Cal. 636 on the ground that that section conferred upon judgment-debtors a new right which they did not possess under the old Act. But this decision was held wrong by another Full Bench in I. L. R. 22 Cal. 767 which also upset another Full Bench ruling in I. L. R. 21 Cal. 940 as to section 310A of the old Code of Civil Procedure not being retrospective. Thus both section 174 of the Bengal Tenancy Act and section 310A of the Civil Procedure Code were ultimately held to be retrospective.

2. In I. L. R. 25 Bom. 104 it is said that section 310A of the Civil Procedure Code had been drafted on the lines of section 174 of the Bengal Tenancy Act VIII of 1885 which has been passed " in the interest of another unfortunate class; the poor tenure holders whose lands were liable to be sold for arrears of rent." In the Full Bench ruling of I. L. R. 14 Cal. 636 it was said that if the language used had contained a direct implication as to the intention of the legislature to make it retrospective, it would have been so interpreted. Though on the one hand Mr. D. A. Khare argued before the Full Bench in I. L. R. 31 Bom. 630 that section 12 of the Dekkhan Agriculturists' Relief Act mixed procedure and rights so inextricably that it was not possible to separate the one from the other and to give retrospective effect to it, it may be argued on the other hand that this inextricable mixing of the two amounts to a direct implication of the kind mentioned in the Full Bench ruling in I. L. R. 14 Cal. 636. If the legislature in order to relieve agriculturists directs the history and merits of their cases to be gone into for two purposes and if the history of a case implies an inquiry into the past why should it be supposed that it intended such an inquiry for one purpose in the case of contracts and other transactions entered into before the extension of the Act and for both the purposes in the case of contracts and other transactions entered into after the extension of the Act.

3. No doubt the general rule is that a statute is not to be retrospectively enforced. There is, however, another principle referred to by West, J., in a case under the Dekkhan Agriculturists' Relief Act (I. L. R. 8 Bom. 340) which requires to be considered—the principle "that a law passed to promote some important public interest may be given on that account a retrospective operation if necessary, as the rule against such operation rests itself on such a general public interest, which may, under the circumstances be deemed of less importance than the one embodied in the statute." The learned Judge adds: "The purpose of the Dekkhan Agriculturists' Relief Act was undoubtedly to shield the property of agriculturists against their creditors and this purpose we cannot but see was considered [224] by the Legislature one of great public importance. Thus only are the anomalous provisions of the Act to be accounted for. Such a purpose so manifested we cannot suppose to have extended only to

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the cases of attachments made after the Act had come into force. No intelligible reason could we think be assigned for such a distinction" (p. 347). In 7 Bom. L. R. 497 at page 518 Batty, J., refers to the passage and says when the maxim *Salus populi suprema lex* applies and the aim of an Act is to promote important public interests, private interests may justifiably be subordinated and a construction necessary to effectuate the intention of the Legislature must be given effect thereto. In the case of the Dekkhan Agriculturists' Relief Act the point was not whether it created new rights but whether expressly or by direct implication the legislature intended both the things mentioned in section 12 thereof to be done retrospectively or only one of them.

4. The ruling in question (I. L. R. 31 Bom. 630) was arrived at in the case of a pending suit and so it cannot apply to a case like the present where the suit was instituted after the coming into force of section 13. The plain meaning of this section is to affect all transactions whether made before or after the Act came into force. But there is nothing to clearly show that it was intended to operate in pending suits.

These arguments give rise to the following question :—

Whether section 13 of the Dekkhan Agriculturists' Relief Act is retrospective so as to apply to the case of transactions entered into before the date of its extension to this district but the suit in respect of which is instituted after that date ?

The question thus formulated does not appear to me free from doubt and difficulty, but as it is very important as affecting the interests of agriculturists and is likely to arise now and then, with diffidence I venture to submit it with the following observations :

The important question for consideration seems to be : what does I. L. R. 31 Bom. 630 actually decide? Does it decide that the last sixteen words of section 13 and sections 13 and 71A of the Dekkhan Agriculturists' Relief Act are absolutely non-retrospective or does it decide that they are only partially non-retrospective so as not to apply to the case of a pending suit. The case was one of a pending suit. All that their lordships said during the course of the argument or in the judgment had reference to this case of a pending suit. That a statute may be only partially retrospective appears from the following passage in Maxwell on the Interpretation of Statutes (4th Edition, 1905, page 322):—

"For it is to be observed that the retrospective effect of a statute may be partial in its operation. Thus it has been said that section 85 of the Divided Parishes Act, 1876, which contains a code of transmitted status in relation to settlement, is to be considered as fully retrospective for all purposes, except [225] only as regards adjunctions made before the commencement of the Act; so that for the purpose of determining the settlement of children born after 1876, it may be that their father's settlement is governed by the section even though his settlement for the purposes of his own removal is not affected by it."

Again West, J., in *In re Ratansi Kalianji and others* (I. L. R. 2 Bombay 148) at page 210, says :

"The general principle of non-retroactivity of new laws need not be insisted on. On the other hand there is in one sense an element of retroactivity in all laws since no law can operate except by changing or controlling what would else have been different capabilities or a different sequence of acts and events having their roots and motives in the past. It would be more important for practical purposes to distinguish if possible the cases and the senses in which the loosely expressed principle does and does not apply and to ascertain the exceptions to which it is subject. That, as has occasionally been argued, there is something universally and essentially wrong and unjust in retrospective laws is not to be admitted. The principle has indeed been accepted as a fundamental one in the written constitutions of some states, but it is properly rejected by Willes, J., in the case of *Phillips v. Eyre* (L. R. 6 Q. B., p. 23) and by Dr. Lushington in the "*Ironsides*". For the legislator the question is always one of the higher as against the lower or of the general against the particular interest. For the judges the question is simply as to the true intention of the Legislature."

There is the further rule "that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain" (Maxwell on the Interpretation of Statutes, p. 322, 4th edition, 1905).

Applying these principles to the section in question it appears that though the words of it convey that the section is meant to have retrospective effect they do not



show whether it was meant to include cases of pending suits. Courts are reluctant to extend the application of a statute or its section to the case of a pending suit unless it clearly appears that it was the intention of the legislature to so apply it. The Legislature may intend a section to operate retrospectively and yet may not intend it to operate on pending suits. Section 13 of the Dekkhan Agriculturists' Relief Act appears to be a section of this type. In my opinion I. L. R. 31 Bom 600 while deciding that the last sixteen words of section 12 and sections 13 and 71A do not apply to pending suits leaves their retrospectivity otherwise untouched notwithstanding the fact that the Subordinate Judge and their Lordships of the High Court during the course of the argument made general remarks to the effect that the sections were not retrospective. Though their remarks were general it cannot be forgotten that they were made in relation to the case of a pending suit.

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[226] The fact that a particular statute or a section if it is retrospective will not necessarily make it applicable to the case of a pending suit. The question would still have to be considered whether it is so far retrospective as to apply to pending suits. If there is no such intention appearing section 6 of the General Clauses Act will apply if the new enactment repealed any existing one. If the new enactment altered any existing law without repealing any enactment the principle of law enunciated in the *Gujrat Trading Company v. Trikarnji Velji* (3 Bom. H. C. R. 45) and followed in 10 Bom. L. R. 625 will apply. In the last case the ruling in *Fatamabibi v. Ganesh* (I. L. R. 31 Bom. 630) seems to have been interpreted as deciding no more than that the last sixteen words of section 12 and sections 13 and 71A are not retrospective so as to apply to a suit instituted before the Act came into force in the particular district (p. 636); thereby the meaning is conveyed that they are otherwise retrospective. If the view of their Lordships in 10 Bom. L. R. 625 had been that I. L. R. 31 Bom. 630 decided that these sections were absolutely non-retrospective there would have been no necessity to set aside the order of the lower Court permitting withdrawal of the suit.

In I. L. R. 17 Bom 289 a question arose whether section 31, clause 2, of the Talukdars' Act (Bom. Act VI of 1888) was retrospective in operation. In this case a decree upon a mortgage bond was passed on 15th August 1887. The property was sold on 5th August 1889 but the Collector refused to confirm the sale for want of sanction of the Governor, the Talukdars' Act having come into force on the 25th March 1889. The High Court held that the section was not retrospective and that the sale should be confirmed though no sanction had been obtained.

In I. L. R. 19 Bom. 80 which also is a case on the same section of the Talukdars' Act the mortgage was executed before the Act came into force, but a decree for sale was passed after its coming into force. It was held that no sanction of the Governor was necessary.

In I. L. R. 20 Bom. 565 the correctness of the above ruling was doubted. It was however explained and its correctness maintained by Ranade, J., in I. L. R. 24 Bom. 884 on the ground that it was presumably the case of a pending suit. In the last mentioned case the mortgage was executed in 1883 and a suit on the mortgage was brought in 1893. The District Court held that section 31, clause 2, of Bombay Act VI of 1888 did not apply as the mortgage was effected prior to the passing of the Act and so passed an order absolute for the sale of the mortgaged property. The High Court reversed the order holding that the section did apply. The case in I. L. R. 19 Bom. 80 was assimilated to the class of cases referred to in I. L. R. 17 Bom. 289 on the ground that the suit in I. L. R. 19 Bom. 80 was presumably instituted before the date of the application of the Act. Ranade, J., observed —

"There is no particular reason to distinguish cases in which a decree has been obtained from those in which proceedings had been presumably instituted before the Act came into force. In *Doolubdass v. Ramlohi* (5 Moo. I. A. 109) [227] their Lordships of the Privy Council had to consider how far retrospective effect could be given to the provisions of an Act of 1848 which declared that 'all agreements by way of wager shall be null and void' and it was held that this prohibition did not affect the validity of existing contracts at all events not those contracts on which actions had already been brought before the new Act came into force..... (The italics are mine.) In *Shah Kalidass v. Chudasama* (P. J. for 1895, p. 428) as the encumbrance was a date prior to the Act but the suit was instituted long after the Act came into force, a decree was passed for the amount due, but its enforcement by sale of the property was made subject to the provisions of section 89 of the Transfer of Property Act which would, it was observed, make it possible for the creditor to obtain the sanction of Government before the sale actually took place."



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The above decisions on section 31, clause 2, of the Talukdars' Act show that though the section was expressly held not to be retrospective by one Bench, it did not come in the way of another Bench holding subsequently that the section did apply to a case in which the suit was instituted after the coming into force of the Act though the transaction sued on was of a date anterior to its coming into force.

On the strength of these decisions it may be argued that though section 13 of the Dekkhan Agriculturists' Relief Act is held not to be retrospective in I. L. R. 31 Bom. 680 the decision would be no bar to the applicability of the section to the case of a transaction which, though entered into prior to the coming into force of the section in this district, was sued on after its coming into force.

For the above reasons I think that the ruling in I. L. R. 31 Bom. 680 does not come in the way of answering the question I have framed in the affirmative.

If however my interpretation of the ruling in 31 Bombay be not correct and it be interpreted as deciding that section 13 of the Dekkhan Agriculturists' Relief Act is absolutely non-retrospective the arguments in favour of the retrospectivity of the section appear to be very cogent and it is for their Lordships to consider whether another Full Bench should not intervene. Under this latter interpretation it seems difficult to make a distinction between two cases of contracts both of which are entered into, say a year before the coming into force of a section authoritatively ruled to be a provision not of procedure law but of substantive law but one of which was sued on the day preceding, and the other on the day of, the coming into force of the section. To make myself more clear, suppose a provision of substantive law comes into force on August 1st, 1905. A suit is filed against B by A on July 31st, 1905, and another against C on August 1st, 1905. The contracts with B and C both were entered into on 1st September 1904. The High Court in the former case rules that the provision is of substantive law and affects a vested right, therefore the new law cannot operate retrospectively. The rationale of this ruling is that A and B contracted on 1st September 1904 with reference to a particular state [228] of things. They did not know that the interest agreed to could be cut down. Does not the same reasoning apply to the case of A and C who also entered into a similar contract on 1st September 1904?

According to the usual canons of construction governing such enactments as the Dekkhan Agriculturists' Relief Act everything must be done in advancement of the remedy consistently with the plain language of the Legislature so as to afford the utmost relief which the meaning of the language can allow. It appears from the ruling in 10 Bom. L. R. 745 that section 13, Dekkhan Agriculturists' Relief Act, has of necessity to be applied to all cases the history and merits of which have been inquired into under section 12 of it. Thus the application of the two sections is co-extensive. If this view is correct there is a conflict between it and the ruling that the last sixteen words of section 12 and sections 13 and 71A are not retrospective.

On a consideration of the arguments for the plaintiff and the defendant and for the reasons above set forth, I would answer the question framed in the affirmative.

The reference was argued before Sir Basil Scott, C. J., and Batchelor, J.

*T. R. Desai (amicus curiæ)* for the plaintiff:—So far as pending suits are concerned this Court has, in its Full Bench ruling in *Fatmabibi v. Ganesh* (1), held that the last sixteen words of paragraph 2 of section 12 of the Dekkhan Agriculturists' Relief Act are not retrospective. We submit that section 12 applies only to transactions entered into after the provisions of the Act were extended to the Ahmedabad District. There are no decided cases either way, therefore reference will have to be made to the canons of construction of a statute. The Privy Council have held in *Doolubdass v. Ramlohl* (2), which was a case of wager, that a new statute cannot affect a transaction entered into before it was enacted, at any rate it cannot affect a transaction in respect of which a suit is already brought. In the above case, the suit was brought before the particular Act was enacted but therein there is an expression of general opinion that anterior transactions are not to be affected. The observations in *Moon v.*

(1) (1907) 31 Bom. 680.

(2) (1850) 5 Moo. I. A. 109.



*Durden* (1) are to the same effect. We rely on section 6 of the General Clauses Act, 1896. We have a vested right to get a [229] decree on our *khata* and no new statute subsequently passed can divest us of that right. No distinction can be made between (1) the case of a transaction admittedly entered into before the Act came into operation and (2) one in respect of which a suit is brought after the enactment of the Act. Relying on the decision of the Full Bench in *Fatmabibi v. Ganesh* (2) we submit that section 12, clause 2, of the Dekkhan Agriculturists' Relief Act is not retrospective and the point referred to should be answered in the negative. The following cases were cited :—

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*In the matter of the petition of Ratansi Kalianji* (3), *Javanmal Jitmal v. Muktabai* (4), *Manohar Ganesh v. Chutabhai Mithabhai* (5), *Kalian Moti v. Pathubhai Faljibhai* (6), *Taylor v. Manners* (7) and *Phillips v. Eyre* (8).

*G. M. Thakore* (*amicus curiæ*) for the defendant :—The ruling of the Full Bench in *Fatmabibi v. Ganesh* (2) gave rise to the present question. Therefore it is necessary to see what that case really decides. The reference to the Full Bench was made because there is an apparent conflict between the decisions of this Court in *Pannalal v. Kalu* (9) and *Suryaji v. Tukaram* (10). The last case decides that sections 12 and 13 of the Act are applicable only to suits instituted on or after the 1st November 1879 and the former case was supposed to be in conflict with it. The Full Bench held that sections 13 and 71A and the last sixteen words of section 12, clause 2, did not apply to suits instituted before the Act came into force and read *Pannalal v. Kalu* (9) as indicating a similar construction of the law. The question of the applicability of the Act to anterior transactions was not before the Full Bench and the language used is to be read in the light of the question submitted for decision.

To argue from this that the Act did not apply to anterior transactions is to take a long stride. Pending suits stand on a footing of their own. They are always governed by the law [230] obtaining at the date of their institution: *Gujarat Trading Company v. Trikramji Velji* (11). They are understood to have the same force as a decree: *Chudasama Naudhabhai v. Naran Tribhovan* (12). The rights created by a decree or of the highest kind and infinitely superior to those created by a contract: *Navlu v. Raghu* (13), *Tatya v. Bapu* (14). It cannot therefore be urged that because the Act does not apply to pending suits, it cannot also apply to past transactions.

Apart from the Full Bench ruling the present case is quite clear. There is no ruling against the view we contend for. On the contrary this Court has always proceeded on the assumption that the Act applies to all transactions. Even the case of *Suryaji v. Tukaram* (15) supports this contention. The cases of *Navlu v. Raghu* (13) and *Tatya Vithoji v. Bapu Balaji* (14) are further illustrations. In all these cases the transactions were of earlier dates, still the decisions rest on grounds other than that of the non-applicability of the Act to certain transactions. This is

(1) (1848) 2 Ex. 22.

(2) (1907) 31 Bom. 630.

(3) (1877) 2 Bom. 148.

(4) (1890) 14 Bom. 516.

(5) (1884) 8 Bom. 347.

(6) (1892) 17 Bom. 289.

(7) (1865) L. R. 1 Ch. 48.

(8) (1870) L. R. 6 Q.B. p. 23.

(9) (1906) 8 Bom. L. R. 798.

(10) (1880) 4 Bom. 358.

(11) (1867) 3 Bom. H.C.R. (O.O.J.) 45.

(12) (1897) 22 Bom. 884.

(13) (1884) 8 Bom. 303.

(14) (1883) 7 Bom. 330.



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because the language is quite clear. The word 'history' in section 12 of the Act can only mean past history and the word 'commencement' is used without any word modifying its natural import. The preamble of the Act again clearly indicates the intention of the legislature which was to relieve the indebtedness, meaning thereby existing indebtedness. The supplementary definition of the word 'agriculturist' in clause (2) of section 2 also helps our contention. Both the language and the intention being clear, no canon of construction can help the plaintiff. The Act is to be construed as indicated in *Shivram Udaram v. Kondiba Muktaji* (1). The cases of *Moon v. Durden* (2) and *Doolablass Pettamberdass v. Ramloll Thackoorseydass* (3) were both cases of pending suits. Those decisions went on the presumed intention of the legislature which was there quite different. The observations relied upon are *obiter dicta* and should be read with reference to the point for decision. We therefore submit that the question referred should be answered in the affirmative.

[231] *Desai* in reply :—The observations in *Manohar Ganesh v. Chutabhai Mithabhai* (4) cannot affect the present case, for they are in conflict with the view of the majority of Judges in *In the matter of the petition of Ratansi Kalianji* (5). No doubt the object of the Act was to help agriculturists and relieve them from indebtedness but at the same time some consideration will have to be shown to creditors whose position becomes very hard under the Act.

SCOTT, C. J. :—We answer the question referred in the affirmative.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness. We understand this to mean indebtedness existing at the date of the passing of the Act as well as future indebtedness.

The point referred to us has never, so far as we have been able to ascertain, been raised during the last thirty years which have elapsed since the passing of the Act, and we know of no case which has been decided which is based upon any other reading of the Act than that indicated above.

We are indebted to the pleaders who have argued the case as *amici curiæ* with much keenness and have given great assistance to the Court.

*Order accordingly.*

(1) (1884) 8 Bom. 840.

(2) (1848) 2 Ex. 22.

(3) (1850) 5 Moo. I. A. 109.

(4) (1884) 8 Bom. 847.

(5) (1877) 2 Bom. 148.



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[232] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt. Chief Justice, and Mr. Justice Batchelor.*

RAMRAV GOVINDRAO (*Original Plaintiff*), *Appellant*, v.  
 THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER  
 (*Original Defendants*), *Respondents*.\*

[6th November, 1909.]

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*Revenue Jurisdiction Act, (X of 1876), section 4, sub-section (a)†—Act XI of 1852—  
 Land held as Saranjam—Decision of the Inam Commissioner—Finality—Suit  
 for declaration of title and possession—Exclusion of jurisdiction of Civil Courts.*

In the year 1856 the Inam Commissioner decided that a certain estate was Saranjam of P. and not his Sarv Inam. On P.'s death in 1899 Government resumed the estate on the ground that it was Saranjam and re-granted it to V., one of P.'s grandsons. Subsequently the plaintiff, another grandson of P., brought a suit against the Secretary of State for India and V. for declaration of title and possession on the ground that the immovable property in suit was plaintiff's Sarv Inam property and could not be taken from his possession by Government or its officers or re-granted to any one else.

*Held,*

1. That the decision of the Inam Commissioner was, by virtue of the provisions of Rule 2, Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision.

[233] 2. That after such final decision, the title and continuance of the estate must be determined under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time.

3. That in accordance with those rules the estate was on P.'s death, resumed by Government who re-granted it to V.

*Held, further,* that the suit having been against Government relating to land as Saranjam was excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876)

APPEAL from the decision of T. D. Fry, District Judge of Dharwar, rejecting, the claim in Original Suit No. 3 of 1907.

Suit for a declaration of title and for possession of property.

The property in suit formed part of the estate known as Hebli estate in the Dharwar District. A question having arisen as to whether the estate was Saranjam or Sarv Inam, Major Gordon, the Inam Commissioner, decided in the year 1858 that it was Saranjam and not Sarv

\* First Appeal No. 21 of 1909.

† Section 4, sub-section (a), of the Revenue Jurisdiction Act (X of 1876) runs thus:—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters:—

(a) Claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village-officer or servant; or

Claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such officer or service; or

Suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf; or

Claims against Government relating to lands held under treaty, or to lands granted or held as Saranjam, or on other political tenure, or to lands declared by Government or any officer duly authorized in that behalf to be held for service.



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Inam. One Pandurangrao had a fourth share in the estate. On his death in 1899 the share was resumed by Government on the ground that it was Saranjam. After the resumption Government passed an order in the year 1902 re-granting the share to one Narsingrao. The Secretary of State for India, however, cancelled the said order and re-granted the share to Vithalrao, a minor grandson of Pandurangrao. Owing to the minority of the grantee, his property was managed by the Collector of Dharwar as guardian.

On the 15th August 1907 the plaintiff, another grandson of Pandurangrao, brought the present suit against the Secretary of State for India as defendant 1 and Vithalrao as defendant 2, for declaration of title and possession, alleging that the property was Sarv Inam and was held by his grandfather, Pandurangrao, as full owner and that the re-grant to Vithalrao was illegal.

The defendants contended *inter alia* that the property was Saranjam and not Sarv Inam, that the plaintiff had no cause of action regarding the resumption and re-grant made under the Saranjam Rules and that the suit was barred by section 4, clause (a) of the Bombay Revenue Jurisdiction Act (X of 1876).

[234] The District Judge found that under the provisions of section 5 and Rule 2 of Schedule A of Act XI of 1852 it was not open to him to question the declaration made by Government in their Resolution No. 676, J. D., dated the 6th March 1863, that the property in suit was Saranjam, the said declaration being final, and that he had no jurisdiction to entertain the suit under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876). He, therefore, dismissed the suit.

The plaintiff appealed.

K. H. Kelkar for the appellant (plaintiff).

G. S. Rao (Acting Government Pleader) for the respondents (defendants).

SCOTT, C. J.:—One Pandurangrao, the grandfather of the plaintiff and the second defendant, was the owner of one-fourth share of the Hebli estate in the Dharwar District. On his death in 1899, Government, on the ground that the property was Saranjam, resumed Pandurangrao's one-fourth share and granted it to Narsingrao. That order was cancelled by the Secretary of State and by his orders the property was granted to Vithalrao, the second defendant.

The Collector of Dharwar, as the guardian of Vithalrao, has taken the property into his possession, and the plaintiff, who claims to hold as one of the heirs of Pandurangrao on the footing of the estate being a Sarv Inam of Pandurangrao, sued the Secretary of State and Vithalrao for a declaration of title and for possession. He seeks to have it declared that the immoveable property in suit is the Sarv Inam property of the plaintiff and cannot be taken from his possession by Government or its officers or re-granted to any one else.

The question whether the Hebli estate was Sarv Inam or Saranjam, was decided by the Inam Commissioner, Major Gordon, in July 1858, under the provisions of Act XI of 1852. The Inam Commissioner then recorded his decision that the claimant's title (the claimant being an ancestor of the plaintiff) to hold Kasba Hebli in Sarv Inam was invalid, and he held that it was in fact a Saranjam property.

[235] The decision of the Inam Commissioner is, by virtue of the provisions of Rule 2 of Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision. But once it has been decided



finally by the Inam Commissioner that the Hebli estate is Saranjam, the title to and continuance of the estate must be determined, under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time.

On the 17th of May 1898, Government passed rules for the regulation of the continuance and resumption of Saranjam estates, and those rules apply to the Hebli estate as well as to other Saranjams. In accordance with those rules, the estate was, upon the death of Pandurangrao, resumed by Government and re-granted, and as a result of the revision effected by the Secretary of State the share of Pandurangrao in the Hebli Saranjam has been re-granted to Vithalrao, the second defendant.

This, then, is a suit against Government relating to land held as Saranjam, and is therefore excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876). The District Judge was therefore right in holding that he had not jurisdiction to entertain the suit.

It has been suggested that the plaintiff has acquired certain occupancy rights in the estate of which he cannot be deprived by any decision of Government under the Saranjam Rules. This is obviously an after-thought suggested by the decision of this Court in *Ganpatrav Trimbak v. Ganesh Baji Bhat* (1). It was a point which was not raised in the plaint but is mentioned in the memo of appeal for the first time. It is a question which, we think, ought not to be decided in this suit, and we, therefore, abstain from expressing any opinion upon it.

We confirm the decree of the District Judge dismissing the suit, and we dismiss this appeal with costs.

*Decree confirmed.*

34 B. 236 (=4 I. C. 836 =11 Bom. L. R. 1352).

[236] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

JASODA WARD CHHOTU (*original Defendant*), Appellant, v.  
CHHOTU MANNU DALVALU (*original Plaintiff*), Respondent.\*

[11th November, 1909.]

*Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), section 24—Suits Valuation Act (VII of 1837), section 11.*

A suit for restitution of conjugal rights, wherein the claim was valued by the plaintiff at Rs. 65, was instituted in the Court of the Second Class Subordinate Judge. The First Court decreed the claim: and on appeal the decree was confirmed. On second appeal it was contended that the First Court had no jurisdiction to try the suit.

*Held*, that the valuation of the claim by the plaintiff must be accepted for the purpose of jurisdiction, unless it was shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which in fact it had not.

*Jan Mahomed Mandal v. Mashar Bibi* (2), followed.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree passed by D. S. Sapre, Subordinate Judge of Jalgaon.

\* Second Appeal No. 877 of 1908.

(1) (1885) 10 Bom. 112.

(2) (1907) 34 Cal. 352.

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34 B. 232=4  
I. C. 832=11  
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34 B.236=4  
I. C. 886=11  
Bom. L. R.  
1852.

Suit for restitution of conjugal right.

The plaintiff filed his suit in the Court of the Second Class Subordinate Judge at Jalgaon, valuing his claim at Rs. 65. That Court decreed the claim.

On appeal, this decree was confirmed by the District Court.

The defendant preferred a second appeal to the High Court contending *inter alia* that the Second Class Subordinate Judge had no jurisdiction to try the suit which was for restitution for conjugal rights.

*R. R. Desai* for the appellant (defendant).—A subordinate Judge of the Second Class has no jurisdiction to try a suit for restitution of conjugal rights. The claim is here valued for [287] purposes of court-fees at Rs. 65; but that does not determine jurisdiction.

Under section 24, clause (2), of the Bombay Civil Courts Act (XIV of 1869) the First Class Subordinate Judge has jurisdiction to try all suits of a civil nature within the territorial jurisdiction. Under the third clause of the section, the Second Class Subordinate Judge can try any suit wherein the subject-matter does not exceed in amount or value Rs. 5,000. Therefore, he can try only those suits which are capable of money valuation.

In the present case the subject-matter is incapable of any money valuation; and the claim as valued by the plaintiff for court-fee purposes is no guide to determine jurisdiction. See *Aklemannessa Bibi v. Mahomed Hatem* (1).

The respondents did not appear.

CHANDAVARKAR, J.:—It is contended before us on the authority of *Aklemannessa Bibi v. Mahomed Hatem* (1) that the suit for restitution of conjugal rights, out of which this second appeal arises, did not lie in the Court of the Second Class Subordinate Judge, by whom it was tried, because, according to the Bombay Civil Courts Act, that Court has jurisdiction to try no suit other than that the subject-matter of which is of the value of less than Rs. 5 000, whereas a suit for restitution of conjugal rights (it is urged) is not one the subject-matter of which can be valued. What is meant by this argument is, as we understand it, that a suit for restitution of conjugal rights is not one the subject-matter of which can be precisely and definitely valued. In such cases the law leaves it to the plaintiff to put his own valuation on the plaint and accepts it for the purposes of jurisdiction unless it is vitiated by some improper motive such as a deliberate design to give the Court a jurisdiction which it has not. As was said in the case of *Lakshman Bhatkar v. Babaji Bhatkar* (2), what *prima facie* determines the jurisdiction is the claim or subject-matter of the claim as estimated by the plaintiff, and "this determination having given the jurisdiction, the jurisdiction itself continues... unless a different principle comes into operation to prevent such a result or to make the proceedings [238] from the first abortive." This law has been followed in a series of cases in this Court: *The firm of Jechand Khushalchand v. The firm of Moti Lavji* (3), and *Gulabchand Motiram Gujar v. Fulchand Panachand* (4). It has also been adopted by the other High Courts.

In the present case the plaintiff valued the subject-matter of the suit at Rs. 65 and nothing was urged against the valuation in either of the lower Courts. The point as to want of jurisdiction in the Second Class

(1) (1904) 31 Cal. 849.

(2) (1888) 8 Bom. 81.

(3) (1888) P. J. 1.

(4) (1889) P. J. 192.



Subordinate Judge's Court is raised for the first time in second appeal. The case of *Aklemannessa Bibi v. Mahomed Hatem* (1), cannot be accepted as a decision on the point because, as has been pointed out by the same Court in *Jan Mahomed Mandal v. Mahar Bibi* (2), the observations in the former case are mere *obiter dicta*. In the latter case the Calcutta High Court has held that, where the claim in a suit for restitution of conjugal rights is valued by the plaintiff, that valuation must be accepted for the purpose of jurisdiction unless it is shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which it has not.

The decree must be confirmed,

*Decree confirmed.*

34 B. 239 (=5 I. C. 610=12 Bom. L. R. 16.)

[239] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Appellant*, v. LALDAS NARANDAS (*Original Plaintiff*),  
*Respondent*.\*

[30th November, 1909.]

*Bombay Land Revenue Code (Bombay Act V of 1879), section 48†—Government—Assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of statute.*

The plaintiff, who was the occupant of land used for agricultural purposes, paid to Government the assessment chargeable on "land appropriated" for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff had let it out for stacking timber and derived profit from this special user of the land. Government levied an additional assessment on the land on account of that special user, purporting to do so under section 48, clause (b), of the Code.

*Held*, that the lands could not be charged with any additional assessment in respect of the special user under section 48, clause (b), of the Code; for the expression "appropriated for any purpose" in the clause means set apart for that purpose to the exclusion of all other uses.

The Bombay Land Revenue Code (Bombay Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject.

APPEAL from the decision of F. X. DeSouza, District Judge of Thana. Suit for declaration and injunction.

[240] The plaintiff Laldas owned certain lands which were used for agricultural purposes during the cultivating season, and for which he was

(1) (1904) 81 Cal. 849.

(2) (1907) 34 Cal. 352.

\* First Appeal No. 29 of 1909.

† The Bombay Land Revenue Code (Bombay Act V of 1879), section 48, runs as follows:—

The land-revenue leviable under the provisions of this Act shall be chargeable—

- (a) upon land appropriated for purpose of agriculture,
- (b) upon land appropriated for any purpose from which any other profit or advantage than that ordinarily acquired by agriculture is derived.
- (c) upon land appropriated for building sites.



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paying to Government an annual agricultural assessment of Rs. 18-5-6. During the fair season, the lands were every year rented by the plaintiff to timber merchants for the purpose of stacking timber thereon.

The Collector of Thana, purporting to act under section 48 and Rule 56 of the Rules framed under the Bombay Land Revenue Code (Bombay Act V of 1879), levied altered assessment on the lands in view of their non-agricultural use during the fair season; and recovered Rs. 501-15-8 for the years 1904—1907 from the plaintiff. The plaintiff paid the amount under protest.

Subsequently, the plaintiff filed this suit against the Secretary of State for India in Council praying for a declaration that the lands were not liable to altered assessment, for refund of the amount already paid by him, and for an injunction restraining the defendant from further levying additional assessment.

The District Judge decreed the plaintiff's claim by granting the declaration and injunction sought by him; and by awarding refund of Rs. 122-3-2. In the course of his judgment, the Judge remarked as follows:—

The crucial point in this case is whether it can be said that in the circumstances above described the plaintiff-lands have been appropriated to a purpose unconnected with agriculture within the meaning of section 48 (b) of the Land Revenue Code. The learned Government Pleader presses for an answer in the affirmative, contending that the section contains no such adverb as "perpetually" or "permanently" to qualify the word appropriated. He argues that the appropriation to non-agricultural uses may well be a temporary appropriation only during the fair season, and he urges that if an occupant derives an extra profit by temporarily appropriating land to a non-agricultural purpose, it is within the scheme of the Land Revenue Code that the Crown should participate in any such extra profit. He adverts to the rule of construction that statutes imposing burdens, like Penal Acts, are not to be so construed as to furnish a chance of escape and a means of evasion (Maxwell on the interpretation of Statutes, 3rd edition, p. 405), and he asked the Court to apply that rule in the present case by giving effect to the interpretation for which he contends.

Now, the maxim *ex antecedentibus et consequentibus fit optima interpretatio* furnishes a well-known rule of construction in the interpretation of statutes. [241] And it has been laid down as a corollary of this maxim that "if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other section and finding out the sense of one clause by the words or obvious intent of another" (Broom's Legal Maxims, 7th edition, p. 488). Accordingly in order to determine whether a temporary diversion of the lands to non-agricultural purposes constitutes an "appropriation" to such purposes within the meaning of section 48 (b), it is necessary to refer to the clause immediately following. That clause enacts as follows:—"And the assessments fixed under the provisions of this Act upon any land appropriated for any one of the above purposes, shall, when such land is appropriated for any other of the said purposes, notwithstanding that the term if any for which such assessment was fixed, may not have expired, be liable to be altered and fixed at a different rate."

The Legislature then has classified lands for the purpose of the levy of assessment into three classes, according as they are appropriated to agricultural, non-agricultural or building purposes. This classification is obviously intended to be exhaustive; apparently it is also intended to be mutually exclusive, for it is provided that the diversion of land from one class to another entails liability to enhanced assessment under section 48 and to a fine under section 65. It was apparently not contemplated that the same land could, during the pendency of a survey settlement, be "appropriated" to agricultural as well as non-agricultural purposes during one and the same year so as to be referable to either class indiscriminately. The "appropriation" contemplated by the section seems thus to have been an exclusive and permanent appropriation so that lands assessed at the survey settlement as lands "appropriated for purposes of agriculture" would not be liable to re-assessment as lands "appropriated" for any purpose unconnected with agriculture unless they had in the interval ceased to be appropriated to agriculture. If this is the correct interpretation then it is obvious that it is not competent to the Collector to levy enhanced assessment on



the plaint-lands which are admittedly "appropriated to agriculture" during the cultivating season.

The same result follows if we apply the general rule that the words of a statute are to be understood in their etymological or popular sense, unless there are special reasons to the contrary. To "appropriate" is defined in Webster's dictionary to mean "to set apart for or assign to a particular use to the exclusion of all others." Accordingly, so long as land is used for agricultural purposes "during the only period when it is capable of being so used," it cannot be subjected to enhanced assessment or fine as land appropriated to purposes unconnected with agriculture, because there has been no exclusion of agricultural uses but rather a combination of agricultural with non-agricultural uses.

The argument that the Crown is entitled to participate in any extra profit derived by the occupant from a temporary appropriation of agricultural land [242] to a non-agricultural purpose can easily be answered by a reference to the definitions of the words "occupant", "holder" and "right to hold land" given in section 3 (16, 11, 10) respectively of the Land Revenue Code.

An occupant's right to the possession and enjoyment or disposal of land is absolute subject only to the burdens and limitations imposed by the Land Revenue Code. Such burdens must be stated in clear terms in the Code itself and cannot be left to be inferred from extraneous considerations; for it is a recognised rule that statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction, they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach upon the rights of person; and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt (Maxwell on the Interpretation of Statutes, 3rd edition, p. 399).

The conclusion then at which I arrive is that the plaint-lands cannot be said to have been appropriated by the plaintiff to a purpose unconnected with agriculture within the meaning of section 48 (b) of the Land Revenue Code and rule 56 of the rules framed thereunder and are hence not liable to altered assessment under that section.

The defendant appealed to the High Court.

*Strangman* (Advocate General), with the Government Pleader, for the appellant.—The lower Court has erred in construing the term "appropriated" in clause (b) of section 48 of the Bombay Land Revenue Code (Bombay Act V of 1879). The wording of the section makes it clear that Government have the right to levy extra assessment when land used for agriculture in the agricultural season is utilized for non-agricultural purposes during the fair season. There is no hardship in this; for when the occupant makes extra profit, he must also be liable to extra assessment.

*G. K. Parekh* and *P. B. Shingne* for the respondent.—The Land Revenue Code should always be construed in favour of the subject. The lower Court's view is correct. There cannot be any appropriation within the meaning of section 48 of the Code, unless there is abandonment of one purpose and exclusive adoption of another. At any rate, the new purpose for which the land is used ought to be such that it becomes unalterably [243] attached to the soil and is not capable of abandonment easily as in the present case.

CHANDAVARKAR, J. :—The respondent is the occupant of land used for agricultural purposes and has been paying to Government assessment chargeable on "land appropriated" for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code. During the seasons when the land is not used for agricultural purposes, the respondent has been letting it out for stacking timber and deriving profit from this special user of the land. Government by the suit which has lead to this appeal claim the right to impose additional assessment on the land on account of that special user. They rely on clause (b) of section 48, which provides that

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land-revenue shall be chargeable "upon land appropriated for any purpose from which any other profit or advantage than that ordinarily acquired by agriculture is derived." The word "appropriated" means in its natural sense "made one's own" and conveys the idea of exclusion. "To appropriate" anything for any purpose is to set it apart for that purpose in exclusion of all other uses : American and English Encyclopædia of Law ; *Whitehead v. Gibbons* (1).

The context in which the clause in question occurs in section 48 leads to the same conclusion. Clause (a) relates to "land appropriated for purpose of agriculture." That obviously means land devoted to agricultural purposes and no other. Similarly clause (c) relates to "land appropriated for building sites"—that is, land devoted to building purposes and no other. If the word "appropriated" has that meaning in clauses (a) and (c), we must understand it in the same sense in clause (b) having regard to the ordinary canon of construction that a word, which occurs more than once in an Act, must be construed to have the same meaning throughout the Act unless some definition in it or the context shows that the Legislature used the word in different senses.

[244] Had the Legislature intended clause (b) to apply to land used both for agricultural and other purposes, it would have used apt language to convey its meaning. It would have referred to the land in clause (b) as land appropriated for purposes of agriculture and other purposes except building sites. This is a taxing enactment, and must be construed strictly in favour of the subject.

The decree appealed from must, therefore, be confirmed with costs.

*Decree confirmed.*

84 B. 244 (=2 I. C. 146=11 Bom. L. R. 237).

ORIGINAL CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

BAYABAI, WIDOW, AND OTHERS, *Appellants and Defendants* 2, 3, 4,  
v. HAJI NOOR MAHOMED CASSAM, *Respondent and Plaintiff*, AND  
N. C. MACLEOD, *Respondent and 1st Defendant*.\*

[15th June, 1908.]

*Practice*—Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed—*Res judicata*.

A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting.

After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

H. filed a suit in 1904 against A. and J. the drawer and indorser respectively of two hundies. At the time of filing the suit J. was dead.

H. obtained a decree against both defendants, which decree remained unsatisfied.

In 1905 H. filed a suit against the heirs of J. on the same two hundies.

*Held*, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit.

(1) 10 N. J. Eq. 285.

\* Appeal No. 1477, Suit No. 611 of 1905.

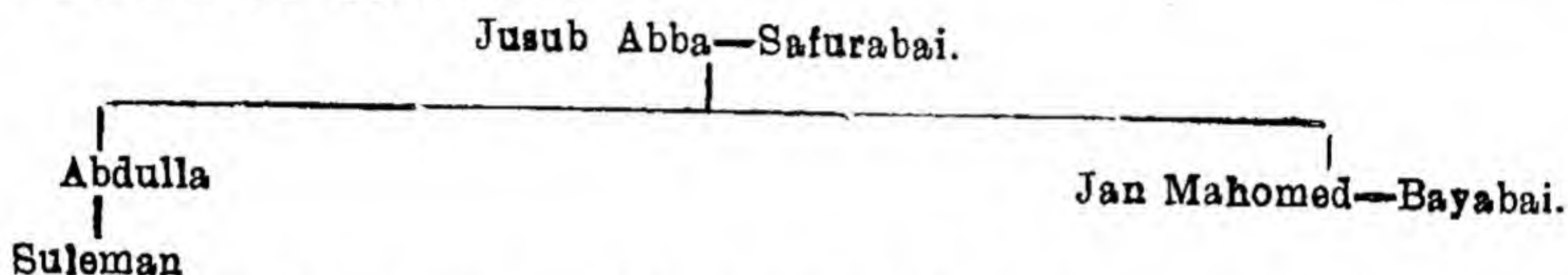


THIS was a suit filed by Haji Noor Mahomed Cassam against the defendants as the heirs and legal representatives of one [245] Jusub Abba, deceased, for the recovery of a sum of Rs. 1,800 with interest alleged to be due to the plaintiff upon certain hundies, dated the 5th and 8th days of September 1904, passed by one Abdoor Rehman Noor Mahomed and endorsed by the first defendant in the name of his deceased father Jusub Abba. The defendants 2, 3, 4 pleaded that the suit was barred as being *res judicata*, the plaintiff having sued to judgment these parties in another suit. Russell, J., passed a decree in favour of the plaintiff for the amount claimed with costs. Against this decree the defendants 2, 3, 4 appealed.

Robertson (with Davar) for the appellants.

Setalvad (with Mirza) for the respondents.

BATCHELOR, J.:—The following tree shows the relation between the various defendants-appellants :—



Abdulla is an insolvent, and the Official Assignee is the first defendant in his place. Jan Mahomed died intestate in 1906, leaving his widow his only heir. The parties are Cutchi Memons, and the plaintiff is by profession a money-lender.

The suit out of which this appeal arises is based on two *hundies* drawn by one Abdul Rehman in September 1904 in favour of Jusub Abba, and endorsed in the name of Jusub Abba by Abdulla to the plaintiff. Upon these same *hundies* the plaintiff brought an earlier Suit No. 863 of 1904 against Abdul Rehman, the drawer, and Jusub Abba, the indorser, and in that suit obtained a decree against both the then defendants. That decree has remained unsatisfied, and it is common ground that Jusub Abba, died in February 1902 or over two years before the institution of this Suit No. 863. The suit underlying the present appeal is No. 611 of 1905, and in it the plaintiff seeks to enforce liability for the two *hundies* against the defendants as the representatives of the deceased Jusub Abba. The learned Judge below has decreed the claim, and against that decree [246] the present appeal is preferred by the defendants Bayabai, Safurabai and Suleman.

The stress of the argument in this appeal has fallen upon the question as to the exact character of Suit No. 863, and Mr. Robertson has contended that that suit is a bar to the present claim. The contention is put in the alternative, and it is urged that the second defendant in Suit No. 863 was either the firm of Jusub Abba or was the individual Abdulla Jusub : in either of these cases it is said that the present claim is unsustainable. I will deal with the argument that the second defendant in the earlier suit was the firm of Jusub Abba, and not the individual of that name. It will not be necessary to consider the alternative suggestion. Turning, first, to the title of the suit, we find that the second defendant is there described as "Jusub Abba also of Bombay Mahomedan inhabitant doing business at Esplanade Road opposite to Watson's Hotel within the fort." I must accept the argument that that is *prima facie* the description of an individual person, but I cannot accept the view that that is an

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end of the matter. For, having regard to the practice of these Courts, the description is conceivably applicable to the firm Jusub Abba, and I think we must look to the evidence to see what precisely the description meant. We need not look beyond the evidence of the plaintiff himself. In the course of execution proceedings under the earlier decree, notice was issued on Safurabai, who on 16th June 1905 made the affidavit exhibit 21 pointing out that Jusub Abba had died more than two years before the suit was filed. Plaintiff's reply is this affidavit exhibit 1 of 12th January 1906, in which he not merely admits, but emphatically contends, that his suit of 1904 was brought against the firm of Jusub Abba, which through its manager, Abdulla Jusub, had endorsed the *hundies* to him. In his deposition in the present suit the plaintiff does indeed make a half hearted attempt to resile from this position, but on his attention being drawn to his affidavit he abandons the attempt and says, "I say now I sued the firm of Jusub Abba. By firm I mean shop. I sued the owner of the shop." There the matter rests, except that this view is amply corroborated by the form in which the *hundies* are drawn and by the general [247] tenour of the plaintiff's deposition. For it appears that the plaintiff had no knowledge of the man Jusub Abba; he never saw him, he says, or tried to see him. Asked how he knew the name of Jusub Abba, he says "I know the name of Jusub Abba in connection with this business. Jusub Abba was the name of the firm—the firm of Jusub Abba, his own business." And further on he says that what he thought he was getting by the suit was a decree against the firm. And here, I think, may be found the answer to the question put by the plaintiff's counsel in the lower Court, namely, why should the plaintiff have brought a suit against a dead man? It may be that the plaintiff when he filed the suit was not aware of Jusub's death, though his own evidence on the subject is plainly untrustworthy; but the real explanation is, I conceive, that it mattered nothing to the plaintiff whether the man Jusub Abba was alive or dead; his suit was a suit against the firm. So the writ was served on Abdulla as manager of the firm—see section 74, Civil Procedure Code—and that is the position assigned to Abdulla throughout the proceedings. No doubt the question is not, whom did the plaintiff intend to sue, but whom did he in fact sue? The distinction, however, cannot, in my opinion, avail the plaintiff here; for under the practice and rules of this Court—see especially Rule 375 of the High Court Rules—a suit framed within the meaning and in the form of Suit No. 863 would be a good suit against the firm. In other words the plaintiff in the earlier suit did intend to sue the firm of Jusub Abba and did give sufficient effect to that intention. In the same way the plaintiff filed Suit No. 16788 of 1904 on the Small Cause Court against "Jusub Abba" (exhibit B), and, as he admits, under the decree made, he levied an attachment on the shop and the money was paid.

Thus upon a consideration of all the evidence and the circumstances connected with Suit No. 863 I come to the conclusion that that suit was brought against the firm of Jusub Abba. That being so, the present suit admittedly will not lie against the defendant-appellants as partners; and it is in that view of their position that the learned Judge has decreed against them, and upon that footing only has the plaintiff sought to uphold the decree.

[248] Upon this finding the question arises why the plaintiff did not rest content with the decree which he obtained and which as he understood it bound the firm, especially as there has been no determination in



execution proceedings or otherwise that the decree does not bind the firm. Mr. Robertson's answer to this question is that the plaintiff, having discovered that the assets of the firm of Jusub Abba are exhausted, is now anxious to come upon certain immoveable properties which would not be liable under the terms of the decree in Suit No. 863 construed as a decree against the firm. It seems to me that this is the real explanation of the origin of the present suit, and upon this point reference may be made to the plaintiff's application exhibit 2 of 5th May 1905. That was the first step taken in execution of the decree, and the disingenuous passage in paragraph 2 of the application as to the second defendant being "now" dead is very significant. I have no doubt that the plaintiff had long been aware that Jusub Abba's death had occurred long before the decree, and when he was challenged upon this point by Safurabai in her affidavit of 16th June 1905, he falls back upon the other position that the second defendant in his suit was the firm of Jusub Abba: see his affidavit exhibit 1. Finally on 20th January 1906 he abandons the notice against Safurabai (exhibit A 20), the present suit having been instituted on 11th August 1905. It is not, as Mr. Setalvad has suggested, that the plaintiff was forced by Safurabai's contentions to abandon execution: it was his business to go on with it and obtain the adjudication of the Court, and I cannot doubt that that is the course which he would have pursued if he had thought that his decree was sufficient for his purposes. But for reasons which are no longer obscure he elected to give the go-by to the decree which he had, and endeavoured to convert that decree into one of a different character. There can be no doubt of the nature of the suit he then filed. The only prayer in the plaint—other than the formal prayer for further and other relief—is a prayer "that the defendants as the representatives of the deceased Jusub Abba" may be decreed liable to discharge the debt out of the estate of Jusub Abba. Before us it was conceded that no liability could be attached to the defendant-appellants [249] upon this footing, and indeed it is plain that as representatives of Jusub Abba they cannot be held responsible for a debt contracted two years after Jusub Abba's death. The learned Judge below was, I gather, of the same opinion, and he has decreed against the appellants, not as representatives of Jusub Abba, but as partners, or rather as *quasi*-partners, in a firm. But they were not sued in this latter capacity, and no question of their liability in that capacity is raised either in the pleadings or in the issues on which the parties went to trial. In my opinion, therefore, the appellants upon this ground alone are entitled to succeed, and to claim that a suit brought against them on one ground, which failed, should not be decreed against them on another ground which they had no opportunity of meeting. The only plain issue as to the appellant's liability is issue No. 13 which contemplates merely their liability as representatives of Jusub Abba, and Mr. Robertson, who appeared for the appellants below, was taken by surprise when the ground assigned for the liability was shifted as the trial proceeded; and no attempt was made to obtain the Judge's permission to amend the plaint or frame further issues.

In my opinion, then, the appeal must be allowed both because the suit against the appellants was barred by Suit No. 863 of 1904. and because it was not competent to the Court in this suit to make a decree against the appellants on the footing of their being partners or *quasi*-partners in the firm.

After the arguments in this appeal had been completely heard Mr. Setalvad applied for leave, if necessary, to amend the plaint; but it is

1908  
JUNE 15.

ORIGINAL  
CIVIL.

34 B. 244=2  
C. 146=11  
Bom. L. R.  
257.



1908  
JUNE 15.

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ORIGINAL  
CIVIL.  
—

84 B. 244=2  
I. C. 146=11  
Bom. L. R.  
237.

plain that at that stage we ought not to allow a suit of one character to be converted into a suit of a substantially different character.

The judgment of the lower Court must be reversed and the suit must be dismissed as against the appellants with costs throughout.

CHAUBAL, J.—I concur.

*Decree reversed.*

Attorneys for appellants.—*Messrs. Unvalla and Phirozshaw,*

Attorneys for respondents.—*Messrs. Mirza and Mirza.*

84 B. 250 (=3 I. C. 159=10 Bom. L. R. 969=11 Bom. L. R. 498=6 M. L. T. 234.)

[250] ORIGINAL CIVIL.

*Before Sir Basil Scott, Chief Justice, and Mr. Justice Batcherlor.*

THE FIRM OF GUNNAJI BHAVAJI, *Appellants and Plaintiffs*, v. MAKANJI KHOUSALOHAND AND OTHERS, *Respondents and Defendants*. \*

[2nd March, 1909.]

*Civil Procedure Code (Act XIV of 1882)—Amendment of plaint by referring to document not included in list of documents relied on.*

At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application.

On appeal:—

*Held*, that the amendment should have been allowed.

APPEAL from the judgment of Russell, J., dated 21st August 1908.

The plaintiffs filed this suit on 15th October 1907 against the defendants who were partners to recover a sum of Rs. 6,671 due to the plaintiffs on agency accounts and interest thereon. The plaint stated that the accounts were adjusted and settled on the 18th September 1899 when a sum of Rs. 8,501 was found payable to the plaintiffs by the defendants for which sum the defendants signed an acknowledgment undertaking to repay it with interest at 6 per cent. At the hearing of the suit when it came on as a short cause a written statement was put in raising several defences, but the only one relied on was that of limitation; and upon that being done counsel for the plaintiff applied for leave to amend the plaint, because he sought to rely upon another document, namely, a letter of 20th of March 1902, which amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. Russell, J., declined to allow the amendment on the ground that the letter was not referred to in the list of documents relied on by the plaintiffs and dismissed the suit with costs. Against this decision the plaintiffs appealed.

[251] *Setalvad* for the appellants:—The amendment should have been allowed. The suit is brought under the Code of 1882. We submit that if the suit was barred on the face of it as the lower Court thinks it is the plaint ought under section 54 (a) to have been rejected at the time of presentation and not taken on the file. Had this been done the plaintiffs might have filed another suit while there was yet time, whereas now

\* Appeal No. 48 of 1909.



owing to the period that has passed between the date of admission of the plaint and now they would be hopelessly out of time. Section 54 does not apply to the case but section 53 and the Court ought to have given leave to amend the plaint. The object of a suit being to get at the rights of parties any amendment which may be required for that purpose should subject to general principles be allowed, see Bowen L. J. in *Cropper v. Smith* (1). In *Mohummud Zahoor v. Mussumat Thakooranee* (2) the Privy Council allowed an amendment on the ground that if the plaintiff was left to bring a fresh suit it might be met by a plea of limitation. By allowing the amendment the character of the suit would not be altered. The cause of action would have remained the same; the defendant could still have pleaded the same defence of limitation, all the amendment could do would have been to give the plaintiff greater facility to meet the defences.

1909  
MAR. 2.  
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ORIGINAL  
CIVIL.  
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34 B. 250=3  
I. C. 159=10  
Bom. L. R.  
969=11  
Bom. L. R.  
498=6 M. L.  
T. 235.

*Strangman*, Advocate-General, and *Inverarity* for the respondents.

The lower Court was right in disallowing the amendment. A gross injustice would be done to the defendants by allowing it. See *Steward v. North Metropolitan Tramways Company* (3); *Weldon v. Neal* (4); *Clarapade & Co. v. Commercial Union Association* (5).

SCOTT, C. J. :—In this case we cannot agree with the learned Judge of the Court below that an amendment such as was asked for would convert the suit into a suit of different and inconsistent character. The suit would remain the same based upon exactly the same cause of action except for the addition of one [252] allegation. We think therefore, that the amendment should be allowed as shown in paragraph 1 of the memorandum of appeal, but as the controversy has arisen entirely through the negligence of the plaintiffs we direct that they must pay the costs of the appeal and of the first hearing in the Court below including the costs, if any, of the hearing of the judgment. Leave granted to defendants to file a supplemental written statement, if so advised.

Attorneys for the appellants :—*Messrs. Mehta and Dalpatram*.

Attorneys for the respondents :—*Mr. N. M. Cama*.

34 B. 252 (=11 Bom. L. R. 1181=4 I. C. 281=10 Cr. L. J. 543).

#### APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

MUNICIPAL COMMISSIONER OF BOMBAY, Complainant, v. THE  
AGENT, G. I. P. RAILWAY COMPANY, Accused.\*

[4th August 1909].

*Indian Railways Act* (IX of 1890), sec. 7—*City of Bombay Municipal Act* (Bom. Act III of 1888), sec. 394—*Use by Railway Company of its premises for storing timber*—*License from the Municipal Commissioner for the use not necessary*.

The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the *City of Bombay Municipal Act* (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the *Criminal Procedure Code* (Act V of 1898) :—

\* Criminal Reference No. 67 of 1909.

(1) (1884) 26 Ch. D. 700 at p. 711.

(2) (1867) 11 Moo. I. A. 468.

(3) (1886) 16 Q. B. D. 556.

(4) (1887) 19 Q. B. D. 394.

(5) (1883) 82 W. R. (Eng.) 262.



1909  
AUG 4.

APPELLATE  
CRIMINAL

34 B. 252=11  
Bom. L. R.  
1181=4 L. C.  
281=10 Cr.  
L. J. 548.

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

*Held*, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and [253] using the Railway notwithstanding anything in any other enactment for the time being in force.

The storing of timber was necessary for the convenient making, &c., of the Railway line.

Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890) the Governor-General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1.

[Fol : 33 Bom. 565.]

REFERENCE by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The accused, the Agent of G. I. P. Railway Company, was charged under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having on or about the 25th March 1909 used certain premises, namely, two plots of ground, the property of the G. I. P. Railway Company at Bombay, for the purpose of storing timber without a license granted by the Municipal Commissioner of Bombay.

The timber in question consisted of about 15,000 Railway sleepers and it was admitted that no license was obtained and that the sleepers were timber and they were stored. The accused, however, contended on the strength of the ruling in *Emperor v. Wallace Flour Mill Company* (1) that as the Railway Company was not trading in timber and as the purpose for which the premises were used was entirely accessory and necessary for their business, the real purpose was not in fact to store.

The evidence recorded by the Magistrate also showed that the G. I. P. Railway Company for some years past had "stacked" sleepers on the said premises for the use of their whole line. The maximum of the sleepers stacked was estimated at about 36,000 sleepers and the minimum at about 7,000 and 8,000.

Under these circumstances the Chief Presidency Magistrate referred the following questions to the High Court for an authoritative decision under section 432 of the Criminal Procedure Code (Act V of 1898):—

[254] 1. Does the fact that the Railway are not trading in timber and that the purpose for which the premises are used is necessary for the convenient carrying on of their business as a Railway over their whole system negative the intention to store within the meaning of section 394 (1) (d) of the City of Bombay Municipal Act?

2. Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?

3. Is the fee payable for a license contemplated by section 394 (1) (d) of the Municipal Act a tax within the meaning of section 135 of the Indian Railways Act IX of 1890?

4. Is the Government of India Notification No. 9977, dated the 29th November 1907, a valid notification within the meaning of section 135 (1) of the Indian Railways Act and does it render the Railway Company liable to pay the license fee in question?

(1) (1904) 29 Bom. 193.



5. Can an obligation to obtain a license be separated from a liability to pay the fee?

6. Do license fees come within the Notification?

In making the reference the Magistrate observed as follows:—

In this connection it may be pointed out that the Railway system worked by the G. I. P. Railway is about 2,900 miles in extent and sleepers were stacked for the use of the whole system. Mr. Batty, J., in *Emperor v. Wallace Flour Mill Company* (1) laid down the principle that an intention to store is negatived if the quantity retained is only reasonably sufficient for the varying exigencies of consumption but it does not, I think, follow that the intention would be negatived if a Company having mills in various parts of India were to accumulate in one place a quantity sufficient for the varying exigencies of consumption of all its mills. In the case of *Emperor v. Wallace Flour Mill Company* (1), the supply of oil in hand would only have sufficed for about twelve days' use in the particular mill, in the present case the 15,000 sleepers which were stacked by the Railway would have sufficed according to the consumption in 1908 for about five months' use over the whole area worked by the Railway and according to the same rate the quantity of sleepers actually received and stacked in 1903 would have sufficed for nearly two years' use. It is true that the average for 1907 and 1908 together works out at a somewhat higher rate of consumption, viz., 39,739, but this is counterbalanced by the fact that on the 1st January 1908 there was a balance in hand of about 8,000 sleepers.

[255] It is however contended by Mr. Yorke Smith that the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the Municipal Commissioner from insisting on a license.

Under section 7 clause (f) statutory powers have been conferred on the Railway to "do all other acts necessary for making, maintaining, altering or repairing and using the railway," and in my opinion on the evidence it is necessary for the convenient making, maintaining, altering or repairing the railway, that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time. As the sleepers are obtained by shiploads from Australia, it inevitably follows that at certain periods there is a larger accession to the stock.

Mr. Crawford however contends that even if the need for storing is conceded the obligation to obtain a license from the Commissioner is not thereby extinguished.

The Railway have a right to store subject to the necessity of obtaining a license. But the necessity of obtaining a license restricts to that extent the statutory power conferred by the Railway Act and implies a power in the Municipal Commissioner of refusing to grant a license and I am of opinion on reading the authorities relied on by the defence, viz., *London and Brighton Railway Company v. Truman* (2); *City and South London Railway Company v. London County Council* (3); *London County Council v. School Board for London* (4); *Emsley v. North Eastern Railway Company* (5), that such a power is inconsistent with the statutory power given to the Railway.

I think Mr. Yorke Smith is also right in his contention that a license fee is a tax within the meaning of section 135 of the Railway Act and that the Notification by the Government of India, Department of Commerce and Industry, No. 9977, dated 29th November 1907, which is relied on as rendering the Railway administration liable to pay the tax, is not such a notification as was intended by the section and inoperative. The case of the *Brewers and Maltsters Association of Ontario v. Attorney-General for Ontario* (6) and section 3 (p) of the City of Bombay Municipal Act, 1888, have been cited with reference to the first contention while with reference to the second contention the validity of the Notification has been attacked firstly on the ground that its wording shows that the discretion necessary in framing a Notification under the section has not been exercised; *The Queen v. Bommaya* (7), *Macbeth v. Ashley* (8), *Sharp v. Wakefield* (9), *Sprigg v. Sigcau* (10); Maxwell on Interpretation of Statutes (third edition, pp. 175 to 177) and secondly on the ground that the Notification is not consistent with the Act under which it purports to have been made; *Macbeth v. Ashley* (8) and *Rajam Chetti v. Seshayya* (11). If the wording of the Notifi-

(1) (1904) 29 Bom. 193.

(2) (1885) 11 App. Cas. 45.

(3) [1891] 2 Q. B. 513.

(4) [1892] 2 Q. B. 606.

(5) [1896] 1 Ch. 418.

(6) (1897) A. C. 231.

(7) (1882) 5 Mad. 26.

(8) (1874) L. R. 2 S. & D. 352—357.

(9) [1891] A. C. 173, 179.

(10) [1897] A. C. 238.

(11) (1895) 18 Mad. 236 at p. 245.

1909  
AUG. 4.

APPELLATE  
ORIGINAL.

34 B. 252=11  
Bom. L. R.  
1181=4 I. C.  
281=10 Cr.  
L. J. 543.



1909  
AUG. 4.

APPELLATE  
CRIMINAL.

34 B. 252=11  
Bom. L. R.  
1181=4 I. C.  
281=10 Cr.  
L. J. 543.

ocation is considered, I think it can [256] be reasonably contended that the Notification is so worded as to affect not only existing but even future Railway administrations, not only existing but also future taxes and that its effect is virtually to repeal the provisions of the section from which it derives its authority."

The reference was heard by Scott, C. J. and Batchelor, J.

*Cohen* (instructed by *Crawford, Brown and Co.*) for the Municipal Commissioner.

*Robertson* (instructed by *Little & Co.*) for the Railway Company.

SCOTT, C. J.—The Agent of the G. I. P. Railway Company was charged in the Presidency Magistrate's Court under section 394 (1) (d) of the City of Bombay Municipal Act with having used certain premises for the purpose of storing timber without a license granted by the Municipal Commissioner.

The Chief Presidency Magistrate having taken evidence has referred for the opinion of this Court certain questions specified at the end of the case stated by him.

The first question is, in our opinion, one of fact and not of law, and, therefore, cannot be stated under section 432 of the Criminal Procedure Code, under which this reference is made.

As regards the other questions, if the second question is answered in the affirmative no answer need be given to the remaining questions, for the case will in that event have to be decided in favour of the respondent.

The second question is in these terms :

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Section 7 of the Indian Railways Act IX of 1890, to the provisions of which the G. I. P. Railway is subject, provides as follows :—

(1) "Subject to the provisions of this Act and, in the case of immoveable property not belonging to the Railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case [257] of a Railway Company, to the provisions of any contract between the company and the Government, a Railway administration may for the purpose of constructing a Railway or the accommodation or other works connected therewith and notwithstanding anything in any other enactment for the time being in force. . .

"(f) do all other acts necessary for making, maintaining, altering or repairing, and using the Railway.

(2) "The exercise of the powers conferred on a Railway administration by subsection (1) shall be subject to the control of the Governor-General in Council."

In stating the case the Magistrate finds as a fact on the evidence that it is necessary for the convenient making, maintaining, altering or repairing the Railway that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time and that as the sleepers are obtained by shiploads from Australia it inevitably follows that at certain periods there is a large accession to the stock. Upon this finding it would appear *prima facie* that the Railway administration is authorised to store Railway sleepers upon the premises in question notwithstanding anything in any other enactment for the time being in force.

It is, however, argued on behalf of the Municipal Commissioner that notwithstanding the statutory authority and notwithstanding the finding of the Magistrate it is still necessary for the Railway Company to obtain



a license under section 394 of the Bombay Act III of 1888 for storing sleepers upon the premises.

It will be convenient at this point to set out the portions of the sections of the Municipal Act, which have been referred to in argument :—

Section 394 (1), (b) and (d) provide :—

(1) " No person shall use any premises for any of the purposes hereinbelow mentioned, without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf, namely . . .

(b) any purpose which is, in the opinion of the Commissioner, dangerous to life, health or property, or likely to create a nuisance, . . .

(d) storing for other than domestic use or selling timber, firewood, charcoal, coal coke, ashes, hay, grass, straw or any other combustible thing."

[258] Section 479 (1) provides :—

(d) " Whenever it is provided in this Act that a license or a written permission may be given for any purpose, such license or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same."

Section 479 (3) provides :—

" Subject to the provisions of clause (d) of section 403, any license or written permission granted under this Act may at any time be suspended or revoked by the Commissioner, if any of its restrictions or conditions is infringed or evaded by the person to whom the same has been granted, or if the said person is convicted of an infringement of any of the provisions of this Act or of any regulation or by-law made hereunder in any matter to which such license or permission relates."

It is not disputed that the unrestricted provisions of section 394 would empower the Commissioner to refuse in his discretion to grant a license. This view has the authority of a ruling of this Court in its favour : see *Haji Esmail v. Municipal Commissioner of Bombay* (1).

It was at first contended by counsel for the Commissioner that the power of refusal extended to such a case as the present but being pressed by the words of section 7 of the Railways Act " notwithstanding anything in any other enactment for the time being in force " and by the consideration that such a contention if upheld would give to the Commissioner, under section 394 (b), the power, if he thought fit, to prohibit the working of the Railway in parts of the city, he modified and reduced the argument to this, that although by reason of the terms of section 7 of the Railways Act the Commissioner could not prohibit the use of any premises the use of which was authorised by the terms of section 7, yet he still had reserved to him under section 394 (1) (d) a power of regulating the method in which the Railway Company should store timber upon its premises even though such storing was authorised by section 7 (1) (f) ; and authorities were cited to the Court in support of the general proposition that an implied repeal of one Act by a later Act will not be [259] inferred if it is possible even partially to harmonise the provisions of the two Acts. While we recognise this as a general rule of construction, we do not think that there is any scope for its application in the present case ; in the first place, it would involve an almost complete re-writing of section 394, part of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet another part being altogether deleted. It seems to us very doubtful whether such a recasting of the section would be warranted by any recognised principles of construction. In the second place we have

(1) (1903) 28 Bom. 253 : 5 Bom. L. R. 1001.

1909  
AUG. 4.

APPELLATE  
CRIMINAL

34 B. 252=11  
Bom. L. R.  
1181=4 L. C.  
281=10 Cr.  
L. J. 848.



1909  
AUG. 4.  
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APPELLATE  
CRIMINAL.  
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34 B. 282=11  
Bom. L. R.  
1181=4 I. C.  
281=10 Cr.  
L. J. 643.

not only the provision that the words of section 7 shall be read notwithstanding anything in any other enactment for the time being in force, but we have an express declaration in sub-section (2) of the authority which shall have control of the Railway administration in the exercise of its powers under sub-section (1). That authority is the Governor General in Council and not the Municipal Commissioner.

The provisions of the Railways Act to which we have referred provide, we think, for an undivided and exclusive control of Railway administrations by the Supreme Government.

Considerations of convenience and the safety of the public and security of property have been pressed upon us in argument. But we do not think there is any practical force in any of these suggestions, for, if the Municipal Commissioner is really of opinion that the Railway Company is exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it is always open to him to make a representation to that effect to the Governor General in Council in order that the state of affairs complained of may be inquired into and if necessary remedied by the proper authority.

For these reasons we answer the second question in the affirmative and we return the case to the Presidency Magistrate to be disposed of in accordance with this finding.

*Order accordingly.*

34 B. 260 (=5 I. C. 864=12 Bom. L. R. 137).

[260] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

MUGAPPA CHANBASAPPA SAWADATTI (*Original Plaintiff*), Appellant. v. MAHAMADSAHEB valal IMAMSAHEB (*Original Defendant*), Respondent.\*  
[7th September, 1909.]

*Decree—Execution of decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.*

In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—

*Held*, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off.

SECOND appeal from the decision of T. D. Fry, District Judge of Dharwar, confirming the order passed by G. N. Kelkar, Joint Subordinate Judge at Dharwar.

\* Second Appeal No. 472 of 1908.



Proceedings in execution.

The defendant mortgaged certain land with the plaintiff on the 25th September 1892 with possession. On the same day, the defendant passed a rent-note in respect of the land in favour of the plaintiff and the defendant entered on the land as plaintiff's tenant.

In 1904, the plaintiff sued the defendant on the rent-note to recover from him four years' rent (1899 to 1903), and obtained [261] a decree for Rs. 1,378-4-1. At the date of the decree, the provisions of the Dekkhan Agriculturists' Relief Act did not apply.

The provisions of the Dekkhan Agriculturists' Relief Act were made applicable to the district in 1905.

The defendant sued in 1906 for redemption of the mortgage. In the course of the suit accounts were taken of the dealings in the way provided for by the Act, and they showed that not only had the mortgage been satisfied by February 1898 but that the mortgagee had received over Rs. 900 in excess.

The plaintiff then applied to execute the decree for rent.

The Subordinate Judge rejected the application on the following grounds:—

"The original mortgage-debt has been more than satisfied by the usufruct of the mortgaged lands, and the mortgagee has already received nearly Rs. 950 in excess of what was due to him under the mortgage. This complete satisfaction of the mortgage-debt took place before April 1898. This decree is for the four years' rent subsequent to April 1898. The account taken in Suit No. 114 of 1906 shows that after February 1898 nothing was due to the mortgage under his mortgage, and that since then he has enjoyed the profits for nothing. Under these circumstances, I think the decree-holder cannot be allowed to execute this decree. If the Court allowed him to execute this decree, it would be helping him to get money to which he is not entitled after the complete satisfaction and discharge of the mortgage-debt. This would be going against the spirit of the Dekkhan Agriculturists' Relief Act. There is no question of going behind the Court's decree or of disturbing any jural relations. The question is "whether the Court can lend its assistance to one seeking to make an undue gain and to cause undue loss to another"? I think the Court cannot do this.

This decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

*Jayakar*, with *K. H. Kelkar*, for the appellant.—The lower Court has misconceived the question; it is whether the first decree, being a subsisting decree, is capable of execution or not. The question that at the date of that decree, *viz.*, 8th July 1905, Rs. 1,378-4-1 were due is *res judicata* in the execution proceedings, the defendants are estopped from questioning this finding in execution proceedings. The execution proceedings are only a carrying out of the decree and the only question which [262] the Court can go into in execution proceedings is the question of the satisfaction of the decree under section 258, old Civil Procedure Code, and Order 21, rule 2, new Civil Procedure Code. But the Court has not proceeded under this section, since this is not a case of subsequent payment or satisfaction of the decree. Here the defendants want to counteract the finding in the first decree that Rs. 1,378-4-1 was due, by pleading against it, in execution proceedings, the finding in the redemption suit that nothing was due from defendant at the date of the first decree and that the defendants had paid Rs. 950 more than was due. This cannot be allowed to be done in execution proceedings.

We say this case has nothing to do with the Dekkhan Agriculturists' Relief Act, since the first decree was passed before the introduction of that Act. The act cannot be construed retrospectively: see *Fatmabibi*

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*v. Ganesh* (1). The amount of Rs. 950, found as overpaid, is arrived at by taking accounts on the footing of the Dekkhan Agriculturists' Relief Act.

But assuming that the Dekkhan Agriculturists' Relief Act applied, there is nothing in that Act enabling the Courts to depart from the ordinary rule of practice that the Court executing the decree has no power to vary the decree: see *Ramachandra v. Kondaji* (2) and the cases cited there. The sections of the Act which are most favourable to such a case are sections 12 and 13 but even these sections, it has been held, cannot apply to decrees passed previously: see *Goverdhan v. Yesu bin Anaji* and *Apaji v. Atmaram* (3); *Tatya Vithoji v. Babu Balaji* (4); *Navlu v. Raghu* (5).

As for the second part of the finding in the redemption suit that Rs. 950 were over-paid, I submit, assuming that the Dekkhan Agriculturists' Relief Act governed this case, there is nothing in the Act to allow defendants to claim a set-off of an amount found as owing to them at the foot of an account taken on the basis provided by the Act. The Act being a special piece of legislation passed for a particular object cannot be so construed [263] as to cover purposes which were never contemplated: see *e.g.*, *Janoji v. Janoji* (6) where even a refund was disallowed.

The first decree was never mentioned or referred to in the redemption litigation in 1906: see *e.g.*, the plaint in that suit. It was not taken into account in the latter suit, the question of the first decree was expressly left open in the redemption judgment: see the judgment.

*D. A. Khare* for the respondent.—The first decree has been paid off. That is the finding in the second decree, which must be accepted, though the Court has not made an actual order for payment of the amount found to be over-paid. The Court could not make such an order in that suit.

The defendant could have brought a suit to recover the amount over-paid under the Dekkhan Agriculturists' Relief Act: see *Williams v. Davies* (7). If undue influence, or wrong advantage or any other equitable defence is proved, the Court sets aside the transaction. I ask the Court to act on the same principles here: see *Janoji v. Janoji* (6); *Sheo Saran Singh v. Mohabir Pershad Shah* (8); *Ramchandra Baba Sathe v. Janardan Apaji* (9).

CHANDAVARKAR, J.:—We must set aside the decree of the lower Court and allow the execution in this matter to proceed. The decree for rent, it is admitted, remains unexecuted. But what is relied upon for the respondent is that, according to a subsequent decree for redemption, a certain amount over and above that due to him as mortgagee was appropriated by the appellant, during the time that he was in possession of the property as mortgagee. That amount is adjudged to have been so appropriated upon account taken under the Dekkhan Agriculturists' Relief Act. It is conceded that the Act did not apply at the time the decree for rent was obtained. That decree gave a right to the appellant to recover a certain amount from the respondent. The fact that in a subsequent decree passed under the Dekkhan Agriculturists' Relief Act, it was found upon taking accounts in the way directed by the Act that the appellant as [264] mortgagee had over-paid himself from the rents and profits cannot

(1) (1907) 81 Bom. 630.

(2) (1896) 22 Bom. 221 at p. 231.

(3) P. J. for 1882, p. 125.

(4) (1883) 7 Bom. 830.

(5) (1884) 8 Bom. 303 at p. 305.

(6) (1882) 7 Bom. 185.

(7) (1839) 2 Sim. 461.

(8) (1905) 82 Cal. 576.

(9) (1889) 14 Bom. 19.



affect the right he had acquired under the previous decree which stands in all its force. The Dekkhan Agriculturists' Relief Act nowhere provides that where, upon an account taken under it, it is found that a mortgagee in receipt of rents and profits has overpaid himself, the overpaid amount becomes a debt due from him to the mortgagor and that the latter becomes entitled to recover it from the mortgagee. As was held in *Ramchandra Baba Sathe v. Janardan Apaji* (1), a mortgagor under such circumstances is only enabled by the Act to redeem his mortgaged property on favourable terms upon an account taken in the special mode directed by the Act; but the Act does not entitle the mortgagor to claim the payment from the mortgagee of any amount received from the property over and above the amount due on the mortgage on the footing of the account so taken. If that is so, the set-off allowed by the lower Court is plainly contrary to law.

The rent decree must be executed as it stands, having regard to the fact that the provisions of the Act do not apply to it, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the respondent to redeem on favourable terms, not for entitling him to recover anything from the appellant.

The decree of the lower Court is reversed and the Darkhast is remanded to the Subordinate Judge to be executed according to law.

Costs up to this throughout upon the respondent.

Costs incurred hereafter to abide the result.

HEATON, J.:—I have very great sympathy with the decision which has been arrived at by both the lower Courts; and I have no doubt that our decision will be received by them with considerable surprise and will be regarded as militating against the intention of the Dekkhan Agriculturists' Relief Act. But, after all, we have to administer the law as it is, not as we think it ought to be. And although, both the lower Courts have regarded [265] the claim which the decree-holder has made in execution of his decree with some thing almost amounting to amazement, and as something, which if allowed, would be grossly unfair; yet it is to be remembered that the decree for redemption has only been made by setting aside the terms of the mortgage, that is, by setting aside the contract between the parties, which the Dekkhan Agriculturists' Relief Act allows the Judge to do and by then proceeding to take an account in which only a moderate rate of interest is allowed. If the mortgage contract had been allowed to proceed, unaffected by the provisions of the Dekkhan Agriculturists' Relief Act, the mortgagee would still be entitled to the possession of the land, would be entitled to the annual profits, and would so remain for something like ten years more. And, therefore, although it is pointed out very clearly and emphatically that the mortgagee has received considerable sums in excess of what after the account was taken under the Act, was found due to him, yet it must be remembered, that all that he has received, and also all that he claims under this decree which he now seeks to execute would be due to him but for the operation of the Dekkhan Agriculturists' Relief Act, and even after he has executed the decree, the mortgagee will have obtained far less than he would have received if the contract between the parties had been allowed to proceed. This may be an example of the great need that the Court should be allowed to break contracts of this kind and re-settle the relations between

(1) (1889) 14 Bom. 19.



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the parties on a fair basis. But it seems to me that there is nothing that can be described as unjust or unfair in allowing a creditor to receive that which the law entitles him to receive and permits him to receive. Until the Dekkhan Agriculturists' Relief Act was introduced into the Dharwar District, the mortgagee in this case was entitled to the rent fixed by the rent-note, and he was entitled to that for the years for which he obtained the decree for it. That decree was perfectly right as the law then stood. It has never been set aside, and it seems to me that we are bound to let that decree be executed whatever our opinions may be as to whether the decree-holder is fairly entitled to the rent or not. We are bound to let that decree be executed unless it can be shown that in law, or for [266] some reason or another recognized by the law, it ought not to be executed. It is one of the first principles of our law, that when a decree is made, that decree, unless set aside by a Court of competent jurisdiction, is a good decree and the holder of it can enforce execution of it until it becomes time-barred. Therefore this decree must be executed unless it has been satisfied, and nobody contends that it has, or unless there is some set off which can be placed against it. Nobody can make out anything in the nature of a legal set off; or that there is any money due by the mortgagee to the mortgagor which the latter is entitled to say must be regarded as payment of the decree in whole or in part; because although in the redemption suit, it was found that under the method of taking accounts peculiar to the Dekkhan Agriculturists' Relief Act the mortgagee's debt was more than paid off, yet the mortgagor has not obtained a decree on the excess payments and therefore they cannot be pointed to as monies due from the mortgagee to the mortgagor. Therefore, as the decree is still in force and has not been paid and there is nothing which can be pointed to as a set-off in law against what is due under that decree, it seems to me that it must be allowed to be enforced.

This result is not more peculiar than that which was arrived at recently in England in the case of *Poulton v. Adjustable Cover and Boiler Block Company* (1). In that case it was held that a decree obtained must be enforced though after events showed that no such decree would have been made had the true circumstances been known. Here we have a decree perfectly lawful and good and not based on any misconception of fact, but it is proposed to forbid its execution on account of a change in the law made after the decree was obtained, which change does not either directly or by implication affect the decree. That change in the law cannot be permitted to annul the decree.

*Decree reversed.*

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(1) [1908] 2 Ch. 490.



34 B. 267 (=12 Bom. L. R. 149=5 I. C. 867.)

[267] APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

RHIMBAI JAMALBHOY (original Plaintiff 1), Applicant, v. MARIAM BINTE ABDUL RASOOL AND OTHERS (original Defendants), Opponents Nos. 1, 4 to 9 and 11.\*

[15th November, 1909.]

Aden Act (II of 1864), sections 8 and 15 (†)—Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d)—Suits Valuation Act (VII of 1887), section 8—Civil Procedure Code (Act XIV of 1882), section 551—Civil Procedure Code (Act V of 1903), section 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.

The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), [268] section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped.

Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden, and on the 23rd September 1908 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court.

The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case.

A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864),

\* Application No. 8 of 1909 under extraordinary jurisdiction.

(†) Sections 8 and 15 of the Aden Act (II of 1864) are as follows :—

8. No appeal shall lie from any decision or order of the Resident given or made by him, whether in the exercise of his original jurisdiction, or in the exercise of his jurisdiction as a Court of Appeal or of revision; but if in the trial of any suit in which the claim estimated as aforesaid shall not exceed one thousand rupees in value, any question of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, on which the Resident shall entertain doubts, the Resident may, either of his own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with his own opinion, for the decision of the High Court of Judicature at Bombay.

And if in the trial of any suit or the hearing of an appeal in any suit in which the claim, estimated as aforesaid, shall exceed one thousand rupees in value, any question of fact or of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, the Resident shall, on the application of any of the parties to the suit, or he may of his own motion, draw up a statement of the case and submit it with his own opinion for the decision of the said High Court.

15. In the administration of civil justice, the Court of the Resident shall be guided by the spirit and principles of the laws and regulations in force in the Presidency of Bombay, and administered in the Courts of that Presidency not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts.

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*Held*, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court.

Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden.

*Held*, further, that the plaintiff's claim being valued at Rs. 130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit.

[Dist : 41 Cal. 915 ]

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of E. de Brath, Major-General, Political Resident at Aden, summarily dismissing an appeal against the order passed by Major J. R. Carter, Assistant Resident, rejecting a plaint on the ground of the insufficiency of the Court-fees stamp.

[269] One Dadabhoy Ganibhoy, a resident of Aden, died at that place in the year 1904 leaving him surviving a widow Rhimbai, children and grand-children. The deceased was possessed of considerable moveable and immoveable property consisting of houses, cash, shop-goods, pearls, etc. The Court of the Resident at Aden took charge of the said property and realized about Rs. 53,000 by its sale. After the sale the heirs of the brothers of the deceased claimed a three-fourths share in the proceeds of the sale and the Resident's Court proposed to distribute that share among the claimants and to give the remaining one-fourth share to the widow and the children of the deceased. The widow, Rhimbai, and the children of the deceased brought a Suit No. 176 of 1907 against the claimants of the three-fourths share in the Court of the Assistant Resident at Aden for a declaration that the plaintiffs were the sole legal heirs of the deceased Dadabhoy Ganibhoy and as such entitled to receive the whole of the property of the deceased according to their respective shares, free from the claims of the defendants. The plaintiffs also prayed for an injunction restraining the defendants from receiving from the Court any portion of the said estate. The claim was valued at Rs. 130 and the plaint was engrossed on a Court-fee stamp of Rs. 10. The Assistant Resident found that the plaint was insufficiently stamped and gave a month's time to the plaintiffs to make up the requisite stamp. The plaintiffs having failed to do so, they presented an application praying for extension of time and for amendment of the plaint. The Assistant Resident refused the application and passed an order rejecting the plaint under section 54 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs preferred an appeal, No. 3 of 1908, against the said order to the Court of the Resident and subsequently on the 23rd September 1908 applied to that Court to refer the case for the opinion of the High Court at Bombay under section 8 of the Aden Act (II of 1864) on the following question :—

Is the plaint sufficiently stamped, and, was the order of the Court rejecting the plaint under section 54, clause (b) of the Civil Procedure Code without making an order, what the requisite stamp should be, legal?



[270] On the 24th September 1908 the Resident summarily dismissed the appeal under section 551 of the Civil Procedure Code, 1882.

On the 28th September 1908 the plaintiffs applied to the Resident to be informed as to what became of the appeal and they were, in reply, required to attend the Court-house on the 7th October following in connection with the appeal. On the appearance of the plaintiffs in Court on that day, the judgment of the Court dismissing the appeal was read and recorded.

Against the said order dismissing the appeal, Rhimbai preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that the Resident erred in law in not referring the case for the opinion of the High Court under section 8 of the Aden Act (II of 1864), that he acted beyond jurisdiction in passing his order without making a reference to the High Court, that he failed to exercise a jurisdiction which he ought to have exercised and that he acted with material irregularity in the exercise of his jurisdiction. A *rule nisi* having been issued calling on the opponents (defendants) to show cause why the decision of the Resident should not be set aside.

K. N. Koyaji appeared for the applicant (plaintiff 1) in support of the rule.

L. A. Shah appeared for the opponents (defendants) to show cause :—We have to urge a preliminary objection. The applicant is not entitled to ask this Court to interfere with the decision of the Resident in revision because section 115 of the Civil Procedure Code, 1908, is not applicable. The Resident's Court at Aden is not subordinate to the High Court. The power of superintendence is given to the High Court only in certain particulars specified in some sections of the Aden Act. We rely upon the ruling of the Full Bench in *Khoja Shivji v. Hasham Gulam* (1). Even though appeals lay from the Zanzibar Court to the High Court, it was held that the High Court had no powers of revision over the Zanzibar Court. By the Aden Act neither an appeal nor a revisional application lies to the High Court.

[271] SCOTT, C. J., referred to *Abdul Karim v. The Municipal Officer, Aden* (2), affirmed by the Privy Council in *Municipal Officer, Aden v. Ismail Hajee* (3).

In *Abdul Karim v. The Municipal Officer, Aden* (2), only the power of the High Court to remove a suit from the Resident's Court and to try and determine it itself under clause 13 of the Letters Patent was declared. It did not declare any revisional powers to be in the High Court and the Privy Council merely affirmed the decision of the High Court. The fact that the transfer was not ordered under section 25 of the Civil Procedure Code, 1882, shows that the Resident's Court could not be subordinate to the High Court. See section 2 of the Civil Procedure Code, 1882, and section 3 of the new Code, 1908.

K. N. Koyaji for the applicant (plaintiff 1) in support of the rule :—The Full Bench ruling in *Khoja Shivji v. Hasham Gulam* (1) is in our favour. The judgment of Sir Charles Sargent, C. J., in that case shows that it was merely because the High Court of Bombay was made by the Zanzibar Order in Council to be only an appellate Court to hear appeals in Civil cases from Zanzibar, that there was no power of revision in the

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34 B. 337 = 1  
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(1) (1895) 20 Bom. 480.  
(2) (1903) 27 Bom. 575.

(3) (1905) 30 Bom. 246.



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34 B.367=12  
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High Court. In Criminal cases the High Court of Bombay is, under section 9 of the Order in Council, to be deemed the High Court and not merely an appellate Court, and this difference was clearly pointed out by Sir Charles Sargent, C. J. Under the Aden Act, the powers of superintendence and revision are expressly given to the High Court over the Resident's Court at Aden. Besides Zanzibar is not a part of the Bombay Presidency, but Aden is, and this circumstance makes the Court at Aden subordinate to the Bombay High Court. See section 16 of the Letters Patent.

*Abdul Karim v. The Municipal Officer, Aden* (1), affirmed by the Privy Council in *Municipal Officer, Aden v. Ismail Hajee* (2) establishes the power of the High Court to superintend or revise the acts and decisions of the Court at Aden. Superintendence and revision are interchangeable terms. Superintendence may be more comprehensive than revision but it cannot exclude [272] revision. The ruling in *Abdul Karim v. The Municipal Officer, Aden* (1), points out that superintendence is not only a ministerial but a judicial power. Superintendence implies appellate jurisdiction and *vice versa*: *Pirbhai Khimji v. B. B. & C. I. R. Co.* (3). Section 15 of the Charter Act and section 16 of the Letters Patent act and re-act on each other. The decision in *Gabindasundari Debi v. Jagadamba Debi* (4) covers exactly a case like the present. Section 2 of the Civil Procedure Code, 1882, and section 3 of the new Code, 1908, are not meant to give exhaustive definition of "Subordinate Courts." The application of section 13 of the Letters Patent in any case does not mean that section 25 of the Code of 1882 or section 24 of the Code of 1908 is necessarily inapplicable. Therefore in the present case either section 115 of the new Code or section 15 of the Charter Act may be applied. But apart from all general arguments, it is enough for our purpose to confine attention to section 8 of the Aden Act. That section makes it imperative for the Resident to refer a case to the High Court where the claim exceeds Rs. 1,000 in value. This circumstance gives the High Court the power to direct the Resident at Aden to refer a case to the High Court. The Resident may otherwise act capriciously. At any rate for the purposes of section 8 of the Aden Act, section 115 of the new Code, 1908, or section 15 of the Charter Act must apply.

Coming to the merits, the claim here was more than Rs. 1,000 in value and so the Resident was bound to submit a case for the decision of this Court under section 8 of the Aden Act when we made an application to him to that effect.

*Shah* for the opponents (defendants) to show cause:—The application for reference to the High Court was made on the 23rd September 1908 and it is not shown that the appeal was heard on that day. The judgment was written on the 24th September and it was pronounced on the 7th October following. The applicant (plaintiff) cannot therefore claim the benefit of section 8 of the Aden Act which requires the application for reference to be made "in the trial of any suit or the hearing of an appeal." Secondly, the claim does not exceed Rs. 1,000 in value. The [273] Aden Act requires the claim to be "estimated according to any law for the valuation of claims for the time being in force," and the Court-fees Act and the Suits Valuation Act lay down the law for the valuation of claims at the present day. The present claim being for declaration and

(1) (1908) 27 Bom. 575.

(2) (1905) 30 Bom. 246.

(3) (1871) 8 Bom. H. C. R. (O. C. J.) 59.

(4) (1870) 6 Ben. L. R. 168 at p. 170.



injunction, the value of the claim for the purposes of Court-fees is that mentioned in the plaint, which is Rs. 130, and the same is the value of the claim under section 8 of the Suits Valuation Act for the purpose of jurisdiction. Under section 15 of the Aden Act the Court of the Resident at Aden is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts. Hence the valuation prescribed by the aforesaid Acts must be taken to be the valuation for the purposes of section 8 of the Aden Act. As the claim did not exceed Rs. 1,000 according to such valuation, the Resident was not bound to submit the case to this Court.

*Koyaji* in reply :—The words "in the trial of any suit or the hearing of an appeal" in section 8 of the Aden Act mean during the trial of any suit or during the hearing of an appeal and not at the hearing of a suit or appeal.

The claim is to be estimated according to the law for the valuation of claims and not of suits. The words in sections 5—8 of the Aden Act clearly imply a distinction between suits and claims therein; otherwise the wording would have been, in any suit estimated according to the law for the valuation of suits for the time being in force. The sections of the Aden Act are to be construed in the same way as section 596 of the Civil Procedure Code, 1882, corresponding with section 110 of the new Code, 1908. The right of appeal depends on the real value and not the value fixed for the purposes of Court-fees: *Mohun Lall Sookul v. Bebee Doss* (1), *Baboo Lekraj Roy v. Kanhya Singh* (2), *Pichayee v. Sivagami* (3), *Hari Mohan v. Surendra Narain Singh* (4), *Musst. Aliman v. Musst. Hasiba* (5). The Suits Valuation Act [274] determines the values of suits and not claims and it is for the purposes of jurisdiction of the Courts in which suits have to be filed and not for purposes of appeals. According to the law for the valuation of claims, they are to be valued according to the market price. The provisions of section 40 of the Punjab Courts Act, 1884, are similar to those of section 8 of the Suits Valuation Act and it has been laid down by a Full Bench in Civil Judgment No. 24 of the Punjab Records for 1903 that the value of the claim under that section for purposes of appeal was not the same as under Suits Valuation Act.

Section 15 of the Aden Act need not be invoked as the Court fees Act and the Suits Valuation Act are actually in force in Aden inasmuch as those Acts extend to the whole of British India. But we submit that those Acts have nothing to do with the question of valuation of claims under section 8 of the Aden Act.

Our grievance is that our plaint was rejected on the ground that it was insufficiently stamped because we valued the claim at Rs. 130 and not at Rs. 53,000 for the purposes of Court-fees. We contend that this is contrary to the rulings of this Court. *Manohar Ganesh v. Bawa Ram-charandas* (6), *Sadarsingji v. Ganpatsingji* (7), *Parvatibai v. Vishvanath* (8), *Vachhani v. Vachhani* (9). For the purposes of the Court-fees we gave the correct valuation at Rs. 130 according to the said rulings, but

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34 B. 267=12  
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(1) (1860) 7 Moo. I. A. 428.

(2) (1874) L. R. 1 I. A. 317.

(3) (1891) 15 Mad. 237.

(4) (1903) 31 Cal. 801.

(5) (1897) 1 Cal. W. N. LXXXXIII.

(6) (1877) 2 Bom. 219.

(7) (1892) 17 Bom. 56.

(8) (1904) 29 Bom. 207.

(9) (1908) 33 Bom. 307.



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for purposes of jurisdiction the value was Rs. 53,000. But when come up here in revision we are met with the contention that the value of the claim is Rs. 130. Thus we get no relief.

SCOTT, C. J. :—This is an application by the plaintiff in a suit filed in the court of the Resident at Aden that an order dismissing an appeal in the suit under section 551 of the Civil Procedure Code may be quashed and that the Resident may be required to state a case upon certain questions specified in an application, dated the 23rd of September 1908, made the day before he delivered judgment in the appeal, it being contended that the [275] obligation to state such a case was imposed upon him by the provisions of section 8 of the Aden Act II of 1864.

A preliminary objection was taken on behalf of the opponents that this Court has no jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his civil jurisdiction under the Aden Act, on the ground that the Resident being only subject to the High Court of Bombay in certain specified particulars under the Act with regard to civil jurisdiction his Court could not be said to be a Court Subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code.

Now with regard to questions which should be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act there can, we think, be no question that the Resident's Court is Subordinate to the High Court, for the Resident is, after the decision of the High Court given upon the questions submitted by him under that section, bound to pass a decree and to dispose of the case conformably to the decision of the High Court. We think, therefore, that with regard to such questions, this Court has the power of revision under section 115 of the Code in order that the Resident may not refuse to exercise the jurisdiction given to him by that section and may not act with material irregularity in the exercise of such jurisdiction without the power of the superintending Court to interfere. We, therefore, decide the preliminary objection against the opponents.

The next question is whether the Resident has refused to exercise the jurisdiction vested in him under section 8 or has acted with material irregularity in the exercise of such jurisdiction.

It appears that on the 14th of August 1908, a petition of appeal was presented to him from the decision of his Assistant Resident, Major Carter, in Suit No. 176 of 1907, rejecting the plaint on the ground that it was not properly stamped. The petition of appeal, according to the practice in Aden, where Pleadings are not usually heard, stated the arguments of the appellants and referred to the authorities on which they relied and nothing [276] more was heard of the appeal until an application, made to the Resident on the 23rd of September 1908, requesting that the applicant might be informed as to what had become of the appeal, received on the 30th of September, a response requiring the appellants to attend the Court-house on the 7th of October in connection with the appeal. Prior to the application of the 23rd of September, namely, on the 23rd of September, the appellants had applied under section 8 of the Aden Act for reference of the following questions in the above appeal for decision of the High Court of Bombay, namely, "Is the plaint sufficiently stamped, and, was the order of the Court rejecting the plaint under section 54, clause (b) of the Civil Procedure Code, 1882, without making an order, what the requisite stamp should be, legal?"



On the 7th of October the plaintiff attended at the Court of the Resident and a judgment was then read out dismissing the appeal under section 551. The judgment is dated 24th of September.

Neither the judgment nor the records of the case indicate that the Resident took any notice whatever of the application made on the 23rd of September that a case should be stated under section 8.

The question is, whether in ignoring that application so far as the records of the case indicate, the Resident acted with material irregularity in the exercise of his jurisdiction or refused to exercise jurisdiction vested in him by law.

Now one of the conditions entitling a litigant at Aden to demand the statement of a case for the decision of the High Court by the Resident is stated in section 8 to be the trial of a suit or the hearing of an appeal in which the claim estimated according to any law for the valuation of claims for the time being in force shall exceed Rs. 1,000 in value. In the present case the claim of the plaintiff was for a declaration and injunction with reference to certain property of a deceased resident in Aden alleged to be of the value of upwards Rs. 50,000 regarding which there was a dispute as to whether the plaintiff was entitled to the whole or a quarter share.

[277] The claim being for declaration and injunction was under the provisions of the Court-fees Act, section 7, sub-section (4), clauses (c) and (d), valued by the plaintiff at Rs. 130, upon which the prescribed Court-fee stamp was Rs. 10 only.

For the purpose of jurisdiction in the Bombay Presidency, the Suits Valuation Act VII of 1887, section 8, provides that "where in suits other than those referred to in the Court-fees Act, 1870, section 7, paragraphs V, VI and IX and paragraph X, clause (d), Court-fees are payable *ad valorem* under the Court-fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same."

Therefore, as under section 15 of the Aden Act, the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, we have in the provisions of the Suits Valuation Act, to which we have referred, 'the law for the time being in force for the valuation of claims.'

Assuming that the plaintiff's claim has been correctly valued under the Court-fees Act, as appears to be the case on a consideration of the decisions of this Court reported in *Manohar Ganesh v. Bawa Ramcharandas* (1), *Sardarsingji v. Ganpatsingji* (2), *Parvatibai v. Vishvanath* (3), *Vachhani v. Vachanni* (4) her claim estimated according to the law for the valuation of claims for the time being in force would be Rs. 130. It is, therefore, a claim which does not fulfil the requirements of section 8 of the Aden Act so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in her suit.

For these reasons we cannot hold that the case calls for any interference under section 115 of the Code, and we dismiss the application with costs.

*Application dismissed.*

(1) (1877) 2 Bom. 219.

(2) (1892) 17 Bom. 56.

(3) (1904) 29 Bom. 207.

(4) (1908) 33 Bom. 307.



34 B. 278=(12 Bom. L. R. 196=5 I. C. 960.)

## [278] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*PARAMI KOM RAMAYYA (*original Plaintiff*), *Appellant*, v. MAHADEVI  
KOM SHANKRAPPA (*original Defendant*), *Respondent*. \*

[6th October, 1909.]

*Hindu Law—Maintenance—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance.*

A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child: but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance.

*Held*, negating the contentions, that though the annuity was granted by the will as "maintenances" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will.

The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship.

The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

*Honamma v. Timannabhat* (1); *Valu v. Ganga* (2); and *Vishnu Shambhog v. Manjamma* (3), disapproved.

[Fol : 27 M. L. J. 305=25 I. C. 900 ; 24 I. C. 890 ; Dist : 89 Mad. 658 ; 80 I. C. 536=48 Bom. 208.]

SECOND appeal from the decision of C. C. Boyd, District Judge of Kanara, reversing the decree passed by R. R. Sane, Subordinate Judge of Sirsi.

## [279] Suit to recover maintenance.

The plaintiff, Parami, was the widow of one Ramayya who died in 1890. Ramayya had a daughter Mahadevi (defendant) by his first and predeceased wife.

Previous to his death, Ramayya had made a will whereby he left the whole of his property to his daughter Mahadevi, and provided for maintenance at the rate of Rs. 24 a year for his wife, Parami. The provision as to maintenance ran as follows :—

" But if the said Parami and Timappa Hegadi (the executor) should not pull on harmoniously, then, from the date on which the difference arises, the said Timappa Hegadi or the *Mane Aliya*† who may take possession of the property according to this will should go on paying to her, only as long as she lives, maintenance at the rate of Rs. 24 per annum on the responsibility of my property.

\* Second Appeal No. 763 of 1908.

† A son-in-law who makes his home in his father-in-law's house.

(1) (1877) 1 Bom. 559.

(8) (1884) 9 Bom. 108.

(2) (1882) 7 Bom. 84.



It appeared that after Ramayya's death, Parami had led an unchaste life and had a son born of her. But she soon returned to a chaste life which she had maintained upwards of eight years before suit.

In 1906, Parami sued to recover the arrears of six years' maintenance before suit.

The defendant contended that the plaintiff was disentitled to maintenance on account of the unchaste life she had led.

The Subordinate Judge examined the Hindu Law texts bearing upon the subject : and arrived at the conclusion that there was nothing in Hindu Law to deny to a widow even starving maintenance on the ground of her past unchastity. Upon her right to receive the maintenance under the will, he remarked as follows :—

Even apart from these considerations there is another strong reason to hold that the plaintiff is entitled to get the said allowance from defendants. The plaintiff's husband's will (exhibit 15), under which the defendants hold his property, contains an express direction, that the defendants should maintain plaintiff, or in case of disagreement, should annually pay her Rs. 24 as a separate allowance. It is not stated in the will that the allowance should be payable to plaintiff so long as she would remain chaste. Plaintiff's chastity was not made a condition precedent to her getting the allowance. In the absence [280] of any express direction to that effect in the will, I do not think that the plaintiff has forfeited her right to the allowance, which to all intents and purposes is like an annuity for life. The defendants are bound to respect the wishes of the testator.

On appeal, this decree was reversed by the District Judge on considerations which he expressed as follows :—

The learned Subordinate Judge has written an interesting and careful judgment. But, when all is said, it simply amounts to this : that he prefers the *dicta* in *Kandasami v. Murugammal* (19 Mad. 6) and *Roma Nath v. Rajonmoni* (17 Cal. 674), to the definite pronouncements of the Bombay High Court in *Valu v. Ganga* (7 Bom. 84) and *Vishnu v. Manjamma* (9 Bom. 108). I do not think that such a course is open to us. We are bound to follow the decisions of our own High Court, even if the other High Courts disapprove of those decisions. I arrive at this conclusion with regret, as the maintenance sought is only a pittance of Rs. 2 a month and defendants are cruel in refusing it.

It is urged for plaintiff that no Hindu Law need be applied, as in this case the annuity of Rs. 24 a year was left to the widow as a legacy and defendant 1, her daughter, the residuary legatee, was bound to give effect to it under the common law. There would be force in this argument if the will did not clearly state that the annuity should be paid to plaintiff as maintenance allowance. But as it was ordered to be paid on that account, the fact that it was bequeathed (instead of being given in some other way) does not seem to absolve plaintiff from the duty of fulfilling such conditions as a Hindu widow drawing maintenance allowance must fulfil. And one of these conditions is chastity. It can hardly be supposed that the testator intended to free his widow from this duty.

I wish it could be held otherwise. But it is useless to waste time in bewailing the severity of the Hindu law as interpreted by authority.

The plaintiff appealed to the High Court.

*Nilkanth Atmaram*, for the appellant.

*D. G. Dalvi*, for the respondent.

CHANDAVARKAR, J.:—This second appeal arises out of a suit brought by the appellant to recover arrears of maintenance from the respondents. Both the Courts below have found that the appellant's husband Ramayya died in February 1890, devising all his property by a will to the respondents. The will contains a provision that the respondents should maintain the appellant [281] in case she lived with them, but that, if owing to disagreement she lived apart they should give her Rs. 24 a year for her maintenance.

It is also found by the lower Courts that after the husband's death the appellant led for some time an unchaste life and gave birth to a child; but that since then she has been chaste.

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Upon these facts the respondents contended in the Court of first instance that, on account of the unchaste life which the appellant had led for some time after her husband's death, she had forfeited her right even to bare or starving maintenance. In support of that contention they relied on two decisions of this Court — *Valu v. Ganga* (1) and *Vishnu v. Manjamma* (2).

In an able judgment, which is to be commended for a careful collation and examination of original texts, the learned Subordinate Judge (Mr. R. R. Sane) held that these decisions were not applicable to the present case, first, because, "the rule there laid down seems to have been based on certain passages from the Mitakshara and the Mayukha, which refer to the maintenance either of the wives of disqualified heirs or of the widows of deceased coparceners ;" and, secondly, because, "it did not clearly appear from the reports that the attention of the learned Judges, who were parties to the decisions in question, was drawn to some verses from the Smriti of Yajnyavalkya and Vijnaneshwara's commentary thereon, relating to the treatment to be given to degraded persons or outcastes in general." On the strength of these verses, cited in his judgment, and also of the provision in the will, the Subordinate Judge held that the appellant was entitled to "bare" maintenance and awarded the claim.

On appeal by the respondents, the District Judge of Kanara held that whether the decisions of this Court in *Valu v. Ganga* (1) and *Vishnu Shambhog v. Manjamma* (2), were right or not according to the texts of Hindu Law, they were binding all the same on the subordinate Courts. As to the provision in the will, he held that the annuity of Rs. 24 a year, having been given to the [282] widow in express terms "as maintenance allowance", must be presumed to have been intended by the testator to be subject to the condition that the appellant should lead a chaste life. Accordingly, the District Judge reversed the Subordinate Judge's decree and dismissed the suit.

On second appeal it is argued that the texts, on which the learned Subordinate Judge has relied in his judgment apply to the facts of this case, and that the rule to be gathered from those texts is that a Hindu widow, who has at one time led an unchaste life, is entitled at least to starving or bare maintenance, if she has subsequently returned to a life of chastity.

The first set of texts (3) noticed by the Subordinate Judge occurs in Yajnyavalkya in the chapter on "marriage" in the section which treats of "Rituals." The first text, verse No. 70, relates to an adulterous wife, and, as correctly translated by the Subordinate Judge, it runs as follows: "She is to be allowed to live (by the husband in his own house), deprived of her rights, poorly dressed, fed with a view to sustain life only, dishonoured, sleeping on the ground." This obviously relates to a wife, who is leading a life of unchastity, is unrepentant, and is not purified by means of expiatory rites. In the case of one so purified, the general rule is that she is restored to all conjugal and social rights. As Apararka (4) puts it, "she, who has performed expiatory rites, becomes fit for conjugal and social association." And for that proposition he cites Manu, who says that "a wife, who has become purified after degradation, shall not

(1) (1882) 7 Bom. 84.

(2) (1894) 9 Bom. 108.

(3) Verses 70 and 72:—The Mitakshara: (Moghe's 3rd Edition, page 18).

(4) कृतप्रायश्चित्ता तु संव्यवहार्या भवति (Apararka: Anandashrama Series, Vol. I, page 98.



be censured." This also follows from the next but one verse of Yajnyavalkya (1) and the explanation given of it by the Mitakshara. There the Mitakshara explains that only a certain class of degraded women must be "abandoned"—viz., a woman who has committed adultery with a man of a lower caste, and a woman who has committed any of the sins regarded as deadly by the *Shastras*. The Mitakshara also explains that even in the case of such women, "abandonment" (*tyaga*) does not mean entirely [283] forsaking and throwing them upon the world, helpless and hopeless. It means abandonment only "for the purposes of conjugal rights and religious ceremonies". That is, such women must be treated in the same way as women leading an unchaste life. They must be kept apart in the house and given just enough food and clothing to keep body and soul together, but all other relations of husband and wife must cease. The same view is taken by Nilakantha in his *Prayaschitta Mayukha* (2). Referring to a text in the *Chatur Vimshati Smriti*, which provides that "there should be no abandonment of any woman except in the case of such sins as the murder of a Brahmin and the like," he explains that even in such cases, a woman should be made to do penance in the house. Madhavacharya in his *Parashara Dharma Samhita* explains the law to the same effect (Sanskrit Bombay Series Edition, page 352, Vol II, part I).

The general rule to be gathered from these is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

The next set of texts of Yajnyavalkya (3) noticed by the Sub-ordinate Judge occurs in the Section on "Penances."

In that section Yajnyavalkya first deals with the question of expiatory rites which a degraded man has to perform before he can be restored to his caste. Then in verse 297 he deals with the case of a "degraded woman." He says that the same expiatory [284] rites that are prescribed for degraded men are ordained in the case of degraded women too, with this difference, however, that in the case of such women, even after their purification by means of expiatory rites, they do not become entitled to restoration of the conjugal and social rights which they had before degradation but they must be allowed to live "near" the house, provided with bare food and scanty clothing just to keep body and soul together, and they must be guarded. Literally interpreted, this would seem to apply to all degraded women, who have undergone purification. But Vijnaneshvara points out, in his remark introducing the next verse of Yajnyavalkya, that it applies only to a particular class of women, that is, to those whose degradation was caused by one of the sins considered

(1) Verse No. 72: The Mitakshara (Moghe's 3rd Edition, page 18).

(2) यत्तु चतुर्विंशतिमते ।

स्त्रोणां नास्ति परित्यागो चमहत्यादिभिर्विना॥

तत्राऽपि ग्रहमध्ये तु प्रायश्चित्तानि कारयेत् ॥

[Prayaschitta Mayukha : Benares Edition, page 91].

(3) The Mitakshara : Verses 297 and 298 : (Moghe's 3rd Edition, page 492).

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deadly. It is such women only who, even after purification, must be abandoned. That is, while they become entitled to bare food and raiment and residence, they must be treated as unfit "for the purposes of conjugal rights and the performance of religious ceremonies." That is the definition and meaning of abandonment (*tyaga*) as given by Vijnaneshvara in his gloss on one of the verses of Yajnyavalkya in the first set of texts above noticed.

As is pointed out by Nilakantha in his *Prayaschitta Mayukha* (1), the word *tyaga* (*abandonment*) is explained in the *Mitakshara* as meaning the discarding of a woman so far as conjugal relations and religious ceremonies are concerned, but it does not mean driving her out of the house (that is, the husband's). No question of abandoning a woman for the purpose of conjugal relations and religious ceremonies can arise except as between a husband and his wife. The important question is whether this latter set of texts applies to the case of an unchaste widow or whether it applies only to the case of an unchaste wife. The learned Subordinate Judge thinks that the language of the texts is wide enough to cover both the cases. Nilakantha in his *Prayaschitta Mayukha*, in the course of his discussion of the question as to the right of degraded women to the performance of [285] expiatory rites, cites some of the texts and along with them he quotes a text of Parashara (2) which provides that "a woman, who conceives a child from a paramour when her husband is either dead or is not to be found or has gone abroad, should be regarded as degraded and sinful and driven out of the country." Nilakantha explains "driven out of the country" to mean "driven out of the house."

This text of Parashara, which includes the case of a widow, is explained by Madhavaacharya (3) as relating only to a woman who is leading a life of unchastity, is unrepentant, and has not performed expiatory rites. As to a woman, whether she is wife or widow, who returns to a life of chastity after she has been unchaste, Madhavaacharya explains that she, after expiation, cannot be cast out of the house, but that she must be maintained.

These texts of the *Shastras*, as explained by the commentators of recognised authority, would seem to support the decision of this Court in *Honamma v. Timannabhat* (4) which has been dissented from in the two later decisions in *Valu v. Ganga* (5) and *Vishnu Shambhog v. Manjamma* (6). Doubt has been expressed in *Roma Nath v. Rajonimoni Dasi* (7) and *Kandasami Pillai v. Murugammal* (8) as to the correctness of the decisions in *Valu v. Ganga* (5) and *Vishnu v. Manjamma* (6). It is not necessary for the purposes of this second appeal to decide the question, which having regard to the conflict of authority in this Court, will have

(1) मिताक्षरायां तु व्यवहारनिरोध एव त्यागः शब्देनोक्तो न तु गृहान्निर्वासनमपीति.

(Prayaschitta Mayukha : Benares Edn., page 91.)

(2) जोरण जनयेद्र्म मृते ऽव्यक्ते गते पतौ ॥

तां त्यजेदपरे राष्ट्रे पाततां पापकारिणीम् ॥

‘अपरे राष्ट्रे’ इत्युक्तेर्गृहान्निष्कारानं गम्यते.

(The Prayaschitta Mayukha : Benares Edn., page 91.)

(3) Parashara Dharma Sambita, Bombay Sanskrit Series, Vol. II, Part I, page 852.

(4) (1877) 1 Bom. 559.

(5) (1890) 17 Cal. 674.

(5) (1882) 7 Bom. 84.

(8) (1895) 19 Mad. 6.

(6) (1884) 9 Bom. 108.



to be settled, when it arises, by a Full Bench. We have referred to it only to notice the texts which bear on the question that they may be of use on a future occasion.

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[286] In the present case the appellant has claimed maintenance not only under the Hindu Law but also under the provision in her husband's will allowing Rs. 24 a year to her as maintenance. The fact that the will expressly refers to the allowance as maintenance has led the learned District Judge to infer that chastity is an implied condition of the bequest. He thinks that the testator must be presumed from that expression to have intended that the allowance should be given subject to the condition of chastity on which the right of a Hindu widow to maintenance depends. No doubt "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property": *Mahomed Shumsool v Shewukram* (1). But a Hindu's power to make a will has been held to be co-extensive with his power to make a gift *inter vivos*. Having regard to the texts relating to an unchaste wife discussed in the earlier part of this judgment and the rule propounded by Vijnaneshavara and Nilakantha, we must presume that the appellant's husband would have given her maintenance even in the event of her unchastity during his life-time. Such a presumption must be preferred to that which the learned District Judge has drawn on the construction of the word "maintenance" in the will, because the ordinary notions of the testator in such a case must be judged with reference to what he would have done if his wife had proved unchaste while he was alive. And what he would have done must be judged from what the *Shastras*, in the absence of usage to the contrary, ordain he was bound to do. According to the *Shastras*, he would have had to maintain his wife, unless she had misconducted herself with a man of a lower caste. There is no allegation against the appellant of such misconduct. Nor is it the case of the respondents that there is any custom which has broken in upon the rule of the *Shastras*. Further, though the annuity is granted by the will as "maintenance," that word cannot be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will. Where an implication [287] is to be made, it must be certain and necessary. The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. Here there is neither. The mere fact that the word maintenance is used cannot affect the unconditional terms of the bequest.

On these grounds the decree of the District Judge must be reversed and that of the Subordinate Judge restored with the costs of both the appeals on the respondents.

*Decree reversed.*

(1) (1874) L. R. 2 I. A. 7 at p. 14.



34. B. 287 (=5 I. C. 599=12 Bom. L. R. 9).

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*MADHAVRAO MORESHVAR PANT AMATYA (*Original Plaintiff*),*Appellant, v. KASHIBAI KOM DATTUBHAI AND OTHERS**(Original Defendants), Respondents.\**

[15th November, 1909.]

*Transfer of Property Act (IV of 1882), sections 55 (6) (b), 129—Registration Act (III of 1877), section 17—Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha.*

In consideration of services already rendered or thereafter to be rendered by the defendant to the predecessor-in-title of the plaintiff, the latter executed two documents whereby he released the defendant from payment to him of the assessment on certain lands. Those documents were not stamped or registered. The plaintiff sued to recover arrears of assessment from the defendant, who pleaded exemption under the two documents. The lower appellate Court found the transaction to be one of sale, and applying section 55 (6) (b) of the Transfer of Property Act, 1882, ordered the plaintiff to pay to the defendant what the Court calculated to be the equivalent of purchase-money before he (the plaintiff) could recover the assessment:

*Held*, that the transaction evidenced by the documents could not be regarded as a sale, for the consideration could not be regarded as "price": [288] and even if it could be assessed in money value, it was vitiated by the fact that it was vague and uncertain as to future services.

*Held*, further, that the transaction must be regarded as one of gift. It was a gift of the grantee's right to assessment; and such a right is regarded as *nibandha* in Hindu Law and therefore immoveable property. The documents not having been registered, the gift did not operate.

*Held*, also, that there having been no registered instrument in support of the defendant's title the right set up in defence must be negatived.

[Rel: 68 I. C. 798=20 A. L. J. 744.]

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, amending the decree passed by S. S. Wagle, Subordinate Judge at Malwan.

The plaintiff sued to recover from the defendant assessment for three years at the rate of Rs. 58-0-10 a year.

The defendant contended that he was exempted from payment of the assessment. The exemption was claimed under two documents executed in his favour by one Sarvottamrao, a predecessor-in-title of plaintiff, in consideration of services rendered by the defendant to Sarvottamrao or thereafter to be rendered by him. The two documents were not stamped or registered, and ran as follows:—

## EXHIBIT NO. 29.

Rajeshri Sarvottamrao Nilkanth Pant Amatya, Inamdar, Mouje Chindar, to Bhaubin Devji Ghadi, residing at Mouje Chindar, Tal Salsi, taluka Malwan, as follows:— At the Mouje aforesaid there were disputes between myself and Gaukars, etc. Therein you acted truthfully and were useful to me in everything and at every time. Therefore, I have been pleased (to confer a grant upon you). (As to that) At the Mouji aforesaid there is Vatni Dhara (standing) in your name. There the thikans purchased by you are included. The particulars of the said Thikans are as follows:—..... Assessment amounting to Rs. 24-1-0 in all is granted as inam to you, your sons, grandsons, and others, from generation to generation. Therefore you should be useful to me in every business of mine at the aforesaid; you should be personally present and should see to my comforts in a proper manner. And you should go on enjoying the Inam as

\* Second Appeal No. 430 of 1908.



afore said from generation to generation. Do you note (the same)? The 16th of March 1893.

## EXHIBIT NO. 29.

Mandatory letter issued by Shrimant Rajeshri Sarvottamrao Nilkant Pant Amatya, Inaudar, Mouje Chindar, taluka Malwan, to Bhau Deoji Ghadi Gavkar, Mouje Chindar, taluka aforesaid as follows :—At (in connection with) the Mouje aforesaid, there was and there is litigation going on in the Court [289] between myself and Kulkarni and other Gaokaris. In that matter you took great pains and honestly and faithfully did and are doing my business. Having regard to the fact that you were careful about my business and worked zealously even more than myself if I had been present, I am very much pleased and therefore I have thought of conferring a grant upon you. As to that at the Mouje aforesaid there is a Vatni Dhara Khata No. 155 standing in your name (comprising land, acres 49-22½ gunthas assessment Rs. 54-10-3). You have been paying the assessment thereof to me in the village (a mandatory letter is issued to you this day for 30th September 1903, out of the said amount as assessment payable in respect of land measuring acres 41-31 gunthas and formerly, that is, on the 16th of March 1893, a mandatory letter was issued to you for Rs. 24-1-0 payable in respect of land measuring acres 7-3½ gunthas under which the land is continued to you. Thus a mandatory letter is hereby issued to you directing that a deduction should be allowed as inam every year to you from generation to generation in your Khata for Rs. 54-10-3 in all. Therefore you should from generation to generation go on taking credit in the Khata for the amount of assessment every year. In respect of this, a separate mandatory letter is issued to the Vahivatdar Karkun; as to that I will go on allowing deduction for the said assessment in the Khata every year. To this effect this mandatory letter is duly given in writing. The 28th of January 1897.

The Court of first instance held that there was for the transaction evidenced by the two documents a good consideration; and that the documents did not require registration. The Court, therefore, dismissed the plaintiff's claim to recover arrears of assessment.

On appeal the Assistant Judge treated the transaction as one of sale. He further held that under section 55 (6) (b) of the Transfer of Property Act, 1882, the defendant was entitled to a charge on the property for the purchase-money which was calculated to be Rs. 1,092-13-0. The plaintiff was, therefore, ordered to pay Rs. 1,092-13-0 to defendant before he recovered the assessment.

The plaintiff appealed to the High Court.

*Weldon*, with *K. N. Koyajee*, for the appellant.

*A. G. Desai*, for the respondent.

CHANDAVARKAR, J.—Both the lower Courts have held that the documents, on which the respondents relied in support of their case, were in the nature of a sale of immoveable property of the value of more than Rs. 100, and that, as those documents were not registered as required by section 54 of the Transfer of Property Act and by section 17 of the Registration Act, the respondents had not acquired the right to exemption from assessment which they pleaded in defence to the appellant's claim. But "sale", as defined in section 54 of the Transfer of Property Act, is "a transfer of ownership in exchange for a price paid or promised or part paid and part promised". And, as held by a Full Bench of three Judges of this Court in *Samaratmal Uttamchand v. Govind* (1), the word "price" is used in the sections relating to sales in the Transfer of Property Act in the sense of money. In the present case, it is found by the Courts below that the consideration for the transaction relied upon by the respondents consisted of services which they had rendered to the appellant's predecessor-in-title in the past and which they were to render in future. Such a consideration cannot be regarded as "price". The consideration, even if it could be assessed in money value, is vitiated by the fact that it

(1) (1901) 25 Bom. 696.



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is vague and uncertain as to future services. It is true that in his deposition the first respondent (defendant No. 1) states that he had rendered assistance to the Inamdar Sarvottamrao in certain suits, and that he had lent him monies from time to time. But there is no evidence to show that the remission of assessment by Sarvottamrao was in consequence of any contract of sale between him and the respondents and that the consideration for the contract moving from the latter was the price calculated at the money value of the services which they had rendered and the sum which they had lent to Sarvottamrao. The documents relied upon by the respondents, in support of their right to exemption from assessment make it quite clear that, as a reward for the services which the respondents had rendered and were expected thereafter to render to him, Sarvottamrao made a grant of the assessment to the respondents. The rendering of the services was not the consideration but merely the motive of the grant.

The transaction, on a proper construction of the document, must be regarded as one of gift, not of sale. It was a gift of Sarvottamrao's right to the assessment of the *dhara*, which the respondents held, and such a right has been regarded as *ribandha* in Hindu Law. *Morbhat Purohit v. Ganga-dhar Karkare* (1). It is immoveable property. *Venkaji v. Shidramapa* (2) and *Madhavray [291] v. Jagannath* (3). There can be no gift of immoveable property except by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. (Section 123 of the Transfer of Property Act). There being no such instrument in support of the respondents' title, the right they have set up in answer to the appellant's claim must be negatived.

But it was urged before us by their learned pleader that the transaction, evidenced by the documents relied upon by the respondents in support of their rights, was in the nature of a relinquishment by Sarvottamrao of his right to the assessment leviable on the *dhara* holding; that, as such, it could be proved by the *Anujnyapatra* (exhibit 30) which did not require registration, since it was not a deed of transfer but was an order addressed by Sarvottamrao to his own officers, and, as such, containing an admission of the relinquishment. No doubt the effect of the grant of the right to assessment leviable on the *dhara* holding was that the owner of the right, so far as he was concerned relinquished it in favour of his grantee; but all the same it was a transfer of the right. The fact that the grantee of the right happened in the present case to be the person liable to pay the assessment was a mere accident. After the grant he could hold and deal with the right separately from the *dhara* holding. He could sell or mortgage or transfer by way of gift the latter right, reserving to himself the former. It was a transfer of the right to assessment by Sarvottamrao to the respondents as a bounty or reward for services rendered and to be rendered. Such a transfer cannot be made except in the manner provided by the Transfer of Property Act.

That being the legal aspect of the transaction, section 55, clause 6, sub-clause (b), which relates to a sale, has no application here.

The decree of the Court below must be varied by striking out from it the direction as to the payment by the plaintiff of Rs. 1,092-13-0 within one month from the date of the decree. In other respects the decree is confirmed. The respondents to pay to the appellant the costs of this second appeal.

*Decree varied.*

(1) (1883) 8 Bom. 231.

(2) (1894) 19 Bom. 668.

(3) (1889) P. J. p. 75.



34 B. 292 (=3 I. C. 801=11 Bom. L. R. 779).

[292] ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

N. JOACHINSON AND OTHERS, *Appellants and Plaintiffs, v.*  
 MEGHJEE VALLABHDAS, *Respondent and*  
*Defendant.\**

[17th July, 1909.]

*Principal and Agent—Construction of Contract—Indian Contract Act (IX of 1872), sections 215-216—Agent appointed to sell goods buying them on his own account.*

Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not.

The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

*Salomons v. Pender* (1) and *Andrews v. Ramsay & Co.* (2), referred to.

[Ref : 27 M. L. J. 501=26 I. C. 822 ; Rel ; 42 I. C. 357.]

The plaintiffs, namely, N. Joachinson, J. Joachinson and S. Joachinson, all resided in Hamburg and did business as merchants in Bombay in the name, style and firm of Messrs. Worman and Co. by their constituted attorney Emil Schumacher. The defendant was a seed merchant carrying on business in Bombay.

On the 3rd of April 1907 the defendant signed two documents (exhibits B. and D.) purporting to be contracts of sale addressed to the plaintiffs in respect of 200 and 100 tons respectively of [293] Bombay cotton seed at the price of 103s. 9d. per ton C. I. F. (costs, insurance and freight payable by the defendant) less 2 per cent. at fixed exchange of 1s. 4 $\frac{7}{32}$ d. The two contracts were in the following forms :—

" *Bombay, April 3rd, 1907.*

*Contract of Sale No. 99.*

To

Messrs. Worman and Co.,  
 Bombay.

Dear Sir,

I (we) herewith confirm the following sale through you on the terms and conditions mentioned herein (100, one hundred tons Bombay cotton seed f. a. g.

Prices 103s. 9d per ton C. I. F. less 2 per cent. }

Shipment to Hull

„ in May 1907

Exchange 1s. 4 $\frac{7}{32}$ d.

\* Appeal No. 55 of 1908. Suit No. 590 of 1907.

(1) (1865) 3 H. & C. 639.

(2) [1908] 2 K. B. 635.

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Insurance as usual.

Payment against Mate's receipt.

Remarks:—As per London Incorporated Oil Seed Association."

"I (we) herewith confirm the following sale through you, on the terms and conditions mentioned herein.....

"I (we) guarantee to the buyers the weights, quality and sound condition at the port of delivery and I (we) bind myself (ourselves) to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I (we) agree to accept your or your agent's reports, decisions, accounts, final invoices and (or) other vouchers as correct and conclusive and binding upon me (us).

"With reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)."

In pursuance of these contracts the defendant handed over to the plaintiffs mate's receipts duly endorsed for 300 tons cotton seed shipped by him to Hull and the plaintiffs paid Rs. 17,000 against the receipts. On the 1st June 1907 bills were made out under the terms of the contract and the balance due to the defendant of Rs. 1,102-5-0 was paid to him on the 3rd June for which he gave a receipt in full payment.

The goods arrived at Hull on the 5th July and on the 10th August the plaintiffs informed the defendant that they had received a telegram from home that an allowance of 8s. 9d. a ton [294] had been awarded by arbitration in respect of the 200 tons and 6s. 9d. in respect of the 100 tons. To this the defendant replied on the same day as follows:—

"It is very astonishing to note that both the said shipments are of one and the same quality and same marks and yet the allowances vary; in the first it is 6s. 9d. and in the other it is 8s. 9d. We think either you have misunderstood the telegram or there is something extraordinary in sampling the shipments for arbitration, because nearly 8,000 tons of the same mark and to the same port were shipped and almost all with the exception of very few passed without any allowance, and in the said few a trifling allowance, ranging from 6d. to 1s. 9d. per ton was awarded.

"We cannot agree to the awards stated by you and therefore request you to wire your home firm to attend on the spot and re-sample the whole of both the lots and have a survey held over same or to appeal against the said awards after re-sampling the same.

"We would like to nominate our surveyors and you will please let us know at once if you have any objection thereto."

The plaintiffs replied to this on the 12th August as follows:—

"In accordance with your letter of August 10th, which we have just received, we have sent a cable to our agent instructing him to re-sample and to appeal against the awards on your two shipments of cotton-seed."

The plaintiffs' agent at Hamburg cabled on the 14th August saying:—

"Shall we appeal against decision, fee £ 21 each case, re-sampling impossible, telegraph at once, am waiting in telegraph office."

This was communicated to the defendant on the 15th August: and not having received a reply the plaintiffs sent their representative Mr. Unvalla to the defendant; and after the interview they wrote saying: "We take note of your instructions to cable home for appeal, which has been done." To this the defendant returned the following reply:

"In the interval between..... (your) two letters your representative had seen us, to whom we gave instructions that under any circumstances re-sampling must be done, even of the remainder, if part is consumed, and it appears that your second letter is incomplete or you do not agree with the clear instructions. . . . We therefore again say that whatever shall be done without re-sampling shall not be binding upon us."



Further correspondence took place between the parties, which terminated with the plaintiffs' letter of the 25th August wherein they stated "appeal has terminated unfavourably, awards con- [295] firmed". And the defendant replied to it next day saying "If the appeal is carried out without observance of the instruction . . . its decision is not at all binding upon us."

On the 19th September the plaintiffs sent to the defendant final accounts for shortage allowances, fee, &c., in respect of the two consignments. The defendant declined to pay and asked for inspection of document.

On the 17th November the plaintiffs filed this suit to recover the shortage allowance, &c. from the defendant. The defendant contended in his written statement that the plaintiffs as agents of the defendant had not carried out his instructions as regards the resampling and therefore he was not liable. Without prejudice to this defence Rs. 800 were paid into Court at the rate of 2s. 6d. per ton.

As Mr. Schumacher, the plaintiffs' constituted attorney in Bombay, who had transacted this business with the defendant, was about to leave India, he was examined *de bene esse* on the 22nd February 1908. In cross examination he said :—

"I was the principal in the contract. It was an out and out sale to me. This is the first time I have stated to the defendant that it was an out and out sale to me."

The defendant then alleged that the plaintiffs, according to this evidence, were making out a different case to that set out in their plaint, namely, that they were suing as principals and not as agents, and obtained leave to file a supplemental written statement, wherein he contended that the plaintiffs were his agents for sale being remunerated by a commission of 2 per cent., and were therefore bound to account to him for all their dealings with the said goods. He denied the goods were sold to the plaintiffs, as contended by Mr. Schumacher, as such contention was entirely contrary to the terms of the contract and inconsistent with the whole course of business between himself and plaintiffs and with the usual course of business between merchants and commission agents in Bombay. He counter-claimed for an account and asked for the suit to be dismissed.

The cause was tried by Macleod, J.

The learned Judge held that the contract goods were short in weight and of inferior quality when they arrived at Hull; that the [296] plaintiffs did carry out the defendant's instructions in obtaining a fresh survey of the goods; and that the plaintiffs were acting under the said contracts as agents for sale of the defendant and were bound to account to the defendant for all their dealings in the said goods. The suit was, therefore, dismissed.

The learned Judge, in the course of his judgment, remarked as follows :

"The evidence shows that it is the practice for export houses in Bombay to receive offers from their correspondents in Europe, without mentioning the name of the offerers, and the defendant certainly understood that he was accepting certain specific offers received from Europe by the plaintiffs. Although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out as agents in the contracts they signed with the defendant, and they cannot now be allowed to say that they were acting as principals in the transactions. As agents they were not entitled to make any profit beyond what was contained in the contracts and as they sold at higher rate they are bound to account to the defendant for the excess. To hold otherwise would be to give an interpretation to the contracts which the words of the

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contracts cannot possibly bear. There is no ambiguity about the wording of the contracts and the ordinary rule of construction applies that the grammatical and ordinary sense of the words must be adhered to unless that would lead to some absurdity or some inconsistency with the rest of the instrument: *Gray v. Pearson*, (1857) 6 H. L. C. 106; *Caledonian Railway Company v. North British Railway Co.* (1881) 6 App. Cas. 181.

"If I give the words 'confirm the sale through you' their ordinary and popular meaning, I cannot possibly hold that plaintiffs were purchasers. But it may be said that this is a mercantile contract and that these words have a special mercantile meaning. To support this contention there must be evidence . . . In my opinion, defendant contracted to ship through the plaintiffs certain goods at a fixed price less 2 per cent C. I. F. for a certain shipment to a fixed port for delivery to an unknown buyer. Plaintiffs contracted to pay the price fixed against mate's receipts in Bombay. As the plaintiffs did not take over the goods in Bombay or inspect them, defendant guaranteed to the buyers weight, quality and sound condition at the port of delivery and bound himself to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever which the agents' buyers in Europe might bring against or on account of the goods immediately on demand and agreed to accept plaintiffs' and plaintiffs' agents' reports, decisions, accounts, final invoices, and other invoices as correct and conclusive and binding upon him. The plaintiffs took the risk of the buyers not taking delivery but as the sale was through them they could not derive [297] any profit by delivering at a higher price. The defendant trusted to the plaintiffs selling his goods at the rate he was paid in Bombay and no doubt if an allowance of 2s. or 2s. 6d. had been awarded on these 300 tons, he would have paid that without making any inquiries. If a misunderstanding about re-sampling and appealing had not occurred, he might still have paid the allowances. The fact that plaintiffs had realised higher prices would in the ordinary course of events never be revealed except by means of legal proceedings, but if plaintiffs contracted as agents, they cannot get rid of their liability to account arising from the contract.

"If the plaintiffs claim to be the purchasers in Bombay contrary to the express wording of the contract, their claim on the defendant's guarantee must fail, as that guarantee was given on the understanding that plaintiffs were acting as agents."

The plaintiffs appealed.

*Strangman*, Advocate General, and *Lang*, for the appellants.

It is quite unnecessary for the Court to find what was the relationship between the parties, the only question is whether or not the plaintiff is entitled to an account. The lower Court gave the relationship a name and said that certain incidents flowed from it. See Jenkins, C. J.'s judgment in *Paul Beier v. Chotalal* (1). It is impossible in Bombay to say what the relationship is. There have been three previous dealings between the parties two of which were put through and one settled. In neither cases were accounts demanded. Our first submission is that we must get a decree for what we have claimed.

There is no doubt that we have acted *bona fide*. They admit "to" and "through" in the contract are the same. The plaintiff is entitled to say "I am ready to account for what I have done."

As to the contract itself the heading is 'Contract of Sale.' We say the 2 per cent. is discount, they say it is commission. When the goods got to European ports they are surveyed, if the survey is disputed there is arbitration and an appeal: see rules. The defendant has according to the rules to accept all reports, etc. We undertook to pay all weighing and superintending charges, these amounted to 9d. in the ton, i.e.,  $\frac{2}{3}$  per cent. Therefore if the 2 per cent. is commission it is at once reduced to  $1\frac{1}{3}$  per cent. [298] We also pay in England  $2\frac{1}{2}$  per cent. discount and something must also be allowed for brokerage, therefore we would have been working at a loss. The whole difficulty in the case arises through the word "through" to the contracts. The word does not necessarily imply an agency.



The finding of the lower Court only comes to this that the defendant thought that the plaintiff was an agent. Their own broker's evidence does not bear out their contention.

The conclusions to be drawn from the evidence are:—

- (1) The plaintiffs treated themselves as principals.
- (2) The plaintiffs never held themselves out as agents.
- (3) It is admitted that the defendant never asked for accounts.
- (4) The question of agency is an after thought as witnessed by the original written statement and the fact that the moonim is not called.
- (5) It is immaterial which word is used "through" or "to."
- (6) Accounts under such contracts are never asked for.

If the Court comes to the conclusion that we are agents we must account. If they waive their right to accounts we must have our decree. The defendant's election does not prejudice our right on the other issues. *Jardine* (with him *Robertson*), for the respondent.

There is a question of the *bona fides* of the plaintiff: we were induced to enter into this contract because we thought he was our agent who had no adverse interest. The facts show that he had adverse interests. They cannot say we have tried to evade payment. They say there is no need to define the relationship of the parties; the Court will look at the contract itself. Can the Court treat the word "through" as of no account. If you want an agent you say you do a thing "through" him.

[CHANDAVARKAR, J.:—You don't deny that evidence to the contrary may be given?]

No evidence was adduced beyond the statement made in cross-examination by the plaintiffs' constituted attorney; what was the object in putting in the word "through". We say you cannot [299] say "through" is same as "to": see the heading "contract of sale" and the counterpart which says "sale through us."

The defendant pays freight, insurance and costs. Why should we pay the costs if they are out and out purchasers. The 2 per cent., we say, is commission. The plaintiffs never wanted to give evidence as to the meaning of the 2 per cent. Schumacher says it is a custom to deduct 2 per cent. discount but no custom is proved.

They now say the relationship is a complex one but we were not asked to meet that case in the lower Court. They held themselves out as agents both by the conversation we have alleged and by placing the contract before us.

*Strangman* in reply.

Our points are:—

- (1) Is it necessary to define the relationship?
- (2) If so, has agency been made out?
- (3) If agency is made out to what relief are the plaintiffs entitled?

As to (1) the relationship was not defined in *Paul Beier v. Chotalal* (1); there as here the plaintiff said that on the form of the contract there was a contract of vendor and purchaser and the defendant contended that it was an agency contract. The whole point is whether there is a liability on behalf of the plaintiffs to account. The evidence shows there is not. The defendant says he never asked for accounts. It is the wrong way to approach the case to try and bring this complex relationship under the head of agency.



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On the question as to whether or not agency is made out. They say they were induced to enter into the contracts because they thought the plaintiffs would get the best price for them from England. But see the broker's evidence. The defendant never suggested that he did not get a fair rate. He could not do so because he knew well what the rates were as he was dealing in the same goods with Sassoon and others. That is all the evidence. There can be no question of prejudice here. It is quite im- [300] material whether the plaintiffs were acting as principals or agents. Therefore on the question of agency we say (i) the Court cannot be asked by the defendant to hold agency in view of his first written statement and of his letter of 1st January 1908 where his attornies write "you contracted to purchase from our client", (ii) no stress should be laid upon the word "through" in view of the defendant's own admission that "through" is the same as "to", (iii) no accounts were asked for in the previous dealings and it is not the custom to demand accounts, (iv) if this is agency our benefits would be nil. As to (i) they say it is hard to hold the defendant to a slip, but why is the Moonim not called to explain the slip?

But if agency is made out to what relief are the plaintiffs entitled? The lower Court says none under section 236 of the Contract Act. They rely on *Robinson v. Mollett* (1). Section 236 applies only to executory contracts. Section 215 does not apply to this case as there is no dishonest concealment established or that the dealings of the agents have been disadvantageous to the principal. The defendant can only say that he is entitled to an account of our profits.

CHANDAVARKAR, J.:—The first question argued on this appeal is, whether the relationship constituted between the appellants (plaintiffs) and the respondent (defendant) by the two contracts, on which the suit was brought, was one of agent and principal, or of purchaser and vendor. Both the contracts are in writing, and, judging from their terms alone, the conclusion is, I think, inevitable that the appellants accepted under them the business of agency to sell the goods for and on behalf of the respondent.

Each contract begins with these words—"We", (i.e., respondents), "herewith confirm the sale through you" (i.e., appellants), words which are apt to convey the meaning that the latter were appointed to sell for the former. There is an admission, however, by the respondent in his deposition that "sale through you" and "sale to you" mean the same thing; and in his solicitors' letter to the appellants, exhibit A 14, the goods forming the subject-matter [301] of another contract are referred to as having been sold to the appellants. We must, therefore, look at the other terms and language of the contract to find the clear intention of the parties. Each of the contracts was on c.i.f. terms, that is, the respondent as vendor agreed to be liable for costs, insurance, and freight. The rate of exchange was fixed in each by the agreement of the parties. Each of these conditions may be as consistent with the relation of principal and agent as with that of vendor and purchaser. There is, however, extraneous evidence in the case, adduced for the respondent to show that these two terms are incompatible, according to the usage of trade, with the latter relation and mark an agency business. That evidence has carried weight with the learned Judge in the Court below. Each of the two contracts in dispute shows that there was a deduction of 2 per cent. in favour of the appellants from

(1) (1875) L. R. 7 H. L. 802.



the purchase money advanced by them to the respondent and the latter has led evidence to prove that this 2 per cent., according to commercial usage, is treated as commission, though it is sometimes spoken of and described in a written contract as discount. This evidence also has been believed by the learned Judge. To all this evidence of usage the objection urged before us on appeal is that no questions as to usage of trade were put to Mr. Schumacher, the appellants' constituted attorney in Bombay, during his cross-examination. But the circumstances under which that cross-examination had to be made are sufficient justification for the omission complained of. Mr. Schumacher had to be examined *de bene esse* before the trial commenced and issues were raised, because he was leaving for Europe. At that time the respondent had no distinct intimation that the appellants were going to set up a case of purchase under the contracts on their own account. In the course of his cross-examination Mr. Schumacher set up that case for the first time; and the respondent has sworn that at that time he was at Calcutta and could not, therefore, give instructions to his counsel as to the new case unexpectedly set up. Under these circumstances we cannot eliminate from the case the evidence as to usage. It was open to the appellants to ask the learned Judge to postpone the hearing for the purpose of examining Mr. Schumacher by commission on the points as to trade usage.

[302] But even if we exclude all this evidence from our consideration and confine ourselves to the language of the written contracts, what is the result? The facts that the contracts were on c. i. f. terms, that a rate of exchange was fixed by the agreement of the parties, and that two per cent. was deducted from the price paid for the goods may be, as I have already observed, as consistent with the case of the appellants as with that of the respondent. And if that had been all the language of the contracts, we might have construed them in favour of the appellants. But it is, in my opinion, difficult to do that in face of the language of the paragraph in each of the contracts, which begins with the respondents granting "to the buyers the weights &c." and ends with the respondent agreeing to accept the appellants' or their agents' reports, decisions, &c., as "correct and conclusive and binding upon" him. There is (in my opinion) here a studious distinction made between the appellants as parties to the contract and "the buyers." Had both the parties intended "the buyers" to be the same as the appellants, there was no need of distinguishing between the two. And this distinction becomes still more marked when we have the fact that one term of the contract imported into it by the incorporation of the contract form of the Oil Seeds Association (Ex. C) was that it should be deemed to have been made in England or to be performed there, implying that the buyers were not here but were foreigners living abroad. It could not be said that the appellants were not here. They formed a trading firm carrying on business in Bombay by their constituted attorney, Mr. Schumacher. This conclusion is further strengthened by another fact. After the goods shipped by the respondent had arrived at their destination, the appellants wrote to the respondent that "buyers" complained bitterly of the quality of the shipments, (Ex. T), implying that the buyers were people distinct from them (appellants). I agree, therefore, with Macleod J. in the conclusion of fact at which he arrived in the case, holding that under the contracts in dispute the appellants had become agents of the respondent to sell his goods.

It is, however, urged before us that, assuming that an agency is established, the evidence on record proves beyond doubt that it was not,

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according to usage, an agency to sell and to account. [803] No doubt there is evidence to show that in the case of such contracts no accounts have been called for. The respondent had three previous dealings with the appellants in each of which the contract was of the same nature as the present. The first was settled by payment of differences; in the other two there was no accounting by the appellants and no inquiry by the respondent whether the goods had been sold by the former at the contract rate or for a lower or higher price than that. Similar dealing of the respondent with E. D. Sassoon & Co. and David Sassoon & Co. have hitherto ended without any account having been demanded or rendered.

But the respondent and his witnesses have given an explanation which to my mind is satisfactory, besides that it is not met by any evidence to contradict it. The explanation is that the contract in such cases is invariably made "against price offers"; the sale being in all cases at the rate fixed, there is no necessity for an account; but that there may be a case for accounts is contemplated by the terms of the contract itself. In each of the contracts in dispute the respondent agrees to accept as conclusive and binding upon him the appellants' or their agents' accounts.

The agency set up by the respondent being established, the next question is one of law. It is admitted that the goods shipped from here under the contracts were bought by the appellants themselves, and not sold to others for and on behalf of the respondent. Upon these facts Macleod J. held that the appellants, having acted in breach of their agency, were not entitled to the charges to recover which the appellants had brought the suit. It is argued that, upon the facts found, the respondent can claim, according to section 216 of the Indian Contract Act, no more than that the appellants should, as agents, account for the profits they may have made from the transactions, but that the respondent cannot deprive them of the right to the charges incurred by them under the written contracts. Section 216 is merely enabling and confers upon a principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account [804] of the latter. The principal is free to exercise that right or not. Mr. Jardine for the respondent relied, in support of Macleod J.'s decree dismissing the appellants' suit, on section 236 of the Indian Contract Act; but the learned Advocate-General urged that that section applied only to executory, not to executed, contracts. Section 236 can have no relevancy here on either construction of it. We have in the present case a dispute between a principal and his agent; section 236 contemplates a dispute between two persons, one of whom falsely professed as agent of a third party to deal with the other. It is section 215 of the Act which has a bearing on the case. It provides that—

"If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

The learned Advocate-General argues that where there has been no repudiation, that is, where the principal has, in the present case, elected to affirm the purchase by the agent to himself, it is not open to the principal to retain the benefit of the purchase by pocketing the price he has already received and declining at the same time to bear the burden of the



transaction, that is to pay to the agent the sums which he has expended for the transaction and which the principal has under the contract rendered himself liable to pay.

Now, the law, no doubt, is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

In the present case what is affirmed is the transaction of purchase by the agent on his own account. Whether the arbitration charges and allowances, which the appellants seek to recover from the respondent under the two contracts in suit, are incidents of and ancillary to that transaction or to the contract of agency is a question which must depend upon the construction [305] of those contracts. To my mind it is clear that those charges and allowances are annexed by the special agreement of the parties to the contract of agency as distinguished, in the written contracts, from the transaction of purchase. One part of the written contract is that the respondent as vendor accepts through the appellants (as his agents) the purchasers' offer to buy for the price specified in the contract. The other part is the term by which the respondent binds himself to his agents (the appellants) to pay to them the arbitration charges and allowances including short weight. The two parts are severable and contemplate two distinct liabilities. The fair inference, derivable from the words of the condition as to the charges and allowances in dispute and from the context in which it is introduced into each of the two written contracts in suit, is that it attaches to the agency, not to the purchase. The words are "with reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)." This mutual arrangement is between the respondent as principal and the appellants as his agents. This term has nothing to do with, but is independent of, the purchaser contemplated by the contract. If the agents substituted the character of purchaser for that of agent with reference to the goods, the condition disappeared with the latter, and no burden was left for the respondent to bear.

It cannot be fairly contended with reference to the two contracts in suit that the arbitration charges and allowances are not in the nature of remuneration for the agents' services but that they are expenses properly incurred for completing the sale and form part of the transaction of purchase affirmed by the principal. They might have been so if the written contracts had been silent; but here the parties have provided for the matter in express terms and imposed the burden as a condition of the principal's liability to his agents.

The reasons for that express agreement are not pure speculation. The arbitration had to be in a foreign country where the respondent could not personally be present to look after his own interests in the matter. Had he dealt with the buyers direct he [306] would have said: "You are at the place of arbitration and can look after your own interests. I cannot. You must, therefore, agree to bear the burden of the charges and allowances." And probably the purchaser would have agreed. But rather than bargain in that way with the purchaser, the respondent let him off and bargained with the appellants as his agents and chose to bear the burden, because they were appointed and trusted to protect his interests

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at the place of arbitration. If the agents, notwithstanding that condition, of their own wrong converted themselves into principals and bought the goods on their own account, the transaction when affirmed must be construed as one in which, as between the vendors and the buyers, the latter had agreed to bear the burden of the charges and allowances. That is the legal aspect of the case presented by the proved facts and surrounding circumstances of the transaction.

This view of the law is supported by the authority of two decided cases, which I was able to find after we had heard arguments on appeal. In *Salomons v. Pender* (1), followed in *Andrews v. Ramsay & Co.* (2), the question for decision was the right to commission of an agent, who, without his principal's consent and knowledge, had dealt with the business of the agency on his own account. But the principle, on which the decision in either case turned and the right in question was negatived, is broad enough to cover the present case. In *Salomons v. Pender* (1) Pollock C. B. said :—

"No authority has been adduced for a departure from the general principles governing such a case, and the argument has failed to convince me that a person can in the same transaction buy in the character of principal, and at the same time charge the seller as his agent. I cannot agree that, because the seller has chosen to abide by the sale, he is therefore to be held to have acknowledged the claims of the plaintiff both as agent and purchaser."

Bramwell B. said :—

"It is true that the plaintiff may have derived no material advantage from the interest which he has acquired in the premises; and that the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say 'what you have done has been done as a volunteer and does not come within the line of your duties as agent.'"

[307] So also, Martin B.—

"Mr. Bovill has contended, that as the sale was not rescinded there is a subsisting contract to pay the commission. But that seems to me to be a fallacy. The engagement to pay a commission to the plaintiff is quite distinct from the acceptance of an offer to buy the land."

And then he cited Story on Agency : "In matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves"—a principle which is fully recognized in the Indian Contract Act.

The rule of law, then, is this. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. That is the principle, as I understand it, of the decisions in *Salomons v. Pender* (1) and *Andrews v. Ramsay & Co.* (2). As that principle, in my opinion, governs the present case, the decree appealed from must be affirmed with costs.

(1) (1865) 8 H. & O. 639.

(2) [1908] 2 K. B. 635 at p. 637.



HEATON, J.—The defendant in this suit sold 300 tons of cotton seed which were shipped by him on the S. S. Knight of the Thistle and sent to Hull.

This intermediary in the sale was Mr. Schumacher of the plaintiffs' firm Worman and Co. He settled the price with the defendant, obtained the bills of lading, paid the agreed price to the defendant, and caused the cotton seed to be delivered in Hull to buyers known to him but not to the defendant. The shipment of the three hundred tons though by one steamer, was in two [808] lots, of two hundred tons (3,200 bags) and hundred tons (1,600 bags) and the two lots were delivered to two different buyers. The arrangement between defendant and plaintiffs was embodied in two written agreements, signed by defendant which are set out at pp. 40 and 48 of the paper book, with counterparts signed by Worman and Co., which appear at pp. 128-129. One of the terms of the agreements was this :

" I/we guarantee to the buyers the weights, quality and sound condition at the port of delivery and I/we bind myself/ourselves to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I/we agree to accept your or your agents' reports, decisions, accounts, final invoices and/or other vouchers as correct and conclusive and binding upon me us.

It happened that by the same steamer the defendant shipped about 6,000 more bags of cotton-seed (he says of the same quality at the 300 tons) to other unknown buyers in England through other firms in Bombay under agreements on the same general lines as those with Worman and Co.

The utmost deduction he was called on to pay for short weight and inferior quality in respect of these other bags of cotton seed was 2s. 6d. a ton. But Worman and Co. informed him that in respect of the two shipments of 200 and 100 tons he had to pay at the rate 8s. 9d. and 6s. 9d. a ton respectively. These deductions were made under the rules of the London Incorporated Oil Seeds Association after weighment and sampling at Hull, the port of discharge, as provided in the contract. The extraordinary difference in the amount of the deductions payable, excited the attention of the defendant. He desired re-sampling in the case of the shipment of 300 tons. This was impossible. He appealed through Worman and Co. against the deductions : the appeal was fruitless. Then he declined to pay the charges claimed and in November 1907 Worman and Co. brought this suit to recover those charges from the defendant.

He resisted the claim at first on the ground that Worman and Co. as his agents had failed to carry out his instructions as to re-sampling and appealing. That ground, it should be mentioned, failed in the suit and was not sought to be made good in appeal.

[309] In February 1908, Mr. Schumacher found that he had to go to Europe shortly and desired to expedite the suit. This the defendant was not prepared for but agreed that Mr. Schumacher should be examined *de bene esse*. This was done in February.

The suit was heard in September. Mr. Schumacher had stated in his examination that the sale to him by defendant was an out and out sale and that he was not defendant's agent through whom the cotton seed was sold to unknown buyers. After this the defendant put in a supplemental written statement alleging in brief that Worman and Co. were his agents to sell ; that the sampling at Hull was made not under his contract with Worman and Co. but under other contracts between Worman and Co. and

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buyers in England, with which contracts defendant had no concern and under which he incurred no liability; and that Worman and Co. were bound to account for all their dealings with the goods.

In the suit the controversy turned on two main points which, briefly put, amount to this—

(1) Were the sampling and the appeal binding on the defendant?

(2) Were Worman and Co. agents to sell or buyers out and out?

The first controversial point was decided against defendant; the second in his favour.

Thereupon, this was the position. Under the contract between the plaintiffs and defendant the latter was bound to pay the deductions claimed. But the plaintiff had not acted under the contract, he had set it aside for he had bought for himself, not acted as a commission agent, and consequently could not claim under it. In the result, Macleod J. allowed the defendant to elect whether he would take a decree on the footing that defendant and plaintiffs were principal and agents or on the footing that plaintiffs were buyers out, and out had set aside the contract and could not claim under it. Defendant elected to take the latter course and the suit was dismissed.

The plaintiffs have appealed and the Hon. the Advocate-General who represented them stated fully, clearly and forcibly the argument for his clients and maintained that all the merits were on their side. He put it this way; these deductions for short [810] weight and inferior quality have to be paid by some one. All Worman and Co. can get is the price payable by the English buyers less the deductions. All defendant is entitled to, is the price agreed on less the deductions. But Worman and Co. have actually paid to the defendant the full price agreed on. How then in justice can defendant avoid paying the deductions? How can he justly retain the full price when the allowances which he agreed to pay have actually been paid by the plaintiff? So stated the case does appear to be very strong for the plaintiff. But as usual there is another side to it. Defendant (it is said on his behalf) dealt with Worman and Co. as commission agents. He trusted them as the business compelled him to do, to safeguard his interest. He was unaware of the identity of the buyers in England and could not reach them or protect himself in dealing with them except by the agency of Worman and Co.

When the weighing and sampling came to be made at Hull, it was all-important that they should be done in the presence of some one who would have a motive for safe-guarding defendant's interests. So long as Worman and Co. were agents acting in the interests of defendant they would employ agents at home who would make it their business to see that the weighing and sampling were fair to the defendant. But if Worman and Co. were buying on their own account they might ship to themselves (or their own agents) in Hull and then it would be to their interest to have the weighing and sampling done so as to bring about a large instead of a small deduction. For they themselves would pocket the whole of the deduction. This view of the case is of importance, not as suggesting dishonesty on the part of Worman and Co. but as showing that if defendant dealt with them as buyers he was running far greater commercial risks than if he dealt with them as commission agents.

Now Macleod J. has found that although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out agents in the contracts they signed with the defendant.



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If that be so, they induced defendant to believe he was running no more than ordinary commercial risks, whereas in reality he was [311] running risks of a much more serious nature and was placing them on a position in which they could benefit by his loss.

If it be so, justice does not require that they should be protected against loss due to their own action in order that defendant may not take an unforeseen profit. They could apparently have obtained from defendant deductions at 2s 6d. a ton; defendant was apparently ready to pay that for he deposited it in Court but they preferred to take the chance of getting more. It is not for them to complain because in taking that chance they incurred the risk of getting nothing.

In this case the merits are not unquestionably all on one side but depend on the facts found.

The real crucial question is that on which Macleod, J. has recorded an unambiguous finding. Did the plaintiffs induce the defendant to enter into contracts in the belief that they were to be commission agents?

The actual form of the contract has been keenly and exhaustively discussed. The result of the discussion is to demonstrate that it is in a form which suggests that Worman and Co. were commission agents and not buyers. It is unnecessary to embark on a detailed examination of the arguments one way or the other; it is enough to say that the relations between the parties were complex; one party took some risks, the other party took other risks; but nevertheless according to the form of the contract, the plaintiffs were to sell the cotton seed on behalf of defendant and not to buy it themselves. There are however two arguments which need comment. The Hon. the Advocate-General urged that defendant himself had admitted that plaintiffs were buyers and that the terms of the contract were such that plaintiffs stood to lose if they got nothing but the 2 p. c. commission or discount provided for in the contract.

It is quite true that defendant has spoken and written of plaintiffs as buyers from him. But this does not of itself indicate that defendant ever believed they were buyers only; and not his agents selling on commission. They were buyers in the sense that they represented purchasers in England and were the only persons with whom defendant would deal in arranging his [312] relations with the real buyers. Therefore, once the agreements were signed and the goods shipped, Worman and Co. would be of more immediate and practical importance to him as agents of the buyers in England than as his agents to sell. It was after this stage had been reached that defendant termed them buyers. It is not surprising then, that he did speak of them as buyers; unless we assume that he would carefully discriminate between the two capacities in which they stood to him, namely, as agents to sell on his behalf and as buyers on behalf of clients in England. Such nice discrimination is not to be expected and its absence does not excite the belief that defendant knew the plaintiffs were out and out buyers.

The second argument is made out in this way, plaintiffs were to get 2 p. c. on the price defendant paid, but they had to pay about  $\frac{3}{4}$  p. c. as weighing and superintending charges in Hull and  $2\frac{1}{2}$  p. c. discount to the buyers there. So unless they could make a profit by getting a better price in England they must inevitably lose; therefore, it must have been intended that they were to get a better price if they could; and it follows that they bought to make a profit for themselves and were buyers out and out and not agents to sell. The argument is neat but unconvincing. The



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price entered in the agreement between plaintiff and defendant would not be identical with the price arranged with the buyers in England. The latter price would naturally allow for the discount of  $2\frac{1}{2}$  p. c. if not for the charge of about  $\frac{3}{4}$  p. c. We have evidence of Mr. Powell of Messrs. David Sassoon and Co. to show that it is so and it naturally would be. In the nature of things, commission agreements need not state both the price at which the principal sells and that at which his agent sells. It may be implied that the price at which the agent sells is to cover discount and other charges and still leave him his clear commission. It is not necessary to express this, and what evidence there is on the point indicates that it is usually implied and not expressed. It does not, therefore, appear that the contracts were in a form so different from ordinary contracts made with commission agents as to suggest a sale out and out. The Hon. the Advocate-General also urged, it seems to me quite correctly, that the right way to deal with this [313] case, is to ascertain from the contract and the evidence what really were the relations between the parties: not to give the contract a name and from that name infer the relations. He urges that the crucial test is whether the plaintiffs were bound to account to the defendant and argues that they were not because the defendant did not call for an account either in this matter or in the previous dealings between the parties; and because the evidence shows that in apparently similar dealings between defendant and other parties accounts were not called for. All this is true; but the fact that in practice accounts are not called for, does not prove that there is not a liability to account. It is an indication which properly may be used as an argument in plaintiffs' favour. But is it a cogent argument or one of only slight value? I think, in this case it is the latter. In these, as in other mercantile dealings, there is necessarily a good deal of give and take and much mutual confidence. To enforce the liability to account as a practice, would impair the mutual confidence and create friction, where smooth working is essential. Hence, it is easy to understand that though the liability to account is there, it would not be enforced so long as the parties had confidence in, and desired to continue to deal with each other. This consideration, it seems to me, destroys the force of the Hon. the Advocate-General's argument. That a liability to account was contemplated is, I think, clear from the words in the contract. "We agree to accept your or your agents' reports, decisions, accounts, &c., as conclusive and binding upon us."

Having considered these general arguments I come back to the real question whether the plaintiffs induced the defendant to enter into the contracts in the belief that they were commission agents. I have shown that the form of contract indicates that plaintiffs were to be commission agents. The actual course of dealing indicates the same, for, as has been explained, on any other hypothesis, the defendant was running greater mercantile risks than it is reasonable to suppose, he would be likely to undertake. The evidence of Messrs. Powell, Jivaraj Tokersey, F. D. Lalka and Thomas, who show that Messrs. David Sassoon and Co., E. D. Sassoon & Co. and [314] Graham & Co. in similar dealings do act as commission agents and nothing else, supports this conclusion. The cumulative effect of these considerations tends clearly and definitely to the finding that plaintiffs would appear to the defendant to be commission agents. The plaintiffs could not fail to know this. It follows that they knowingly entered into contracts which could not bear any interpretation but that



they were commission agents. What is there on the other side? Putting aside the general arguments, the most important of which have been discussed, there is the evidence of Mr. Schumacher which states that Worman and Co. bought out and out on their own account and did not act as agents in the transaction; that the 2 per cent was trade discount and not commission; and implies that he did nothing to lead defendant to suppose Worman and Co. were acting as agents. There is also the evidence of the broker Pranshankar which is indefinite and does not, in my opinion, elucidate the matter at all. It is perfectly true that when Mr. Schumacher was examined the crucial points in the case were not so clearly understood as later, when the suit came on for trial; and that he was not questioned as to certain matters to which Meghji, the defendant, deposed; especially matters bearing on this question as to whether Mr. Schumacher led defendant to believe that the former was merely an agent to sell. Hence it is argued that either the defendant should not have been questioned on these points or that when defendant's case was closed the plaintiffs should have been allowed to adduce rebutting evidence. In my opinion, this argument cannot prevail. The issues indicated clearly enough what was in dispute. If matters came out in the evidence which plaintiffs had not foreseen, that was an ordinary incident of a trial. These matters were pertinent to the issues, they were an important support, not of a new case set up by defendant after the plaintiff's case was closed, but of defendant's case, as indicated in the second written statement and crystallized in the issues. Therefore, I do not think, plaintiffs were entitled to give rebutting evidence or that Macleod J. was wrong in refusing to allow it.

It only remains to add a few words as to Mr. Schumacher's evidence. Macleod J. who tried the case came to the conclusion [315] that, whether consciously or not, Mr. Schumacher did obtain the contracts on the representation (whether by precise unqualified words or not does not matter) that he was to act as commission agent. He does himself admit he did not tell the defendant he was buying out and out (page 34 of the Paper Book): this admission taken with the words of the contract, the course of dealing between the parties, and the course of dealing deposed to in similar transactions, convinces me that Macleod J. was right. That being so, the plaintiffs cannot claim under the contract, for they themselves set it aside. As purchasers out and out, the plaintiffs were themselves bound to accept, from the buyers in England, the price diminished by the amount of deductions there made. On what footing can they recover these deductions from the defendant? Not under the contracts, for these they themselves destroyed. If at all it is only, so far as I can see, by way of damages. But damages are neither claimed nor proved in the case. That they were not claimed, is clear from the course of the litigation. They are not proved, because the only evidence of them consists of reports and correspondence which would be conclusive, if the contracts could be appealed to, but which otherwise do not by themselves amount to satisfactory proof even if they are evidence at all.

Finally, the plaintiffs claim that they should be allowed to render an account; but that would be to assume that in fact they were agents, which they were not. They were in fact buyers out and out and went to trial and had issues framed on that assertion. They cannot now be allowed to rectify unforeseen losses by assuming the position of agents. The judgments in *Andrews v. Ramsay & Co.* (1) explain the principle on which the

(1) [1903] 2 K. B. 635.

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decree made by Macleod J. was proper. Therefore, I think, that decree should be confirmed and this appeal be dismissed with costs.

*Decree confirmed.*

Attorneys for the appellants: *Messrs. Bicknell, Merwanji and Romer.*  
Attorneys for the respondent: *Messrs. Kanga and Patel.*

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[316] CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

*In re SHIVLAL PADMA.\**

[25th November, 1909.]

*Criminal Procedure Code (Act V of 1898), section 195—Sanction to prosecute—Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), sections 37, 38.*

Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, a Full Court of that Court has no power to revoke the sanction.

*Per Chandavarkar, J.:*—The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court.

*Per Batchelor, J.:*—The Jurisdiction conferred by section 38 of the Act is not appellate, but revisional only.

[Ref : 60 I. C. 917=34 C. W. N. 783=47 Cal. 763.]

THIS was an application under the criminal revisional jurisdiction of the High Court.

The fifth Judge of the Bombay Presidency Small Causes Court granted a sanction to prosecute the applicant Shivalal Padma for offences punishable under sections 191, 193, 196, 463 and 465 of the Indian Penal Code.

The applicant applied to the Full Court of the Court of Small Causes at Bombay, but that Court declined to interfere on the ground that it had no jurisdiction.

The applicant applied to the High Court.

*S. B. Dadyburjor*, for the applicant.—The only point is whether the full Court of the Bombay Court of Small Causes can revoke the sanction granted by the fifth Judge. The power of one Court to revoke the sanction granted by another Court is given by section 195 of the Criminal Procedure Code. Under section 195 (6) "any sanction given or refused .....may be revoked or granted by any authority to which the authority... is subordinate." Clause 7 further defines the subordination. "Every [317] Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie.

We have thus to see whether the Court of the fifth Judge is subordinate to the Full Court within the meaning of section 195 (6) and (7) that is, whether an appeal ordinarily lies from the Court of the fifth Judge to the full Court. The powers of the Full Court are defined by section 38 of the Presidency Small Cause Courts Act (XV of 1882) and we have to see whether in view of these powers, it could be called an Appellate Court.

\* Criminal Application for Revision No. 284 of 1909.



The word appeal has nowhere been defined either in the Civil or Criminal Procedure Codes.

Wharton's Law Lexicon (8th Edn.) gives the definition of appeal as "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court." Century Dictionary defines the word as "in law, to refer to a superior Judge or Court for the decision of a cause depending; specifically to refer a decision of a lower Court or Judge to a higher one for re-examination or revisal." The definition in Webster's Dictionary is in terms similar to the one in Wharton's.

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It follows from these definitions of appeal that any Court, which could examine and test the soundness of the decision of another Court on any point, either of law or fact, is a Court of appeal to the other.

The Full Court satisfies all these conditions. It can, under section 38, alter, set aside or reverse any order or decree, passed by the fifth Judge. No Appellate Court could have powers wider than these. The Full Court consists of two Judges, *viz.*, the Chief Judge and the Judge whose decisions are under consideration. Its powers are given in a chapter which is headed "New Trials and Appeals." The constitution of this Court, as well as its powers, were fully considered in *Behram v. Ardeshir* (1). It is not necessary that an appeal should lie from one Court to another in *all* cases. If in some cases it lies, that is sufficient for section 195 of the Criminal Procedure Code: *Maduray Pillay* [318] *v. Elderton* (2). The word "ordinarily" is specially used in the section to obviate this difficulty. Therefore it does not matter if an appeal does not lie in *ex parte* cases.

*R. R. Desai*, for the respondent:—The word appeal does not appear anywhere in the section. I rely on the case of *In re Goverdhandas* (3) to show that the Full Court has no power to revoke a sanction granted.

Moreover the Full Court and the Court of the fifth Judge cannot be considered as two distinct Courts. No such distinction is made in the whole Act. The use of the word "appeal" in the heading of the chapter is not justified by what follows in the chapter itself.

CHANDAVARKAR, J.:—The question, in this case, is whether a Full Court of the Presidency Small Causes Court in Bombay has power to grant or revoke a sanction refused or granted by a single Judge of that Court. The determination of that question depends upon the further question whether the Full Court is a Court of appeal, or whether, if it is not a Court of appeal, it is a Court of ordinary original jurisdiction within the meaning of clause 7 of section 195 of the Criminal Procedure Code. As regards the Full Court, it ought to be borne in mind that there is no mention of or provision for it in the Presidency Small Cause Courts Act. This has been pointed out in a decision of this Court in *Behram v. Ardeshir* (1). As held there, it is a Court which has obtained its legality and status owing to a long continued practice. And there it was also held that, though no rules had been framed as to the exercise by the Full Court of any powers under the Act, it did not follow that the sittings of that Court were *ultra vires*. It is the long practice which has given it its validity. But that decision left the question untouched as to whether the jurisdiction exercised by the Full Court was of an appellate or revisional character. Its determination depends on the construction of sections 37 and 38

(1) (1903) 27 Bom. 563 ; 5 Bom. L. R. 555.

(2) (1895) 22 Cal 487.

(3) (1902) 27 Bom, 130.



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of the Presidency Small Cause Courts Act, XV of 1882. Now, these sections occur under Chapter VI of the Act. That chapter is [319] headed "New Trials and Appeals." No doubt the heading of a chapter is a key to the construction of the enactment, as has been pointed out by Lord Macnaghten in his judgment in *Arrow Shipping Company v. Tyne Improvement Commissioners* (1). But it is a key, only where the main provisions of the sections which occur under that heading or chapter are ambiguously worded. Here it is clear that the words of the heading of the chapter mean no more than that the chapter deals with the question of new trials and appeals. That does not mean that an appeal is allowed but it means that the chapter concerns the question. How that question is solved must be decided on the provisions of the sections of the Chapter. Section 37 says:—"Save as otherwise provided by this Chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive." That means that ordinarily a decree of a Presidency Small Causes Court is not appealable. Then section 38 goes on to provide that, "the Small Cause Court may...order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable." Does this language amount to an appellate jurisdiction conferred upon the Full Court? This is an Act of the Legislature of the Government of India, and in construing these sections, we may well call in aid the language used by the same Legislature in other Acts as to the right of appeal. For instance, in the Civil Procedure Code and in the Criminal Procedure Code, in conferring an appellate jurisdiction upon a Court apt language has been used, the words used being "an appeal shall lie." Here the provisions of the section do not use the word "appeal" at all. And that view, I think, is further strengthened by this circumstance, that where a right of appeal is given to a party, it means from a lower to a higher Court. For instance in the High Court, where there is a judgment by a single Judge, sitting as a Court, there is an appeal under the Letters Patent to a Court consisting of two Judges.

But here the Act makes no distinction between a Judge and more than one Judge of the Presidency Small Causes Court. [320] What is spoken of is the Small Causes Court, whether it consists of one Judge or more than one Judge. And the jurisdiction here conferred is not necessarily upon a Bench consisting of more than one Judge. Therefore, the language used in the sections does not appear to me to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court. It is all the more necessary to arrive at that conclusion, having regard to the decision of *Lehram v. Ardeshir* (2) which says that the Full Court is merely a creature of practice. There is no provision for it in the Presidency Small Causes Courts Act. Therefore, we should not extend its powers beyond those which have been recognised up to now unless there is anything express in the Act, which justifies the extension of these powers.

For these reasons, I am of opinion that the Full Court was right in holding that it had no jurisdiction to interfere with the sanction granted by the fifth Judge of the Small Causes Court. This application is rejected and the rule discharged.

BATCHELOR, J. :—I am of the same opinion. I think that in order that Mr. Dadyburjor should succeed in his application, it is necessary for him to show that under the Presidency Small Cause Courts Act, XV of

(1) [1894] A. C. 508 at p. 580.

(2) (1908) 27 Bom. 568; 5 Bom. L. R. 555.



1882, appeals ordinarily lie from the decision of a single Judge to the Full Court. (See section 195 of the Criminal Procedure Code.) That is a proposition which, in my opinion, it is impossible to maintain. The question turns upon the meaning of section 38 of the Presidency Small Cause Courts Act, and I have no hesitation in thinking that the jurisdiction conferred by that section is not appellate, but revisional only. The words used are apt for the purpose of expressing the grant of revisional jurisdiction and they are very inapt for the other purpose. No right is conferred upon the defeated litigant, but a power is conferred upon the Court, and it is noteworthy that the Court concerned is the same Court—the Small Cause Court—with which other sections of the Act deal.

Moreover if Mr. Dadyburjor's argument were right, then the result of section 38 would be this: that in case of every single [321] decree passed in a contested suit there would be a right of appeal. That view is, I think, opposed both to the general scheme of this Act and to the language of section 37, which must be read together with section 38. For these reasons, I agree with my learned colleague in thinking that this application should be refused.

*Rule discharged.*

33 B. 321 (=12 Bom. L. R. 204=5 I. C. 964.)

# APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

RAVJI valad MAHADU PATIL (Original Defendant), Appellant,  
v. SAKUJI valad KALOJI AND ANOTHER (Original Plaintiffs),  
Respondents.\*

[29th November, 1909.]

*Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.*

Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs.

The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir.

[Fol: 55 I. C. 306=22 Bom. L. R. 52=44 Bom. 185; Ref: 75 I. C. 999.]

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, confirming the decree of G. L. Dhekne, Subordinate Judge of Kopergaon.

The plaintiffs, who were cousins, sued for a declaration that they, and not the defendant, were the heirs to the Patilki Vatan of their paternal uncle Ganpati Hari, deceased, or of Reubai, the widow of the deceased. The plaint alleged that Ganpati died about 13 years before the suit, that the defendant fraudulently represented himself to be the heir of Ganpati and got [322] his name entered as such in the Vatan Register in the year 1899 though Ganpati had left him surviving his widow Reubai, that the defendant was *Dasiputra* (illegitimate son) in the plaintiffs' family and was, therefore, not entitled to the vatan, that Reubai died in or about the year 1902 in the Baroda territory where she lived, and that

\* Second Appeal No. 475 of 1909.



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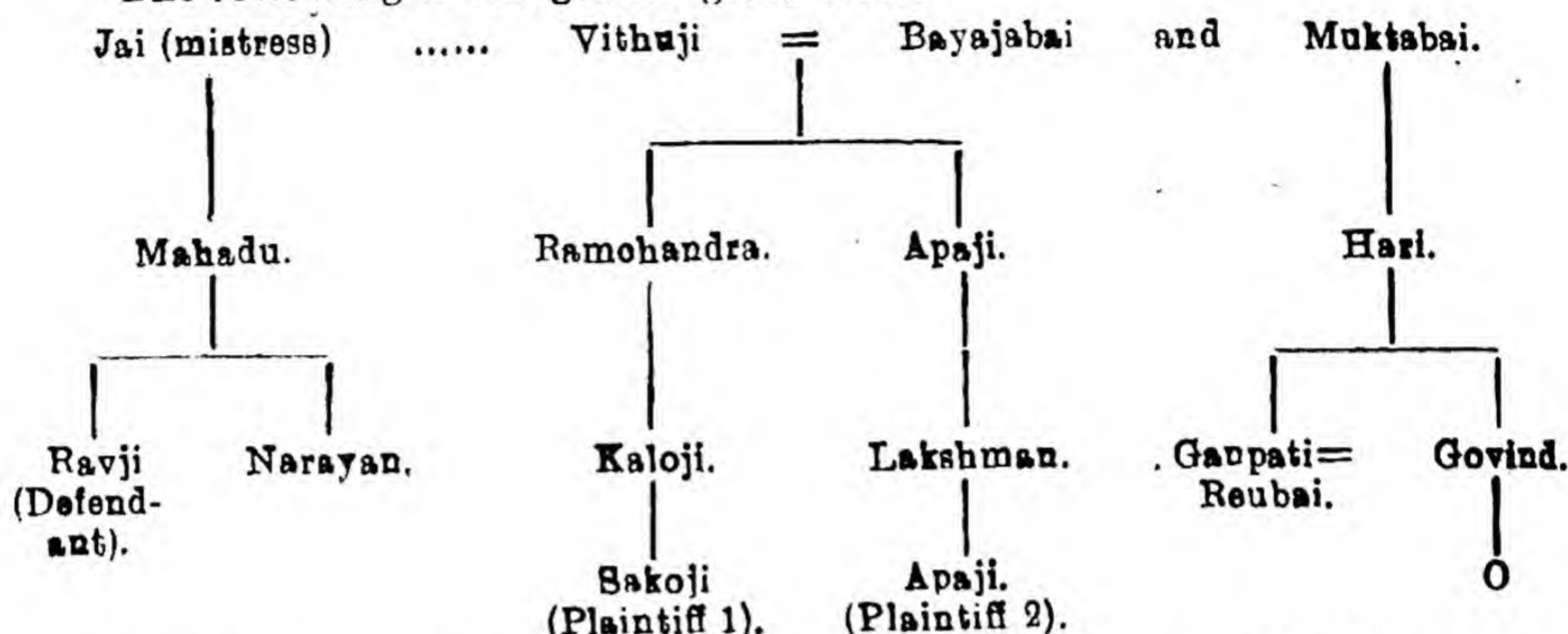
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the plaintiffs having learnt of the defendant's fraud in October 1905, they brought the present suit in the year 1906 for a declaration of their heirship.

The defendant answered that he was not a *Dasiputra*, that he was the son of Mahadu, the natural brother of Hari the father of Ganpati, that he was thus a nearer heir to Ganpati than either of the plaintiffs and that the suit was time-barred.

The following is the genealogical tree:—



The Subordinate Judge found that the plaintiffs were the heirs of the deceased Ganpati, that the defendant was the son of Mahadu who himself was a *Dasiputra* of the plaintiffs' ancestor Vithuji and was not the heir of Ganpati, that the defendant acted fraudulently in getting his own name entered as heir in the Vatan Register, and that the plaintiffs having learnt of the defendant's fraud about four years before the suit, the claim was not time-barred under Article 120 of the Limitation Act. The Subordinate Judge, therefore, decreed the claim, observing:—

The evidence shows that plaintiffs are the heirs of Ganpati and that the defendant is not shown to be born of their ancestor Vithuji. Even for the sake of argument if it be held that Mahadu was born of the mistress of Vithuji, still it can't be held that Mahadu's son Ravji is a preferential heir to the plaintiffs. There is no exact decided case to guide me. Referring to the cases under the [323] heading of "Illegitimate sons" on pp. 3188 to 3191 of Woodman's Digest, I think the case of 1 L. R. 21 All 99 goes against the defendant even if it be conceded that the defendant's father was a *Dasiputra*. As regards vatan property the sentiment of the Hindus even of the Sudra class would be that it should go to the legitimate heirs rather than to the descendants of the illegitimate heirs. The cases referred to above are most of them cases of inheritance by an illegitimate son to his father. There are few cases of collateral succession and the few that are cited are against the defendant. I think that sentiment and opinion even amongst the Sudras would be to give the plaintiffs a preference as against the defendant and especially so when vatan property is concerned. I therefore declare that plaintiffs are the heirs to the vatan share of Ganpati Hari and they are the reversionary heirs to Ganpati Hari now after the death of Ganpati's widow Reubai as regards the property in dispute. I declare that the defendant is not the heir as claimed by him. All costs on the defendant.

On appeal by the defendant the District Judge confirmed the decree. With respect to the defendant's illegitimacy he agreed with the Subordinate Judge, and on the point of limitation he made the following remarks:—

The only remaining question is that of limitation. The suit clearly falls under Article 120 of the Limitation Act, 37 L. R. 15 Bom. 422, and the question is, when did the right to sue accrue to the plaintiffs? As to this I agree with the lower Court that it did not accrue till Reubai's death, which was within six years of the institution of the suit. No doubt plaintiffs were adversely affected by the entry of defendant's name in place of Ganpati's in the vatan Register in 1899, but this in itself gave



them no right to sue for the relief claimed in the present suit, viz., that they were entitled to have their names entered in the register as heirs of Ganpati in preference to the defendant, because the latter in such a suit, could at once have pleaded that even on plaintiffs' case they had no right to such a declaration so long as Reubai was alive. And if, as appears from one of the documents tendered in evidence in this appeal and as is not unlikely from the fact that Reubai lived in Baroda, except for 7 years or so after her husband's death when defendant says she lived with him, Reubai was a consenting party to the defendant's name being entered in the register, it virtually amounted to an alienation of her share of the vatan by Reubai, which would, under section 5 of the Bombay Act III of 1874, be valid during her life-time. And the mere fact that plaintiffs could have brought a suit to declare such alienation valid (invalid?) (illustration (e) to section 42, Specific Relief Act) does not bar a suit like the present, after the plaintiffs have obtained a vested interest in the property in regard to which they seek a declaration. The "right to sue" is a different one and arises out of a different cause of action.

The defendant preferred a second appeal.

[324] *R. R. Desai* for the appellant (defendant):—The plaintiffs sued for the declaration of their status as Vatandars. Civil Courts have no jurisdiction to entertain such a suit.

[Scott, C. J. :—It has been recently held that such a suit can be entertained by Civil Courts : *Rahimkhan v. Dadamiya* (1).]

Our next point is that we are entitled to inherit the vatan though it has been found that our descent was illegitimate in a collateral branch of the family. The parties are Sudras, and under Hindu Law the illegitimate son of a Sudra has the rights of a legitimate son in the family of his father and his share in the family property is half of what a legitimate son is entitled to, and in the absence of a legitimate son he takes the whole of his father's property. The decision in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam* (2) is no doubt against our contention, but we submit that it is not conclusive on the point. There is nothing in Hindu Law to exclude illegitimate sons among Sudras from succeeding to collaterals : West and Buhler (3rd edn.), pp. 72, 81, 83, 461, 462 ; Macnaghten's Hindu Law (3rd edn.), pp. 14, 15. The ruling in *Ramalinga Muppan v. Pavadai Goundan* (3) shows that the sons of an illegitimate son are entitled to succeed to their grandfather. The principle of survivorship is also held to apply by the Privy Council in the case of illegitimate sons surviving the legitimate sons : *Jogendro Bhupati v. Nityanand Man Sing* (4). If that is so, then there is no reason why an illegitimate son should not succeed to the collaterals of his father.

The next point is that the suit is time-barred. Our name was entered in the Vatan Register as next heir after due inquiry under the Vatan Act in the year 1899, while the present suit was filed in the year 1906, that is, more than six years after the entry. It is true that Reubai died in 1902. But the cause of action accrued to the plaintiffs on the date our name was entered in the Vatan Register as the next heir. Such a suit is governed by Article 120 of the Limitation Act : *Chhaganram Astikram v. Bai Motigavri* (5) ; *Ramaswami Naik v. Thayammal* (6).

[325] *V. M. Mone* for the respondents (plaintiffs):—The question as to the inheritance of illegitimate sons is clearly covered by the rulings in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam* (7) and *Nissar Murtojah v. Kowar Dhunwunt Roy* (8). The cases cited and the passages relied on from West and Buhler do not support the defendant's contention.

(1) ante p. 101.

(2) (1898) 21 All. 99.

(3) (1901) 25 Mad. 519.

(4) (1890) 18 Cal. 151.

(5) (1890) 14 Bom. 512.

(6) (1902) 26 Mad. 488.

(7) (1898) 21 All. 99.

(8) (1863) 1 Marsh. 609.



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Bom. L. R.  
204=5 I. C.  
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As to the point of limitation, our claim is not time-barred. So long as Reubai was alive she was entitled to inherit the vatan as the widow of the last male-holder. Our cause of action accrued on her death. She died in the year 1902 and the present suit was filed in the year 1906, that is, within six years after her death; therefore, under Article 120 of the Limitation Act the suit is not beyond time.

*Desai* in reply.

SCOTT, C. J. :—In this case two points have been argued. First, that the suit is barred by limitation, and, secondly, that the defendant was entitled as an heir of Vithoji in preference to the plaintiffs. This latter point does not appear to have been argued in the District Court possibly because it was thought to be a hopeless point. The authorities are all against the defendant's contention, dating from the case of *Nissar Murtojah v. Kowar Dhunwunt Roy* (1) up to that of *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam* (2), and *Ramalinga Muppan v. Pavadai Goundan* (3). The Contention is also opposed to the opinion expressed by the learned authors of *West and Buhler's Hindu Law* at page 83 (3rd edn.). There is no caste custom proved in this case to support the defendant's contention (see also *Mitakshara*, chap. I, section 11, placitum 31).

With regard to the point of limitation we agree with the view taken by the learned District Judge. The plaintiffs' right to sue for a declaration would not accrue until the death of Reubai, whose existence at any time between the death of Ganpati and her own death would have defeated the suit for a declaration by [326] the plaintiffs, on the ground that she had vested right as the nearest heir of the last vatandar.

We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

34 B. 326 (=12 Bom. L. R. 129=11 Cr. L. J. 271=5 I. C. 861).

### CRIMINAL REFERENCE.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

EMPEROR *v.* ARJUN AMBO KATHODI.\*

[2nd December, 1909]

*Criminal Procedure Code (Act V of 1893), sections 109, 123, 397—Penal Code (Act XLV of 1860), section 329—Concurrent sentences—Consecutive sentences.*

The accused was proceeded against under section 109 of the Criminal Procedure Code, and sentenced on the 6th July 1900, under section 123 of the Code, to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months; the second sentence was directed to take effect on the expiry of the first sentence.

*Held*, that the two sentences ought not to run consecutively; but must run concurrently.

[Ref : 37 Bom. 178.]

REFERENCE made by J. L. Rieu, District Magistrate of Thana.

Arjun Ambo Kathodi was proceeded against under section 109 of the Criminal Procedure Code before the Honorary Magistrate First Class, Thana, who, in default of his giving the security demanded, sentenced him

\* Criminal Reference No. 100 of 1909.

(1) (1863) 1 Marsh. 609.

(3) (1901) 25 Mad. 519.

(2) (1898) 21 All. 99.



under section 123 of the Code to undergo rigorous imprisonment for nine months. This order was passed on the 6th July 1909.

Arjun was subsequently prosecuted in the Court of the First Class Magistrate, Salsette, for an offence of theft committed by him in November 1908, and convicted and sentenced to suffer rigorous imprisonment for three months on the 17th August 1909 [327] with a direction that the sentence should take effect on the expiry of the term of imprisonment ordered in the former case.

The District Magistrate of Thana, being of opinion that the direction was not permissible in law, referred the case to the High Court, observing :—

"In view of the decision of their Lordships delivered in *Emperor v. Muthukomaran* (I. L. R. 27 Madras 525), both the sentences ought to run concurrently."

The reference was considered by their Lordships.

*Per Curiam* :—We must accept the District Magistrate's view in this Reference which is in accordance with the ruling of this Court in *Queen-Empress v. Tulshya Bahiru* (1), with *Emperor v. Muthukomaran* (2) and *Joghi Kannigan v. Emperor* (3).

We must, therefore, make the sentences concurrent in the present case.

34 B. 327 (=5 I. C. 858=11 Bom. L. R. 120=11 Cr. L. J. 268.)

#### APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batehelor.

In re DHONDO KASHINATH PHADKE.\*

[22nd December, 1909.]

*Newspaper (Incitements to Offences) Act (VII of 1903), section 3—Order—Forfeiture of press.*

Section 3 of the Newspaper (Incitements to Offences) Act, 1908, provides for the making of a conditional order declaring the printing press used for the purpose of printing or publishing the offending newspaper to be forfeited. The section refers to the whole of the press : and no order could be made under it limited only to such portions of the press as were employed in printing the offending newspaper.

APPEAL from an order passed by J. L. Rieu, District Magistrate of Thana.

[328] Dhondo was the owner of a printing press called the Arunodaya Press at Thana.

A weekly newspaper called the "Hindu Panch" was printed at the aforesaid press. Some of the issues of the newspaper contained articles which fell within the purview of the Newspaper (Incitements to Offences) Act, 1908.

Under section 3 of the Newspaper (Incitements to Offences) Act, 1908, the District Magistrate of Thana, on the 6th October 1909, passed a conditional order for the forfeiture of the whole of the Arunodaya Press ; and he made the order absolute on the 18th idem.

In making the order absolute the Magistrate remarked as follows :—

"The respondent Dhondo Kashinath Phadke has presented an application in which he states that only one machine and two frames of type are used or can be used for

\* Criminal Appeal No. 405 of 1909.

(1) (1898) Unrep. Cr. C. 370.

(2) (1908) 27 Mad. 525.

(3) (1908) 81 Mad. 515.



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Bom. L. R.  
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L. J. 268.

printing the 'Hindu Panch' and prays that the order may be made in respect of these particular portions of his printing press only. I do not see how it is practicable to discriminate between particular portions of a press. It may be that the other portions of the press could not be used for printing the paper without introducing certain modifications in its size and appearance, but this would not be a bar to its production by the press which is the object of this preventive measure. I cannot therefore entertain the application. The order of forfeiture will extend to the whole of the printing plant and materials of the 'Arunodaya Press' by which the 'Hindu Panch' has been declared by its publisher under the Press and Registration of Books Act, 1867, to be printed and to all copies of that newspaper, wherever found."

The applicant applied to the High Court contending, *inter alia*, that the Magistrate erred in making the order applicable to the whole printing plant and materials of the Arunodaya Press, but ought to have ordered the forfeiture of the printing press used for the purpose of printing or publishing the said papers only.

*D. A. Tulzapurkar*, for the applicant.

*M. B. Chaubal*, Government Pleader, for the Crown.

*Per Curiam*:—This is an application by the petitioner Dhondo Kashinath Phadke by way of appeal against the order of the District Magistrate of Thana forfeiting the Arunodaya Press.

The argument advanced before us is that the Magistrate should have limited his order to the forfeiture of such portions of the [329] Arunodaya Press as were used for the printing of the "Hindu Panch" and should not have passed an order of forfeiture of the whole Press.

It is to be observed, however, that section 3 of the Newspaper (Incitements to Offences) Act, VII of 1908, provides for the making of a conditional order declaring the printing press used for the purpose of printing or publishing such a newspaper to be forfeited, and clause (c) of section 2 defines printing press to include all engines, machinery, types, lithographic stones, implements, utensils and other plant or materials used for the purpose of printing.

As the paper was printed at the Arunodaya Press, the Magistrate was right in forfeiting the whole press as defined by the Act.

We, therefore, dismiss the appeal.

*Appeal dismissed.*

34 B. 329 (=12 Bom. L. R. 208=5 I. C. 965.)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

TRIMBAK RAMCHANDRA PANDIT AND OTHERS (*Original Defendants*), *Appellants*, v. SHEKH GULAM ZILANI WAIKER (*Original Plaintiff*), *Respondent*.\*

[8th December, 1909].

*Saranjam—Inam—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.*

In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbrant of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights

\* Second Appeal No. 537 of 1907.



were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right.

[330] *Held*, that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title.

*Vasudev Daji v. Babaji Ranu* (1) and *Deo dem. Marlow v. Wiggins* (2), referred to.

The rights of successive holders of hereditary and impartible estates not governed by the ordinary rules of inheritance but subject to the condition that Government shall approve of the heir may be barred by adverse possession.

*Tekait Ram Chunder Singh v. Srimati Madho Kumari* (3), referred to.

Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants,

*Held*, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected.

[Ref : 61 I. C. 40=15 Bom. 694 ; 24 C. L. J. 103 ; 37 Bom. 224 ; 59 I. C. 473.]

SECOND appeal from the decision of D. G. Gharpure, First Class Subordinate Judge of Satara with appellate powers, confirming the decree of G. N. Sathe, Subordinate Judge of Wai.

Suit in ejectment brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants.

The facts of the case were as follows :—

The plaintiff's family held several Saranjams, Inams and other properties situate in the Poona, Satara, Khandesh and Belgaum districts. The land in dispute, known as the Wai Saranjam, is situate at Wai in the Satara District. In the year 1716 the plaintiff's ancestor Shekh Mira I, who was in the service of Satara Government, made a representation to Shahu Chhatrapati who granted to him a Sanad (Exhibit 94) as follows :—

Peace. Prosperity. In the coronation year 42 (A. D. 1716) the name of the cyclical year being Manmath, the lunar date the 5th of Shravan Bahul (dark half)—Monday. The illustrious King Shahu Chhatrapati (i.e., the lord of the umbrella) Swami—the ornament of the warrior race, issued an order to Rajashri Annaji Janardan, Deshadhikaris and Lekhaks (writers), present and [331] future of Prant Vai as follows :—Ajam Shekh Mira walad Bava Khan, an inhabitant of Kasba Vai, made a representation before the Swami (i.e., the King) at Fort Satara (stating) "I have rendered a great deal of service with a singleness of purpose in the kingdom of the Swami. As to that, there is my old *Katban*\* Thikan—being land cultivated by irrigation, measuring Bighas ...situated at Kasba Vai, which the Swami should be pleased to grant me in Inam." He made a representation to this effect. The Swami thereupon taking (the representation) into consideration and (considering) that he is a devoted servant of the Swami, is graciously pleased to grant in Inam the old *Katban*\* Thikan, being land cultivated by irrigation, measuring  $6\frac{1}{2}$  Bighas, six and a half Bighas—together with all taxes and cesses (but) exclusive of the Hakdars (dues) to him and to his sons, grandsons, etc., from generation to generation. You are therefore to fix the said land (so as), to measure six and a half Bighas—twenty Pands going to make one Bigha—and mark off the four boundaries thereof and continue the (same as) Inam. You are not to insist upon the production of refresh letter (of grant) and deliver the original letter to the person aforesaid for his enjoyment. Note this.

Subsequently in the year 1848 Shekh Khan Mahomed, a descendant of Shekh Mira I, granted in Miras (perpetual tenancy) the land in dispute

\* *Katban*=A grant or tenure in perpetuity for a fixed sum.

(1) (1871) 8 Bom., H. C. R. A. C. J. 175. (3) (1885) L. R. 12 I. A. 197.

(2) (1843) 4 Q. B. 367.

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to Baburav Raghunath Pandit, an ancestor of the defendants. The Miraspatra (Exhibit 84) was as follows:—

To Bhai Baburao Raghunath Pandit, may your affection endure from your sincere friend Amir Hussain *alias* Shesh Khan Mahomed Baba Sahab of Wai Inami Jahagirdar. Greetings—In this Kasba there is my Inami land. The same called *Katba* measuring Bighas 4 and (the right to take) water for a Prahar (i.e. three hours) have been with your father on a lease of cultivation for the total fixed rent of Rs. 40 since the Shaka year 1745 (1823-24 A. D.). As to that, you intimate to me that a fresh lease should be granted by me in regard to the same. The same (request) being considered, that you and your father had been very useful to me, this fresh Miras lease is granted. Therefore you should pay Rs. 40 every year as rent in respect of the above land, as you have been paying hitherto and enjoy the same. In future when on a survey being made of the land the assessment may be increased or decreased, you should pay accordingly and enjoy the said land yourself, your sons and grandsons, etc., from generation to generation. You will not be molested for more. Forwarded on the 19th moon of the year one thousand two hundred and forty-nine. The lunar date the 5th of Jeshtha Vaidya Shaka 1770 (31st June 1818), the name of the cyclical year being Kilak.

[332] Under the terms of the said Miraspatra the defendants' family continued to hold the land on payment of the fixed rent to the grantor Shesh Khan Mahomed till his death in 1872. After that year the defendants continued in possession on payment of the rent to the holders of the Saranjam for the time being or to Government when the Saranjam was resumed by Government owing to the death of the incumbent. In the year 1894 Government recognized the plaintiff as the holder of the Wai Saranjam, and he in the year 1904 brought the present suit to recover possession of the land in dispute from the defendants, alleging that they had been enjoying the land as Mirasdars under the former holders of the Saranjam and that the Miras grant was not binding on him.

The defendants contended *inter alia* that they were the Mirasdars of the land in dispute and the plaintiff had only the right of getting rent every year from them; that only the rent of the land was paid to the plaintiff, his ancestors and Government when the property was under attachment; that whenever the property was attached by Government, only the right to get the rent was attached, that the defendants' Miras right was thus recognized by Government and that the suit was time-barred.

The Subordinate Judge found that the Saranjam was handed over by Government to the plaintiff free of any incumbrances or other jural relations created by the previous holders, that the defendants were neither annual nor perpetual tenants of the land, they being occupants of the land were *quasi* tenants from year to year at the will and pleasure of the Saranjamdars, that the Saranjam included the ownership of the soil and was not restricted to the revenue of the land and that the plaintiff was entitled to recover possession. He, therefore, allowed the claim for the following reasons:—

Now the present holder of the saranjam is 5th in descent from Shesh Mira I to whom the grant of the saranjam was made in 1708 (1716 ?) A. D. and the title of the regant in his (present holder's) favour dates from 1894 (exhibit 42). The history as to how the property has been held by successive holders shows that each of them has received it at the pleasure of the then ruling power either for the military service to be rendered at the time of the grant or on [333] political considerations entirely within the discretion of the paramount power. The words of the grant from time to time predicate rather the break of the old estate with the death of the holder than its continuity through him to the new holder. The



words showing continuity from generation to generation have to be given in this case restricted sense and not their usual significance; and this is evident from the nature of the estate passed. It is argued for the defence that the words in the sanad relating to the lands called Katban, suggest that they were already in the occupation of the plaintiff's family and the grant created only the right under which they were thereafter to be held. It was argued that accordingly the powers of resumption to be exercised by Government at the death of the holder of the saranjam cannot go beyond what was originally granted. It cannot disturb the occupancy right. The import of the document was under the consideration of their Lordships of the Privy Council, and whatever their effect so far as the plaintiff's interest is concerned as against Government, they cannot be available to defendants who come under the grant of Khan Mahomed II and he could not pass more than what he had. He could give the life estate he had, and the words of the title-deed of the defendants itself indicate that a regrant was considered necessary and desirable. It has been decided by the Privy Council that no distinction can be drawn between the Inam and the other property in question, and the whole of the property including the Inam has to be continued as a personal and military Jahagir. Government's action from time to time was based on political considerations and the tenure created was political. The scope of defendant's title must, therefore, be judged from the scope of title of the plaintiff himself. Plaintiff has acquired the title as a holder under a re-grant of the saranjam, and this circumstance cuts asunder all relationships of title through which defendants' claim through the previous holders of said saranjam, and there is no continuity of interest through previous holders. Plaintiff acquired the estate free of any jural relationships created between previous holders and defendants.

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It will be seen from the peculiar nature of the estate successive holders of the saranjam have acquired that the defendants in occupation of the lands under them have no subsisting relations either as ordinary yearly tenants or as permanent tenants in the ordinary significance of the two terms. The occupation is of the nature of *quasi* tenants from year to year, if I may so style it, terminable with the estate of the successive holders, and continuable at their pleasure. The acts and omissions of previous holders cannot bind the plaintiff, and time cannot run against him as dating from the period of the last holder's enjoyment of the saranjam.

On appeal by the defendants the appellate Court confirmed the decree. The following are extracts from the Appellate Court's Judgment:—

The grant of the *saranjam* to plaintiff is admitted. It is also conceded that the Inam rights in the suit lands belong to the *saranjam* and are passed to plaintiff by the grant. The question is about the *Miras* rights. Plaintiff says [334] that these rights were created by former holders of the *saranjam* and that they terminated by the grant to him of the *saranjam* by Government. I feel not the slightest doubt that if plaintiff's former allegation is true, the latter must follow. The question now reduces itself to this: whether *Miras* rights were created in defendants by a former holder of the *saranjam* or existed in defendants prior to the very creation of the *saranjam*. It is proved in this case that the *saranjam* was created prior to 1785 (*vide Sanad* \* \* translated at p. 446 of I. L. R. 17 Bom. 445) and the plaintiff lands, at any rate, since that year, came to be considered as appertaining to the *saranjam*. It is not, therefore, necessary to go behind 1785. Now the creation of defendants' *Miras* was in 1848 (*vide Exhibit 84*). They are not able to go behind this year. If so, their rights must cease with the death of the grantor unless revived by the next holder of the *saranjam*. It is admitted that not only has the original grantor died but also his successors. Plaintiff who is now the holder of the *saranjam* does not wish to continue defendant's rights and they must vacate. This settles the whole question.

Plaintiff's title was created in 1895 (1894?) from which the present suit is within 12 years. It is not, therefore, time barred. On this point I was referred to *Radhabai v. Anantrav*, I. L. R. 9 Bom. 198, which is, however, a *vatan* case. A *vatan* succeeds to the *vatan* by right of inheritance. A *Saranjam* is entirely within the gift of the ruling power (I. L. R. 17 Bom. 431) and a successor takes the *saranjam* by virtue of this gift and not by right of inheritance, or any other right.

The defendants preferred a second appeal.

*Jayakar*, with *G. B. Rele* and *S. R. Bakhle*, appeared for the appellants (defendants):—Our first contention is that under the sanad, exhibit 94, what was granted as *Saranjam* to Shekh Mira I was the revenue of the land and not the land itself. The land is mentioned in the sanad as



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*Katban*, which word is the corruption of the word *Katuban*, and the meaning of *Katuban* is 'a grant or tenure in perpetuity for a fixed sum': see Molesworth's Dictionary. That being so, the land was thus already in the possession of the grantee as *Katban*, that is *Miras*, and what was granted by the sanad as *Saranjam* was the exemption from the payment of land revenue. The then Government exempted the grantee from the payment of the revenue due to royalty. The language of the sanad is quite clear on the point. Under the sanad the grantee's *Kadim* (old) *Katban* was granted in *Inam*. That means what was granted was the right of Government, namely, the right to receive revenue. Government could not profess to grant what already belonged to the grantee as perpetual tenant, [335] namely, the land. It was wrong to hold that the grant of the *Saranjam* affected the soil. Our contention is fortified by the grant of the *Miraspatra*, exhibit 84. That grant expressly refers to the revenue of the land. The land *Katban* was granted in *Miras* to the plaintiff's ancestor and we were to pay to him, our landlord, the revenue which was *Saranjam*.

Further, whenever Government resumed the *Saranjam* on the death of the holder and levied attachment thereon, what was attached was the revenue and not the land. They allowed the land to remain in our possession and we paid them the revenue. If the land was *Saranjam* Government would have attached the land.

[Batchelor, J. :—What Government resumed was the estate, that would mean the land also.]

We submit that was not so. If the land was *Saranjam* there was nothing to prevent Government from taking possession of the land by ejecting us, which they never did. Further, by resumption Government does not make itself the absolute owner of the *Saranjam*. The *Saranjam* is not extinguished. Government holds as trustee for the next incumbent to be chosen by Government. Such incumbent is generally a capable and an eligible member from the family of the deceased incumbent. A stranger is not generally allowed to come in. Whenever Government re-grants the *Saranjam*, such re-grant is always accompanied by the cash appertaining to the *Saranjam* accumulated in the hands of Government.

Further, it has been held that *Saranjam* is generally the grant of Royal revenue and very rarely soil: *Krishnarav Ganesh v. Rangrav* (1); *Vaman Janardan Joshi v. The Collector of Thana* (2); *Radji Narayan Mandlik v. Dalaji Bapuji Desai* (3); *Ramchandra v. Venkatrao* (4). There is no distinction between *Saranjam* and *Jahagir*. They are one and the same.

[336] Our next contention is that the suit is time-barred. The lower Court has computed the period of limitation from the time of the plaintiff's selection as *Saranjamdar* in the year 1894. But that is not a correct view. According to the nature of the *Saranjam* holding, each incumbent is only a life member. Assuming that the grant of the *Saranjam* included land, then the land came into our possession in the year 1848 under the terms of the *Miraspatra* granted by Shekh Khan Mahomed. He died in the year 1872, therefore the grant of the *Miras* by him also came to an end in that year. Notwithstanding that the grant thus came to an end we have continued in possession up to this day. Since 1872 we have

(1) (1867) 4 Bom. H. O. R. (A. C. J.) 1  
at p. 7.

(2) (1869) 6 Bom. H. O. R. A. C. J. 191.

(3) (1875) 1 Bom. 529.

(4) (1882) 6 Bom. 598 at p. 606.



been in possession. Therefore adverse possession began to run in our favour from the year 1872 and the present suit was brought in the year 1904. It is therefore clearly time-barred: *Dattagiri v. Dattatraya* (1); *Nilmoney Singh v. Jagabandhu Roy* (2); *Behari Lal v. Muhammad Muttaki* (3); *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (4); *President &c., of the College of St. Mary Magdalen, Oxford v. The Attorney General* (5); *Bobbett v. South Eastern Railway Company* (6).

*Coyaji*, with *G. S. Rao*, for the respondent (plaintiff):—This is a suit in ejectment and our title has been held proved. It was argued that the Saranjam was the grant of revenue and not of land. The documents relied on for this contention are of doubtful import. What was granted by the sanad, exhibit 94, was *thikan Katban*, that is land *Katban*. What is to be considered is what is the inference of fact to be drawn from the documents, and both the lower Courts have concurred in drawing that inference. Such an inference cannot be interfered with in second appeal.

The Saranjam and Inam have been held under one political tenure: *Shekh Sultan Sani v. Shekh Ajmodin* (7). This ruling of the Privy Council, though not *res judicata*, is relevant under sections 13 and 43 of the Evidence Act. It shows that Saranjams and Inams stand on the same footing and there is no distinction between them. In the year 1785 the character of the Saranjam [337] holding was changed and it was brought to the level of Inam holding as shown in the above ruling.

Saranjam and Jahagir are different estates. They differ in their nature: *Gulabadas Jugjivandas v. The Collector of Surat* (8); *Dosibai v. Ishvardas Jagjivandas* (9).

The point of adverse possession was not taken in the first Court. There was an issue on the point of limitation in appeal and the finding thereon was in the negative. When a party is in possession, his possession must be referred to a legal and not to an illegal origin. The defendants set up tenancy, therefore their possession cannot be adverse to us: *Dadoba v. Krishna* (10); *Budesab v. Hanmanta* (11); *Thakore Fatesingji v. Bamanji A. Dalal* (12).

The cases relied on in support of the point of adverse possession relate to Vatan and not to Sarangam. Vatan estate is hereditary, while Saranjam is only a life estate: *Ramchandra v. Venkatrao* (13). On the death of the Saranjamdar the property goes to Government. The period of adverse possession against Government is sixty years. It is not shown when the defendants' possession became adverse to us.

*Jayakar* in reply:—The decision of the Privy Council in *Shekh Sultan Sani v. Shekh Ajmodin* (7) does not touch the point as to the construction of the sanad in suit.

The land is mentioned in the sanad because its revenue was to be paid to the landlord.

Our possession became adverse from the year 1872 when Shekh Khan Mahomed who gave the Miraspatra to us died. Further there is evidence in the case, exhibit 78 and exhibit 79, which shows that in the

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(1) (1902) 27 Bom. 362.

(2) (1896) 23 Cal. 536.

(3) (1898) 20 All. 482.

(4) (1891) L. R. 27 I. A. 69.

(5) (1857) 6 H. L. O. 189.

(6) (1882) 9 Q. B. D. 424.

(7) (1892) 17 Bom. 481.

(8) (1872) 8 Bom. 186.

(9) (1891) 15 Bom. 222.

(10) (1879) 7 Bom. 84.

(11) (1896) 21 Bom. 509.

(12) (1903) 27 Bom. 515.

(13) (1882) 6 Bom. 598 at p. 606.



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years 1885 and 1889 we claimed to hold as Mirasdars, while the present suit was filed in the year 1904.

The cases relied on for the purpose of showing that Saranjam and Jahagir are distinct, turned upon the words of the particular grants therein.

[338] SCOTT, C. J.:—This is a suit in ejectment brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants.

It was conceded in the lower Court that the 'Inam' rights in the lands in suit appertain to a Saranjam held on political tenure and that the present incumbent of the Saranjam is the plaintiff. The defendants, however, contend that the Inam rights are merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were prior to the date of the Inam grant vested in the grantee of the Inam, have descended to his heirs independently of the Inam, and have furnished the permanent leasehold or Mirasi interest by virtue of which the defendants resist the plaintiff's claim to eject them. The lower appellate Court held it proved that the Saranjam was created prior to 1785 and that the lands in suit, at any rate since that year, came to be considered as appertaining to the Saranjam. As the lease under which the defendants claim dates only from 1848, the finding of fact of the lower Court disposes of the point.

If the question were, as urged by Counsel for the defendants, a mixed question of fact and law it must, nevertheless, be decided against the defendants. The contention involves the denial of the title to the reversionary rights in the lands in the defendant's occupation of the successive Saranjamdars approved by Government. The defendants have, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They are thus estopped by attornment from disputing the plaintiff's title. See *Vasudev Daji v. B. baji Ranu* (1) and *Doe dem. Marlow v. Wiggins* (2). In so far as the defendants' case depends upon the construction of the Sanad of 1785, the decision of the lower Court rests upon the authority of the judgement of the Privy Council in favour of Sheikh Ajmodin, the Saranjamdar, who succeeded their lessor, against Sheikh Sultan Sani, their lessor's devisee, with reference to the lands in suit. A reference to the report of the proceedings in that litigation will show that the lands in suit were held not to be the private heritable and devisable property of the defendants' lessor but to [339] be held on political tenure as part of the Saranjam. See *Shekh Sultan Sani v. Shekh Ajmodin* (3).

The defendant's second line of defence was that the plaintiff's right is barred by the adverse possession of the defendants for upwards of twelve years under a claim to hold as permanent tenants. It is urged that time will run against the successive Saranjamdars for the same reasons as it was held to run against successive Watandars in *Radhabai v. Anant-rav* (4). This defence involves an examination of the nature of the particular estate with which we are concerned. The nature of the estate appears clearly from the judgment of the Privy Council in *Shekh Sultan Sani v. Shekh Ajmodin* (3). It is there stated that in consequence of the advice of Mr. Elphinstone the Court of Directors, in a despatch of the 26th October 1842, directed that the Jaghir of Shekh Mira (being the estate in question) "already restored to the son of the last holder but for life only must be considered hereditary". "It remained for Government," say their Lordships, "when necessity should arise to determine to

(1) (1871) 8 Bom. H. C. R. (A. C. J.) 175.

(2) (1849) 4 Q. B. 367.

(3) (1892) 17 Bom. 431.

(4) (1885) 9 Bom. 198.



whom it should regrant or in whom it should recognise a right of succession to the Jaghirs then possessed by Khan Mahomed." Khan Mahomed died on the 31st of December 1872. It then became necessary to determine to whom his Saranjam should be granted. Amongst the candidates was Shekh Ajmodin, the respondent, a descendant of Shekh Abdul Khan, the half brother of Khan Mahomed. This led to a Resolution by the Government dated the 23rd of October 1873 "that the Agent for Sardars should be requested to investigate judicially and after due notice to all parties concerned whether Shekh Ajmodin is under Mahomedan law the legitimate successor to the headship of the family either by adoption or descent." On the 28th November 1873, the Agent reported that Shekh Ajmodin was not the legitimate successor to the headship of the family under Mahomedan law as Khan Mahomed had left a daughter and she had sons who were nearer the head of the family than Shekh Ajmodin, but he recommended that any property the succession to which Government had power to regulate should go [340] to Ajmodin. On the 27th March 1874 the Government confirmed the Agent's report in the following terms:—

"Resolution.—The proceedings of the Agent for Sardars are approved and for the reasons given by Baron Larpent Shekh Ajmodin should be recognised as the head of the family to whom the Saranjam should be continued. To avoid disputes, the allowances for maintenance of the widows of the deceased Shekh Khan Mahomed and Shekh Abdul Kadar and of any others who have a claim for maintenance on the estate should be settled by order of Government after receiving the recommendation of the Agent. The allowances now paid to Shekh Rakmodeen and Rahimanbee under Government letter of 28th March 1861 should be continued."

This arrangement having been approved by the Secretary of State, the whole of the Jaghir and Inam incomes were made over to Shekh Ajmodin, and the agent and the administrators of the estate which had been taken into the hands of Government called on all persons to acknowledge him as owner.

Their Lordships conclude their judgment as follows:—

"Their Lordships, however, are of opinion that no distinction can be drawn between the Inam and the other property in question. As has been pointed out, the Sanad of 1785 included the inam villages and lands with the Mokasa as parts of one Saranjam for the support of troops. The effect of the treaty of the 3rd July, 1820, was to continue to Shekh Mira the whole of the property, including the inam, as a personal and military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer that 'the whole estate intact, Saranjam and Inam, as restored after the war under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son' (Ajmodin) 'as the head of the family'.

"Their Lordships, therefore, concur in the opinion expressed by the Governor-in-Council that a mixed estate of Saranjam and Inam was granted by the treaty of July, 1820, to be held on the [341] same political tenure, and passed intact to the person whom the Government might recognise as the head of the family."

The estate then is a guaranteed hereditary estate. The right to succession is in the family, but it is subject to regulation by Government.

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When there is a delay in the choice of a successor to the last incumbent, Government collects the revenues for the next holder. The holder has no power of testamentary alienation and presumably has no greater powers with regard to the estate than the holders of other Saranjam estates which are, as a general rule, inalienable and impartible. See *Radhabai v.*

*Anantrav* (1).

It was conceded that a Saranjamdar would not, except possibly for necessity, have power to create a Mirasi lease to enure beyond his lifetime, and the defendants could not, after Khan Mahomed's death, successfully base their possession upon the lease of 1848. The defendants' contention was disposed of by the lower Court on the ground that a successor takes the Saranjam by virtue of the gift of the ruling power and not by right of inheritance or any other right, and that as the plaintiff succeeded in 1895 and the suit was filed in 1904, the claim is not time-barred. It is clear from what has been said above that the lower Court did not rightly apprehend the nature of this particular estate. In its incidents it resembles Ghatwali estates of the kind investigated by the Privy Council in *Rajah Nilmoni Singh v. Bakranath Singh* (2), estates which are not transferable nor divisible, which are hereditary though not governed by the ordinary rules of inheritance, and which are subject to the condition of the Government's approval of the heir. Against the successive holders of such estates rights may be acquired by adverse possession. See *Tekait Ram Chunder Singh v. Srimati Madho Kumari* (3). In that case it was held that time would begin to run not from the commencement of the tenancy of persons claiming to hold as permanent tenants but from the date when the claims of the parties became openly and undoubtedly adverse. In the present case it is shown that at least from 1889 the defendants openly asserted their claim to hold as permanent Mirasi tenants. As this was [342] more than 12 years before suit the defendants have acquired a title to the limited interest claimed by them and cannot be ejected.

We, therefore, allow the appeal. We set aside the decree of the lower appellate Court and dismiss the suit with costs throughout.

*Decree set aside and suit dismissed.*

(1) (1885) 9 Bom. 214, Note (8).

(2) (1882) L. R. 9 I. A. 104.

(3) (1885) L. R. 12 I. A. 183 at p. 197.



34 B. 342 (=5 I. C. 860=12 Bom. L. R. 124=11 Cr. L. J. 269.)

## APPELLATE CRIMINAL.

*Before Mr. Justice Batchelor and Mr. Justice Knight.*

EMPEROR v. BALVANTRAO ANANTRAO.\*

[19th January, 1910.]

*Bombay Abkari Act (Bombay Act V of 1878), sections 43 (b), 47†—Cocaine—Illegal possession—Removal—Transportation of cocaine.*

Accused No. 1 who was illegally in possession of cocaine brought it from his room and gave it to accused No. 2 who stood opposite his house. The latter carried it to some distance and delivered to a Purdesbi. The two accused were, under these circumstances, charged with transporting cocaine, an offence punishable under section 43 (b), of the Bombay Abkari Act, 1878. The Magistrate however, acquitted them of the offences and convicted them of illegal possession of cocaine, under section 47 of the Act. Against the order of acquittal, the Public Prosecutor appealed to the High Court:

*Held*, that the Magistrate was right in declining to convict the accused under section 43 (b), of the Bombay Abkari Act, 1878, inasmuch as the accused's [343] offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act.

Section 43, clause (b), seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place.

APPEAL by the Government of Bombay from an order of acquittal recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

Balwantrao and another were tried for an offence punishable under section 43 (b) of the Bombay Abkari Act, 1878, the former on a charge that on the 30th September 1909 at Fanas Wadi, Bombay, he transported 13 ounces of cocaine and the latter that he aided and abetted the offence.

The possession of cocaine by Balvantrao was unlawful from its inception. It was removed by him from his room at Fanas Wadi and handed to accused No. 2 who stood near the gate of the Wadi; and then the latter proceeded with the cocaine from thence to Bhang Wadi where he handed the parcel to a Purdeshi.

The Magistrate found that as the word "place," was not defined in the Bombay Abkari Act, 1878, there was no illegal transport or removal of the cocaine within the meaning of section 43 (b) of the Act: he, therefore, acquitted both the accused of the offence, and convicted them only of illegal possession of cocaine under section 47 of the Act. His reasons were as follows:—

"The word 'place' is not defined in the Abkari Act and the defence contends that the removal of cocaine from accused's house at Fanas Wadi to Bhang Wadi

\* Criminal Appeal No. 413 of 1909.

† Sections 43 (b) and 47 of the Bombay Abkari Act (Bombay Act V of 1878) run as follows:—

43. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act,—.....

(b) transports or removes liquor, hemp or any intoxicating drug from one place to another, or ..... shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

47. Whoever, except under the authority of some license, permit, pass or special order obtained under this Act, has in his possession within any local area or place to which the provision of section 17 has been applied, any larger quantity of country liquor or of any intoxicating drug than may legally be sold by retail under the provision of the said section, shall be punished with fine which may extend to two hundred rupees.

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34 B. 342=5  
I. C. 860=12  
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124=11 Cr.  
L. J. 269.



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CRIMINAL.

34 B. 842=5  
I. C. 860=12  
Bom. L. R.  
124=11 Cr.  
L. J. 269.

would not be a removal from one place to another within the meaning of section 43, that a removal from one place to another must mean a removal from one village or town or district to another and that if the evidence is believed the only section under which accused can be convicted is that possession under section 47. The defence also contend that in the absence of evidence to show the transport was illegal the only section under which accused can be convicted is section 47. I think this latter contention must be upheld. I convict accused under section 47."

The Public Prosecutor appealed to the High Court from the order of acquittal.

[344] *M. B. Chaubal*, Government Pleader, for the Crown.

*Gadgil*, with *D. R. Patwardhan*, for the accused.

PER CURIAM :—We think that we ought not to interfere with this acquittal, and that the Magistrate was right in declining to convict the accused under section 43 (b) of the Bombay Abkari Act V of 1878. The fact was that the accused's possession of this cocaine was altogether illegal, and, in these circumstances, it seems to us that section 43 (b) does not apply. That section seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place. Here the offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act. The appeal, therefore, must be dismissed.

*Appeal dismissed.*

34 B. 344 (=5 I. C. 859=12 Bom. L. R. 122=11 Cr. L. J. 269.)

APPELLATE CRIMINAL.

*Before Mr. Justice Batchelor and Mr. Justice Knight.*

EMPEROR v. MULJI DAMODARDAS.\*

[19th January, 1910.]

*City of Bombay Municipal Act (Bom. Act III of 1888), section 390—Factory—Municipal Commissioner, permission of—Unauthorised factory.*

The accused obtained the Municipal Commissioner's permission [section 390 (1) of the City of Bombay Municipal Act, 1881], to establish a hand-loom factory worked by an oil engine : but by means of this oil engine he also established a flour mill—without any permission. The accused was, therefore, charged with the offence under section 390 (1) of the Act :—

*Held*, that the accused was guilty of a technical offence under section 390 (1) of the City of Bombay Municipal Act, 1888 : for although the accused had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory.

[345] APPEAL by the Government of Bombay from an order of acquittal passed by P. H. Dastur, Second Presidency Magistrate of Bombay.

Mulji Damodardas obtained from the Municipal Commissioner of the City of Bombay a permission, under section 390 (1) of the City of Bombay Municipal Act, 1888, for the establishment of a hand-loom factory to be worked by an oil engine.

It appeared that Mulji (accused) instead of using the oil engine solely for the purpose of working a hand-loom factory used it also for the purpose of working a flour mill.

\* Criminal Appeal No. 452 of 1907.



The accused was under these circumstances tried for an offence under section 390 (1); but the Magistrate acquitted him.

The Public Prosecutor appealed to the High Court from the order of acquittal.

*Strangman*, Advocate General, with *E. F. Nicholson*, Public Prosecutor for the Crown.

*Inverarity*, with *T. R. Desai*, for the accused.

*Per Curiam*:—The respondent here was charged before the Presidency Magistrate, with having committed an offence under section 390 (1) of the Bombay Municipal Act III of 1888. He was acquitted by the Magistrate, and the Government of Bombay appeals against that acquittal.

Section 390 (1) lays down that—

“No person shall newly establish in any premises any factory, workshop or workplace in which it is intended that steam, water or other mechanical power shall be employed, without the previous written permission of the Commissioner.”

The accused obtained the Municipal Commissioner's permission to establish a hand-loom factory, worked by an oil engine. But by means of this oil-engine the accused has also established a flour mill. It seems to us quite clear that he is guilty of a technical offence under section 390. The mechanical power or force is to be distinguished from the factory. And here, although the respondent had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which, in our opinion, is not the less another and a separate factory because [346] it happens to be worked by the same power which it was proposed to employ in the permitted factory. We are, therefore, of opinion that the acquittal should be set aside, and that the respondent should be convicted of the offence charged. He has undertaken, through his Counsel, not to work the flour mill beyond to-day, without permission under section 390, and in these circumstances we think that a nominal fine of one rupee will be sufficient.

*Appeal allowed.*

34 B. 343 (=5 I. C. 860=12 Bom. L. R. 126=11 Cr. L. J. 270.)

APPELLATE CRIMINAL.

*Before Mr. Justice Batchelor and Mr. Justice Knight.*

EMPEROR v. RAJA BAHADUR SHIVLAL MOTILAL.\*

[19th January, 1910.]

*City of Bombay Municipal Act (Bombay Act III of 1888), section 377†—Municipal Commissioner—Neglected premises—Notice to remove nuisance—Magistrate's discretion.*

\*Criminal Appeal No. 458 of 1909.

†Section 377 runs thus.—

(1) If it shall appear to the Commissioner that any premises are overgrown with rank and noisome visitation or are otherwise in an unwholesome or filthy condition or, by reason of their not being properly enclosed, are resorted to by the public for purposes of nature, or are otherwise a nuisance to the neighbouring inhabitants, the Commissioner may, by written notice, require the owner or occupier of such premises to cleanse, clear or enclose the same, or, with the approval of the standing committee, may require him to take such other order with the same as the Commissioner thinks necessary:

(2) Provided that, in so far as the unwholesome or filthy condition of such premises or such nuisance as abovementioned is caused by the discharge from or by any defect in the municipal drains or appliances connected therewith, it shall be incumbent on the Commissioner to cleanse such premises.

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34 B. 344=5  
I. C. 859=12  
Bom. L. R.  
122=11 Cr.  
L. J. 269.



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CRIMINAL.

34 B. 346=5  
I. C. 860=12  
Bom. L. R.  
126=11 Cr.  
L. J. 270.

The accused was served with a notice of requisition under section 377 of the City of Bombay Municipal Act, 1888, requiring him to remove filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him. He failed to comply with the requisition, and a prosecution was instituted against him. The Magistrate viewed the premises; and having so viewed them, but without hearing any evidence, acquitted the accused, as the premises did not appear to him to be in a filthy condition:—

[347] *Held*, that the premises having appeared to the Commissioner in a filthy condition, the notice was validly issued under section 377 of the City of Bombay Municipal Act, 1888; and that there having been a non-compliance with the notice, the offence was complete.

*Held*, further, that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under section 377.

Section 377 of the City of Bombay Municipal Act, 1888, enacts that the only condition precedent to the valid issue of a requisition is that it shall appear—not to the Magistrate but—to the Commissioner that the premises are in the condition specified in the section.

CRIMINAL appeal by the Government of Bombay, from the order of acquittal passed by P. H. Dastur, Second Presidency Magistrate of Bombay.

The Municipal Commissioner of the City of Bombay issued a notice under section 377 of the City of Bombay Municipal Act, 1888, calling upon the accused Raja Bahadur Shival Motilal to remove the filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him.

The accused failed to comply with the requisition. He was therefore prosecuted.

The Magistrate heard the complainant, recorded the accused's plea of not guilty, and postponed the further hearing as he was desirous of personally viewing the premises. The Magistrate did so; and on the next day of hearing, without hearing any evidence, acquitted the accused, remarking: "The heap was seen by me and it is not *cutchera* but only earth."

As a matter of fact, however, though the accumulation of the rubbish in question had outwardly the appearance of an undulating mound of earth of varying height extending for above thirty yards along the length of the western side of the vacant land, it was found on inspection by the Municipality to be nothing less than a heap of house and stable refuse in all stages of decomposition and that there were at least eighty cart-loads of such refuse in the said heap. The evidence of these facts was available to the complainant at the hearing and the Magistrate was also informed of it.

The Public Prosecutor appealed to the High Court against the order of acquittal.

[348] *Strangman*, Advocate General, with *Nicholson*, Public Prosecutor, for the Crown.

*Setalvad*, with *Bhaishankar*, *Kanga* and *Girdharlal*, for the accused.

BATCHelor, J.:—The respondent here was served with a notice or requisition under section 377 of the Bombay Municipal Act III of 1888, requiring him to remove filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him. The requisition was not complied with and a prosecution was instituted in the Court of the Presidency Magistrate. The learned Magistrate, on the 25th of May, adjourned the case so that he himself might view the premises in question, and having so viewed them, but without hearing any evidence, acquitted the respondent, recording his reason for that acquittal in these words: "The heap was seen by me and it is not *cutchera* but



only earth." On this appeal it is represented to us by the Advocate General, on behalf of the Municipal Commissioner, that though the accumulation of the rubbish in question had outwardly the appearance of an undulating mound of earth of varying height extending for about 30 yards along of the western side of the vacant land, it was found, on inspection by the Health Department to be nothing less than a heap of house and stable refuse in all stages of decomposition and that there were at least eighty cart-loads of such refuse in the said heap, that evidence of these facts was available and that the learned Magistrate was so informed. But however that may be, the respondent's acquittal cannot be sustained. The learned Magistrate, I think, has somewhat misread section 377 of the Municipal Act. He has read it as if it enacted that certain consequences should ensue when the premises appeared to the Magistrate to be in a filthy condition. But that is not so. As I understand the section, it enacts that the only condition precedent to the valid issue of a requisition is that it shall appear, not to the Magistrate, but to the Commissioner, that the premises are in such a condition. It is not denied here that these premises did appear to the Commissioner to be in the condition specified; and the notice was, therefore, [349] validly issued under section 377. That being so, the Magistrate was, I think, wrong in acquitting the accused on the sole ground that the premises did not appear to the Magistrate to be in such a condition as to justify the issue of a notice under the section. It is admitted before us now that the Municipal Commissioner's order has not been complied with. I am, therefore, of opinion that the acquittal should be set aside and that the respondent should be convicted under section 471 of the Act. But, in the circumstances of the case a nominal fine of one rupee will, I hope, be enough.

KNIGHT, J.—I concur.

*Appeal allowed.*

34 B. 349 (=12 Bom. L. R. 157=5 I. C. 869).

#### APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar, and Mr. Justice Knight.*

SAKHARAM HARI AND OTHERS (*original Defendants*),

*Appellants, v. LAXMIPRIYA TIRTHA SWAMI*

(*original Plaintiff*), *Respondent.\**

[20th January, 1910.]

*Limitation Act (XV of 1877), Sch. II, Arts. 131, 62—Cash allowance—Tastik—Arrears of cash allowance, suit to recover.*

The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shree Madhukeshwar at Banawasi, a sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal,

*Held*, that the claim was properly allowed.

A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the

\* Second Appeal No. 595 of 1909.

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34 B. 346=5  
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24 B. 349=12  
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157=5 I. C.  
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right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. [350] But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right.

The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment.

[App: 33 Mad. 916.]

SECOND appeal from the decision of D. S. Sapre, First Class Subordinate Judge, A. P., at Karwar, confirming the decree passed by R. R. Sane, Subordinate Judge of Sirsi.

Suit to recover arrears of a cash allowance called *tastik*.

The plaintiff was the manager of a temple called the Vyasraja Matha at Hulekal. The temple was in receipt of a cash allowance every year from the defendants who were the managers of the temple of Shree Madhukeshwar at Banawasi.

The claim was for arrears which had accrued due during the six years preceding the suit.

The defendants admitted the plaintiff's right to receive the allowance; but they claimed that his right to two years out of the six was barred by limitation.

The Court of first instance held that Article 131 of the Limitation Act, 1877, applied to the case, and decreed the plaintiff's claim in full. His reasons were as follows:—

The plaintiff's right to receive this annual payment is acknowledged by the defendants to be an already established one, since time immemorial. It is therefore not at all necessary for the plaintiff to bring a suit for the establishment thereof. So, he can, in a suit like the present, recover arrears that fell due within twelve years before this suit (*vide Chhaganlal v. Bapubhai*, I. L. R. 5 Bom. 68, followed in I. L. R. 16 All. 189).

[351] It is however contended by Mr. Jode for the defendants that this suit is governed by Article 62 of the Limitation Act. But I think that his contention cannot prevail. For, Article 62 applies to the case of a person, suing for his co-sharer who has received the whole amount from the person primarily bound to pay; whereas Article 131 applies to the case of a *hakdar* (i.e., person entitled to some allowance) suing the person primarily bound to pay him the whole *hak* (*vide* Starling's Indian Limitation Act, 4th Edition, page 285). In the present case, it is not alleged by the defendants that they and the plaintiff are co-sharers and that as such, they have received the amount of plaintiff's share for plaintiff's use, from a third person primarily liable to pay. According to plaintiff's allegation in the plaint, the temple property being primarily liable for the payment, the managers of the temples for the time being are the persons primarily liable to pay the amount to him. These allegations were not traversed by the defendants although defendant No. 1, who is the principal manager, was examined on oath (exhibit 11).

Again, according to Article 62, the period of limitation is to be counted from the date when the money is received by the defendants for plaintiff's use. It is neither alleged nor proved by the defendants that the money payable to plaintiff was at any time received by them from some third person for the plaintiff's use. On the contrary



they have distinctly stated in paragraph 3 of their written statement (exhibit 5) that in their account, the year is computed from the 1st of August to the 31st of July of the following year; and that the sum payable to plaintiff for any particular year falls due, after the close of that year. So according to them, the cause of action is to arise in the month of August of each year. This is quite inconsistent with the theory that Article 62 applies to this suit. I am therefore of opinion that this suit is governed by Article 131 of the Limitation Act.

On appeal, this decree was confirmed.  
The defendants appealed to the High Court.  
K. H. Kelkar, for the appellant.  
The respondents did not appear.

CHANLAVARKAR, J.:—In the suit out of which this second appeal arises, the respondent before us as plaintiff sought, as manager of the temple of Shri Laxmi Narayan Dev at Hulekal, to recover the arrears for six years of a cash allowance (*tastik*) due to the temple from year to year from the temple of Shree Madhukeshvar at Banavasi, of which the present appellants are managers.

The appellants admitted the title of the respondent to the allowance but pleaded limitation as to the arrears for two out of the six years.

[352] The Subordinate Judge, who heard the suit, held that the period of twelve years under Article 131 of the Limitation Act applied to the claim for arrears and allowed the whole of the claim. The Subordinate Judge, First Class, who heard the appeal from the original decree, has confirmed it.

On this second appeal it is argued, on the authority of *Chamanlal v. Bapubhai* (1), *Raoji v. Bala* (2), *Kathna Mudaliar v. Tiruvenkata Chariar* (3), that the claim to the arrears is as for money had and received, to which Article 62 of the Limitation Act XV of 1877 applies.

A cash allowance of the nature, such as we have in the present case, is, according to Hindu Law, *nibandha* or immoveable property. Where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. But where there are more than one person entitled to the payment as co-sharers and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right. This is the law clearly established by the decisions of this Court. In *Harmukhgaury v. Harisukhprasad* (4), it was held that Article 132 of Act IX of 1871 (which is the same as Article 131 of Act XV of 1877) applied to a suit brought by a *hakdar* against the person originally liable to pay the *hak* and not to a suit brought by a co-sharer in the *hak* against another co-sharer who has received from the person originally liable the whole amount. The same principle was adopted in *Desai Moneklal Amratlal v. Desai Shivalal Bhogilal* (5) and *Dulabh Vahuji v. Bansraharrai* (6). In [353] *Raoji v. Bala* (7) it was held that a suit by one co-sharer to establish a title to a periodically recurring right as against another co-sharer

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84 B. 349=12  
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(1) (1897) 22 Bom. 669.

(2) (1890) 15 Bom. 135 at p. 140.

(3) (1899) 23 Mad. 351.

(4) (1883) 7 Bom. 191.

(5) (1884) 8 Bom. 426.

(6) (1884) 9 Bom. 111.

(7) (1890) 15 Bom. 135.



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34 B. 354=12  
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fell, for the purposes of limitation, under Article 131 of Act XV of 1877, whereas a suit by the same co-sharer against the other for arrears of the amount received by the latter and payable, in virtue of his share to the former, fell under Article 62. The decision of this Court in *Chamanlal v. Bapubhai* (1) only reaffirms that principle. The important question in all these cases is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is an amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment. The present suit is of the former character and has been rightly held by the lower Court to be governed by Article 131. The decree must, therefore, be confirmed.

*Decree confirmed.*

34 B. 354 (=12 Bom. L. R. 249=5 I. C. 967).

[354] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

RAMKRISHNA NARAYAN SINDE (*original Defendant*), Appellant,  
v. VINAYAK NARAIN SASWADKAR (*original Plaintiff*), Respondent.\*

[24th January, 1910.]

*Transfer of Property Act (IV of 1882), section 85—Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members.*

A Hindu family living jointly consisted of S, his son M, and his two grandsons S<sup>1</sup> and R (minors) by a predeceased son. S mortgaged a house for purposes allowed by Hindu law. The deed of mortgage was signed by S, M. and S<sup>1</sup> represented by his mother. The mortgagees sued on the mortgage and joined S, M. and S<sup>1</sup> as party defendants. The suit passed into a decree in execution of which the house was sold at a Court auction and purchased by the plaintiff. In a suit by the plaintiff against M., S<sup>1</sup> and R. (S. having died) for possession of the house, R. claimed to exempt from the sale his share in the house which was one-fourth, on the ground that as he was not a party to the suit, he was not bound by the decree.

*Held*, that though R. was omitted from the suit he was represented by the adult members, who were the managing members of the family.

*Held*, also, that the debt was contracted by S., the grandfather of R., and R. was bound by it unless it had been contracted for illegal or immoral purposes.

[Ref: 33 All. 71; 34 All. 549; 12 Bom. L. R. 940=8 I. C. 693; 72 I. C. 722=86 C. L. J. 234=27 C. W. N. 372]

SECOND appeal from the decision of R. D. Nagarkar, First Class Subordinate Judge, A. P., at Poona, varying the decree passed by D. G. Medhekar, Joint Subordinate Judge at Poona.

One Santaji had a son Maruti and two grandsons by a predeceased son: Shivram and Ramkrishna (minors).

\* Second Appeal No. 988 of 1908.

(1) (1897) 22 Bom. 669.



In 1893, Santaji mortgaged a house belonging to the family for family purposes. The deed of mortgage was executed by Santaji, Maruti, and Shivram represented by his mother Gojrabai.

[355] In 1901, the mortgagee sued Maruti and Shivram (Santaji having died) upon the mortgagee; and obtained a decree against them. In execution of this decree the house mortgaged was sold at a Court-sale and purchased by the plaintiff.

The plaintiff then sued Maruti, Shivram and Ramkrishna to recover possession of the house. Ramkrishna contended that at least his share in the house (which was one-fourth) was not included in the sale, inasmuch as he not having been a party to the mortgage suit was not bound by the decree passed therein.

The Court of first instance agreed with the contention and passed a decree awarding the plaintiff possession of the house with the exception of Ramkrishna's share. The reasons were as follows:—

The presumption of Hindu law is in favour of joint family and joint property. Plaintiff's case is not that the first defendant had no interest in the property but that whatever interest he had has been sold under the decree, exhibit No. 69 the debt for which the decree was obtained being a joint family debt. But a reference to the mortgage-bond, exhibit No. 49, shows that it contains no recital of the purpose for which the debt was contracted. It is true that the defendant No. 1's mother represented the defendant No. 2, as his guardian *ad litem* in the suit based on the mortgage, but the first defendant was not so represented. The defendant No. 2 was also a party to the mortgage bond, exhibit 49, but not the defendant No. 1. It might be urged that the fact that the defendant No. 2, brother of the defendant No. 1, was a party to the mortgage-bond is sufficient to justify the presumption that the debt was contracted for the benefit of all including the defendant No. 1. But in the absence of any proof of a specific nature, such a presumption would not be justifiable in my opinion. There is nothing to show that there was before the creditor a sufficient material to create on his part a *bona fide* belief that the debt was necessary for any joint family purpose. I am therefore unable to say that the plaintiff purchased the right, title and interest of the defendant No. 1 in the property. Nor is there anything to show that the right of the defendant No. 1 in the property has in any way been distinguished.

On appeal the lower appellate Court came to a different conclusion. It held that Ramkrishna's share also passed by the sale. The following were the grounds:—

The next question is whether the Court-sale is binding upon the defendant No. 1. To prove that it is binding on him, one of the grounds alleged on behalf of the plaintiff is that the loan in the mortgage-bond, exhibit 49, was taken for the benefit of the joint family. The only evidence on the point to [356] which attention is drawn is the fact that Maruti, the son of Santaji, and Shivram's mother Gajarabai, the widow of another son (Narayan) of Santaji, on behalf of her minor son joined Santaji in the execution of the mortgage-deed. But this is insufficient to prove that the creditor *bona fide* believed that the loan was taken for the benefit of the family in the absence of evidence showing that the creditor made enquiries and had reason to be satisfied as to the necessity for the loan. In the absence of such evidence the debt would not be binding on Shivram himself on the ground mentioned. But in Suit No. 293 of 1901 Shivram agreed to pay the debt under a consent decree and therefore his share in the suit house properly passed under the Court-sale.

Another ground on which the share of the defendant No. 1 in the suit house is sought to be found is that the loan taken under the bond, exhibit 49, having been taken by a grandfather, the defendant No. 1 as grandson was under the Hindu Law bound to pay the debt of his grandfather irrespective of its benefit to himself unless it was tainted with immorality or was otherwise repugnant to Hindu law. Reference is made to the following authorities *Narasimharav v. Antaji* (2 Bom. H. C. R. 64); *Lachman Das v. Khunmulal* (I. L. R. 19 All. 26); *Narayan v. Venkatacharya* (6 Bom. L. R. 434); Mayne's Hindu Law, sections 302 to 304; Mayne's Hindu Law, pages 376 to 380, 6th edition; *Sadashiv v. Dinkar* (I. L. R. 6 Bom. 520). I think this contention must prevail in the absence of a suggestion and of evidence to prove

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34 B. 354=12  
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219=5 I. C.  
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that the debt was one which the defendant No. 1 as grandson was not bound to pay under the rules of Hindu law. The Allahabad ruling quoted is an authority for holding that the debt being secured by a mortgage, the defendant No. 1 was bound to pay it with interest. In this view of the matter it is necessary to go into the question whether the defendant No. 1 was benefited by the debt contracted by his grandfather. The plaintiff as auction purchaser, therefore, acquired title to the one-fourth share of the defendant No. 1 in the suit house.

The defendant appealed to the High Court.

*P. P. Khare*, for the appellant.

*G. S. Rao*, for the respondent.

CHANDAVARKAR, J.—It is true that section 85 of the Transfer of Property Act requires that all persons, having an interest in property comprised in a mortgage, must be joined as parties to any suit under Chapter IV of the Act, relating to such mortgage, provided that the plaintiff has notice of the interest. But the section has been construed by the Calcutta and the Madras High Court as not interfering with the rule of Hindu law, that it is open to a father in a Hindu family to represent, subject to certain conditions, his sons or other members in a suit brought [357] upon a mortgage against him. For instance in *Ramasamayyan v. Virasami Ayyar* (1), the mortgage had been executed by a Hindu father. The suit was brought against him and two of his three sons and there was a decree. A suit having been brought by the third son, it was contended by him that as he had not been made a party to the previous suit upon the mortgage, the decree passed in it, and the sale consequent upon it, did not bind him, and he relied upon section 85. It was held there that the father represented the sons in the absence of the proof that the mortgage had been effected for a debt of the father contracted for an illegal or immoral purpose. So also in *Lala Surja Prosad v. Golab Chund* (2), the mortgage was by a Hindu father, who, with his son, constituted a joint Mitakshara family. It was held that the father incurred the debt in his representative capacity and as managing member of the family. And the ruling of the Court was that it was open to the son by a suit to question the decree and the sale consequent upon it, but that the son, in order to succeed and entitle him to redeem his share of the property, must show not merely that he had not been made a party to the suit brought against the father, but also that the debt of the mortgage was not binding upon him, having been incurred for an illegal or immoral purpose by the father. The principle seems to be sound and in accordance with the observations of their Lordships of the Privy Council in *Khierajmal v. Daim* (3).

In that present case the mortgage was by Santaji, grandfather of the present appellant, by his uncle Maruti, and by his brother Shivram, a minor, who was represented by his mother, Gojabai. To the suit which was brought subsequently on the mortgage, the persons brought on the record as defendants were the present appellant's undivided uncles, Maruti and Parshram, and his undivided brother Shivram who had at that time arrived at the age of majority. The present appellant was, no doubt, omitted from the suit, but the adult members of the family represented him. They were the managing members [358] of the family. Therefore, according to Hindu law, we must hold, in the absence of any other circumstance, that the present appellant had been substantially represented upon the record, and was virtually a party to the suit. Further, even if

(1) (1898) 21 Mad. 222.

(2) (1900) 27 Cal. 724.

(3) (1904) L. R. 32 I. A. 28 at p. 35.



Shivram, the brother of the appellant, had not been brought upon the record, there was Maruti, the eldest managing member of the family. The debt again was one contracted by Santaji, the grandfather of the appellant, and the latter is bound by it unless it had been contracted by Santaji for illegal or immoral purposes. It has been found that the debt had been contracted by the managing members of the family for its benefit and necessities.

On these grounds the decree must be confirmed with costs.

*Decree confirmed.*

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34 B. 353 (=11 Bom. L. R. 499=3 I. C. 165).

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*Before Mr. Justice Davar.*

UMABAI, *Plaintiff*, v. BHAU BALWANT AND OTHERS, *Defendants*.\*

[3rd March, 1908.]

*Civil Procedure Code (Act V of 1908) Order 1 Rule 3, Order 11 Rule 3—Grades of several defendants in one suit—"Same act or transaction"—"Series of acts or transactions"—Practice.*

In reading order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit both the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative, [359] must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact.

The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested".

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendant are more or less interested although the relief asked against them may vary.

[Ref: 45 Cal. 111; 38 Bom. 120; 13 Bom. L. R. 1061=12 I. C. 813; Dist: 77 I. C. 761.]

THE material facts in this case appear sufficiently from the judgment. At the hearing of the suit counsel for the 1st defendants raised amongst others the following issues:—

- (1) Whether this court has jurisdiction to try this case.
- (2) Whether the suit is not bad for reason of mis-joinder of causes of action and of parties.

\* Suit No. 651 of 1907.



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These two issues were ordered to be tried as preliminary issues.

*Setalvad* with *Raikes* for 1st defendant referred to Order 1, Rule 3, of Civil Procedure Code of 1908. Their right to relief arises from (1) adoption and (2) from mortgages. One transaction has nothing to do with the other. This is a combination of two distinct suits and transactions. No common question of fact or law would arise if separate suits were brought. *Narsingh Das v. Mangal Dubey* (1), *Mowji Monji v. Kuverji Nanaji* (2), *Ram Narain Dut v. Annoda Prosad Joshi* (3), Succession Certificate Act (VII of 1889), section 4.

Umabai could not sue without taking out letters of administration or a succession certificate.

*Strangman*, Advocate-general, (with him *Inverarity* and *Jayakar*) for the plaintiff.

[360] The point must be decided on the Civil Procedure Code of 1908. Our cause of action is the mortgage in which all the defendants are interested vitally. Common questions of law or fact arise. Under Order 1, Rule 5, it is not necessary that all the defendants should be interested in all the reliefs sought. Even under the old Code this would have been a good suit. See *Farran, C. J.*, in *Raghunath Mukund v. Sarosh K. R. Cama* (4), *Narsingh Das v. Mangal Dubey* (1) is no longer law as the ratio of that case disappears now. There were in that suit three causes of action. Here there is only one cause of action namely the mortgage claim, and a part of it is in the 1st defendant's hands. *Serajul Huq Khan v. Abdul Rahaman* (5); *Sri Raja Simhadri Appa Rao v. Parttipati Ramayya* (6). *Mowji Monji v. Kuverji Nanaji* (2) is in our favour. No embarrassment is caused to 1st defendant and the other defendants don't appear and plead embarrassment. Order 2, Rule 1.

*Setalvad* in reply referred to *Stroud v. Lawson* (7). Two conditions must coincide in Order 1, Rule 3. In this case there are two transactions (1) the adoption, (2) the mortgage, entirely unconnected with each other. Order 1, Rule 5, must be taken in connection with Order 1, Rule 3.

*Raghunath Mukund v. Sarosh K. R. Cama* (4) relied on is different and does not apply to the facts of this case. So also in the other cases relied on there was one cause of action. That there is no embarrassment is no defence against multifariousness, it is a defence where joinder is allowed. But there is considerable embarrassment if you look into the nature of the contentions. The adoption took place in Poona. All the evidence is in Poona.

DAVAR, J.:—At the hearing of this suit Mr. *Setalvad* for the first defendant raised among others the following issues :

(4) Whether the Court has jurisdiction to entertain this suit.

(5) Whether the suit is not bad for reason of mis-joinder of causes of action and of parties.

[361] The learned counsel after the issues had been raised and the Advocate-General had stated the facts of the case applied that the two issues Nos. 4 and 5 which involved questions of law should be tried first. The Advocate-General did not object to this being done. Order XIV, r. 2, provides that where in the same suit issues both of law and of fact arise

(1) (1862) 5 All. 163.

(2) (1907) 31 Bom. 516.

(3) (1887) 14 Cal. 681.

(4) (1899) 23 Bom 266.

(5) (1903) 29 Cal. 957.

(6) (1905) 29 Bom. 29.

(7) [1893] 2 Q. B. 44 at p. 54.



and the Court is of opinion that "the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first."

On the pleadings and the undisputed facts it did appear to me possible that the suit, or at all events a part of this suit, may be disposed of by determination of these issues of law, and I felt that it was desirable in the interest of the parties that these issues should be tried first.

It seems to me however that the decision of the issue No. 4 as to the jurisdiction of this Court depends on my decision on issue No. 5 as to whether this suit is bad by reason of misjoinder of causes of action and of parties and the results that may follow from my decision of that issue. I will, therefore, in the first instance confine my attention to the consideration of the question for decision involved in that issue. To arrive at a correct decision on the issue as to misjoinder, it is necessary that the facts must be clearly appreciated.

The undisputed facts are to be gathered from the plaint in this suit and the plaint in suit No. 8 of 1906 which is referred by the plaintiff herein in para 6 of her plaint.

One Vithoba Khumdappa Gulve died on the 11th of September 1891 leaving a will dated the 27th of January 1890. The 9th and 10th defendants Nilkant Vinayak Chatre and Shankar Ramohandra Phatarpikar were appointed executors under the will. Probate of the will was granted to the two executors by the Thana District Court on the 28th of October 1891. The 9th and 10th defendants are made parties to this suit in their capacity as executors of Vithoba's will.

The will of Vithoba directed that the residue of his estate should be divided in two parts and one of such parts should be given to Shankar Vithoba Gulve. The plaintiff claims to be [362] Shanker's sister. The Advocate-General in his opening stated that Shanker and the plaintiff Umabai were the illegitimate children of a Vithoba by a mistress named Paroo Pringlav. The first defendant's counsel does not admit that the plaintiff is the sister of Shanker. He said his client had no knowledge whether this statement was correct or not. For the present purposes it is immaterial to consider the question whether Umabai is or is not the sister of Shanker. I will assume that Umabai the plaintiff is the sister of Shanker and as such his next of kin.

Vithoba Khimdappa Gulve during his lifetime had, on the 4th of December 1883, lent and advanced to the members of a Hindu family of Bombay named Patkar the sum of Rs. 11,000 on the mortgage of an immoveable property belonging to them and situated at Bhuleshvar in Bombay. This mortgage was outstanding at the time of his death. Vithoba's executors divided his property in two parts and made over one of such parts to Shankar. The mortgage was included in the part of Vithoba's property made over to Shankar. The executors did not at any time execute any written assignment or transfer of the mortgage. Shanker died on the 23rd of January 1903 intestate and without any issue. He left surviving his widow Girjabai who was also known as Umabai. Although in suit No. 8 of 1908 she is spoken of only as Umabai, I will continue to call her Girjabai in order to prevent any possible confusion arising from this name being the same as that of the plaintiff. The mortgage moneys were still outstanding when Shanker died, one of the terms of the mortgage being that the mortgage moneys were to be repaid ten years after the date of the mortgage.

Girjabai was a minor when her husband died, and the District Court of Poona in June 1903 appointed her father Balvantrao Suryavanshi the

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guardian of her person and property. Some time in 1904 Girjabai by her guardian applied to the District Court at Poona for leave to adopt her minor brother and having obtained such leave, she adopted him. This adopted boy Bhau Balvant Suryavanshi, who, after the adoption, was called Vithal Shanker Gulve, is the first defendant in the suit. Shortly after the adoption Girjabai died on the 3rd of January 1905.

[363] On Girjabai's death the Poona Court appointed two persons as guardians of the person and property of the minor Vithal Shanker Gulve.

In the beginning of 1906 the said minor Vithal by his guardians as his next friends filed a suit against the members of the Patkar family to realise the mortgage debt. The mortgaged property being in Bombay the suit was filed in this Court.

When that suit was filed the plaintiff alleged that the amount due to him under the Indenture of mortgage with interest up to the 29th of October 1905 was Rs. 32,018-2-3 and he claimed to recover that sum and further interest. The executors of Vithoba's will not having executed any legal assignment or transfer of mortgage were made co-defendants in the suit and they were defendants Nos. 8 and 9. This suit was heard before me on the 19th of February 1907. At the hearing it was proved before me that the guardians of the minor plaintiff and the first seven defendants had arranged a compromise of the claim for Rs. 20,000; that this compromise was submitted to the District Court of Poona; and that that Court had sanctioned the proposed compromise. I was asked to pass a decree in terms of the compromise. As the Court, whose ward the plaintiff was, had sanctioned the compromise, I passed a decree by consent of all parties in terms of the compromise and sanctioned the same as being for the benefit of the minor-plaintiff. When that suit was called on, the 8th and the 9th defendants, the executors of the will of Vithoba, did not appear but, while I was recording evidence, counsel appeared on their behalf and brought to my notice the fact that the adoption of the plaintiff in the suit was disputed in a suit pending in the Poona Court. It then transpired that Vithal had filed a suit in the Subordinate Judge's Court at Poona to recover the keys of a safe and certain documents from Sirdar Natu and that Sirdar Natu had put in a written statement alleging that Vithal's adoption was not valid and asking that Shanker's sister Umabai should be made a co-plaintiff. On being apprised of this fact I felt that Umabai's interests should in some way be safeguarded and at my suggestion the plaintiff undertook to allow the amount realised to remain with his [364] attorneys for six months to enable Umabai to establish her contention that the adoption of the plaintiff in that suit was invalid and that she as next-of kin was entitled to the property left by her brother Shanker. The plaintiff's attorneys were directed to give notice of the decree to Umabai. The consent decree in Suit No. 8 of 1906 is exhibit No. 1 in this suit.

It is proved before me in this suit that the mortgagors paid the amount for which the claim of Vithal was compromised and on such payment in terms of the arrangements arrived at between the parties, the executors of Vithoba executed a re-conveyance of the mortgaged premises on the 18th of July 1907 and the guardians of Vithal executed the same re-conveyance on the 27th of July 1907. The re-conveyance in favour of the mortgagor is exhibit No. 2.

This is a short history of the events as they happened before the plaintiff Umabai filed this suit on the 15th of August 1907.

The first defendant in this suit is Vithal Shanker Gulve, the son adopted by Girjabai the widow of Shanker after his death.



Defendants Nos. 2 to 8 are the members of the Patker family the mortgagors who had originally mortgaged their Bombay property to Vithoba Khundappa Gulve.

Defendants Nos. 9 and 10 are the executors of the will of Vithoba. The plaintiff says that Shanker before his death had given instructions to Girjabai that she should adopt one of her sons; that her sons were available for adoption, that the adoption by Girjabai of the plaintiff in contravention of her husband's injunction is invalid and in-operative, and that she as the sister and next-of-kin of Shanker is entitled to the whole of the property left by Shanker.

The plaintiff then impeaches the compromise of the claim made in suit No. 8 of 1906. She says she protested against the compromise before the consent decree was taken and in support of her statement she produces correspondence which is collectively marked Exhibit B. She contends that the consent decree is not binding on her and that the same ought to be set aside.

[365] The reliefs that the plaintiff claims in this suit shortly put are that it may be declared that the first defendant is not the validly adopted son of Shanker and that she as the sister of Shanker may be declared to be the sole heir of Shanker and as such entitled "to the right, title and interest of the said deceased" in the mortgage in the plaint mentioned; that it may be declared that the decree in suit No. 8 of 1906 is not binding on her; and that an order may be made "setting the same aside" as against her. She then prays that defendants 2 to 8 may be ordered to pay to her the full amount that may be found due at the foot of the mortgage and that in default the mortgaged premises may be sold. In the alternative she prays that if the consent decree be not set aside then it may be ordered that the amount received under the compromise may be paid to her. She prays for other incidental reliefs which I do not think it is necessary to refer to.

The question for the consideration of the Court on the facts as set out above is, in the first instance, whether the suit as constituted is bad by reason of misjoinder of causes of action and of parties.

Section 45 of the old Civil Procedure Code dealt with the joinder of several causes of action in the same suit and section 28 dealt with the joinder of several defendants in one suit.

Rule 3 of Order I is now enacted in the place of section 28 of the old Code and Rule 3 of Order II takes the place of section 45.

The language of Rule 3 Order II is the same as that of section 45 of the old Code but there is considerable difference in the provisions of Rule 3 of Order I and those of section 28.

The Rule now governing the joinder of several defendants in the same suit provides that—

All persons against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in alternative, where if separate suits were brought against such persons any common question of law or fact would arise, may be joined as defendants in the same suit.

In reading this Rule it seems to me quite obvious that the word "same" which precedes the words "act or transaction" governs [366] also the words "series of acts or transactions" and must be read before those words also. It seems to me therefore that the first condition to be fulfilled before joining several persons as co-defendants in the same suit is

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that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same* series of acts or transactions. The second condition to be fulfilled under the Rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons.

In *Stroud v. Lawson* (1), the Court of Appeal had O. XVI, r. 1, under their consideration. That is an order providing for the joinder of several plaintiffs in the same suit but the language of the Rule is exactly the same as the language of our Rule 3, Order I. Lord Justice Vaughan Williams, in constructing the Rule before the Court, at page 54 of the report, says:—

The two conditions, namely, that the right to relief must arise from the same transaction and that there must be a common question of law or fact, are not alternative conditions. If that had been meant to be so, the wording of the rule would certainly have been different, as for instance by the insertion of the simple word "or", before the word "where."

It seems, therefore, quite clear that before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the Rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally, or in the alternative, must arise from the same act or transaction or the same series of acts or transactions, and, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact.

Then again, under Rule 3 of Order II, the plaintiff is allowed to unite in the same suit several causes of action against the same defendants or the same defendants jointly.

Since I discussed the question of misjoinder of parties and of causes of action in *Mowji Monji v. Kuverji Nanaji* (2) the new Civil Procedure Code, incorporating in it many more Rules of English practice and procedure than were to be found in the old [367] Procedure Code, has come into operation and a great many Indian cases based on the construction of the language of section 28 of the old Code are of no value. But we have, however, Indian authorities dealing with general principles and the policy of the law on the question now under my consideration and I think they are still very useful guides.

In *Narsingh Das v. Mangal Dubey* (3) a full Bench of that Court held that a plaint had been properly rejected because the suit was open to the objection that different causes of action against different defendants separately had been joined in the same suit.

In the course of the judgment it is said (at p. 171):—

"The plaintiff has united different causes of action in one suit against different defendants, who are not jointly liable in respect of each and all of such causes of action—a mode of procedure that the law does not sanction."

This statement of the law by the Full Bench of the Allahabad High Court is important having regard to the fact that the language of section 45 of the old Code and that of Rule 3 Order II of the present Code which deal with the joinder of causes of action against several defendants is the same. As I read the judgment it lays down that the meaning of the word "jointly" in the old section, and therefore in this Rule, is that all the defendants in a suit must be jointly liable in respect of "each and all" of the causes of action which the plaintiff unites against the defendants in the same suit.

That this is the correct reading of the Full Bench judgment appears from the decision in *Bhagwati Prasad Gir v. Bindeshri Gir* (4) where

(1) [1898] 2 Q. P. 44.

(2) (1907) 31 Bom. 516.

(3) (1884) 5 All. 168.

(4) (1888) 6 All. 106.



Mr. Justice Straight delivering the judgment of the Court and speaking of the test of the applicability of section 45 of the old Code says :—

“ Joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants.”

The only other Indian case, which I think it is necessary to refer to, is that of *Mullick Kefait Hossein v. Sheo Pershad Singh* (1). There again a division Bench, consisting of Mr. Justice Beverley [368] and our late Chief Justice Sir Lawrence Jenkins, had under their consideration section 45 of the Code. In the course of their judgment the learned Judges say (at p. 826) :—

“ There is no provision in the Code allowing distinct causes of action . . . . . in which the defendants are *not all jointly* interested, to be united in the same suit.”

Turning to the English Practice we find that Rule 1 of Order XVIII provides that subject to the Rules of that Order the plaintiff may unite in the same action several causes of action. In *Burstall v. Beyfus* (2) the Lord Chancellor, Lord Selborne says :—

“ To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected...) is not contemplated by Order xviii, r. 1, which authorises the joinder, not of *several actions* against distinct persons, but of *several causes of action*.”

The result of the authorities seems to me to be that the plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are “ jointly liable in respect of each and all of such causes of action” and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants, is that such defendants must all “ have a joint interest in the main question raised by the litigation” and that causes of action joined in one suit against several defendants must be causes of action in which “ the defendants are all jointly interested.”

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit (O. I, r. 5, Civil Procedure Code) but it is necessary “ that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary” (Annual Practice, 1909, p. 163).

Keeping these requirements of the law in view, let me now turn to the facts of this case and see whether these requirements are fulfilled in this suit.

[369] The principal defendant in this suit is the first defendant Vithal Shanker Gulve and the main question in this litigation is whether his adoption by Girjabai is good and valid in law as he contends it is or is invalid and inoperative as the plaintiff contends. This is the only question in this suit in which he is interested. If he is declared the validly adopted son of Shanker the suit comes to an abrupt termination—none of the other questions in the suit which affect the other defendants would ever arise. He would then be the owner of the property left by Shanker including the mortgage made by the family of defendants 2 to 8 in favour of Vithoba. He sued to recover the moneys due under the mortgage; the Court whose ward he was sanctioned a compromise of that suit; the Court passing the decree has certified that the compromise was beneficial to him; the moneys decreed are in the hands of his solicitor; the decree is binding on him; and neither he nor the other defendants in the

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(1) (1896) 23 Cal. 821.

(2) (1884) 26 Ch. D. 35 at p. 39.



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suit raise any question whatever in respect of the mortgage, or the consent decree in suit No. 8 of 1906. As I observed above the validity of his adoption is the only question in which the first defendant is interested. Directly that is established, the suit fails and while that question is tried, the other defendants have nothing to do but to sit with folded arms and watch the result of the fight between the plaintiff and the first defendant. I have noticed what the result of the suit would be if the first defendant's adoption is held to be valid. Now take the other possible result. Suppose the Court comes to the conclusion that the first defendant's adoption is invalid. He immediately loses all interest in the suit. He would then have no interest in Shanker's property and it would be a matter of no interest to him whether the plaintiff succeeds or fails in her contentions against the other defendants. It matters nothing to him whether the decree in suit No. 8 of 1906 is held binding on the plaintiff or not. It matters nothing to him whether defendants 2 to 8 have to pay Rs. 20,000 or Rs. 32,000 and more under the mortgage. The main and the only question he is interested in this litigation is to prove the validity of his adoption.

Now let me turn to the other defendant. The second set of defendants are defendants 2 to 8 the members—the members of the Patker family, the mortgagors of Vithoba. What are the questions [370] in the suit between them and the plaintiff? What is the plaintiff's cause of action against them? The plaintiff contends that the compromise of the mortgage debt effected between the first defendant and these defendants is not binding on her. She claims to be entitled to recover the whole amount due under the mortgage. I assume that when the Poona Court sanctioned the compromise of a claim of over Rs. 32,000 for Rs. 20,000 it must have taken into consideration the possibility of the mortgagors being able to reduce the claims originally made in suit No. 8 of 1906. If the plaintiff is declared the beneficial owner of the mortgage, the mortgagor-defendants would be entitled in the event of the compromise being held not binding on the plaintiff to plead all their defences to the claim as originally made. They would be entitled to urge all those contentions for the reduction of the claim which must have been submitted to the District Court at Poona in support of the compromise. Besides this, other defences are open to him. They would say the plaintiff knew of the intended compromise before the decree was taken and took no steps to prevent the decree being passed. On the 30th of January 1907 she was informed of the terms of the compromise and told to take what steps she liked (see exhibit B). The decree was not taken till the 19th of February 1907 and she took no steps to intervene. These defendants would also raise the question whether the plaintiff is entitled to re-open the question in this suit, the executors of this original mortgagee in whom the legal estate had always remained having executed a reconveyance of the mortgaged premises before the plaintiff filed this suit. If the plaintiff succeeded in her main contention against the first defendant and then is allowed to proceed with the second branch of her case against the 2nd set of defendants, further complications would arise because it appears from the written statement of the first defendant that on the property being reconveyed to them defendants 2 to 8 have sold the same and the purchaser whose title would be jeopardised is not a party to the suit.

The first defendant has not the smallest interest in any single one of the questions that would arise between the plaintiff and the other defendants.



[371] It will thus be seen that the questions arising between the plaintiff and the first defendant and the questions arising between the plaintiff and second set of defendants are totally distinct and different. There is no common question of fact or law which affects all the first eight defendants.

Then take the case of the defendants 9 and 10. What is the plaintiff's cause of action against them? They were formal parties to the first suit No. 8 of 1906 because they had not assigned or transferred the mortgage to the plaintiff in that suit. They executed a reconveyance when the person whom they believed to be the beneficial owner of the mortgage debt asked them to do. It is difficult to conceive what the plaintiff's cause of action is against this the third set of defendants. I searched in vain through her plaint to find out what her cause of action is against these defendants and what relief she claims against them. The only possible complaint that she could make against them is that they joined in reconveying the property.

It will thus be seen that all the defendants in the suit are not jointly liable in each and all of the causes of action united in this suit nor are they all jointly raised by this litigation.

It seems to me that in this suit the plaintiff has distinctly combined at least two separate suits. It also appears to me that she has made her claim against defendants other than the first defendant much too prematurely. There is no dispute that the first defendant has, as a matter of fact, been adopted by Shanker's widow Girjabai. He is to all intents and purposes the owner of all Shanker's property till such time as his adoption is set aside and declared invalid by a Court of law competent to try that question. Till she succeeds in establishing the invalidity of the adoption of the first defendant Vithal, she has no right to sue the other defendants in respect of property to which her right is not established. All the property left by Shanker is vested at present in the first defendant and the plaintiff has launched this litigation against the other defendants without having established her right to the property in respect of which she sues. The suit as constituted must in my opinion cause considerable embarrassment to the different defendants.

[372] Under these circumstances I have no option but to hold that the plaintiff has clearly misjoined in this suit both parties and causes of action. I would like to say here that even if the conclusion to which I have arrived had been different, I would still have held that the causes of action joined in this suit could not conveniently be tried or disposed of together and considered what would have been the right order to make under the discretion vested in the Court by rule 6 of Order II.

Having, however, come to the conclusion that the suit as constituted is bad by reason of misjoinder of parties and of causes of action I find the 5th issue in the affirmative.

I will give the plaintiff the option of electing against which defendant or defendants she proposes to go on with the suit and when she has made her election, I will proceed to consider my decision on the 4th issue as to whether this Court has jurisdiction to entertain the suit against the particular defendant or defendants against whom the plaintiff elects to proceed.

Attorneys for the plaintiff :—*Messrs. Chitnis & Co.*

Attorneys for the 1st defendant :—*Messrs. Dikshit, Dhunjisha and Sunderdas.*

1908  
MAR. 3.

APPELLATE  
CIVIL.

34 B. 358 = 1  
Bom. L. R.  
499 = 3 1.  
165.



1909  
JULY 26.

ORIGINAL  
CIVIL.

34 B. 372=11  
Bom. L. R.  
1060=4 I. C.  
188.

34 B. 372 (=11 Bom. L. R. 1060=4 I. C. 188).

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

PERURI SURYANARAYAN AND COMPANY, *Plaintiffs*, v. GULLAPUDI  
CHINNA NARSINGHAM AND ANOTHER, *Defendants*.\*

[26th July, 1909.]

*Arbitration—Reference by parties to a suit—Application to stay proceedings—Arbitration Act (IX of 1899), section 19.*

Section 19 of the Arbitration Act only applies where there has been a submission to arbitration before the commencement of legal proceedings.

*Ranjidas Poddar v. Howse* (1), followed.

[Ref. 88 Bom 687; 81 I. C. 653;]

THIS matter was heard in Chambers. The plaintiffs on the 17th September 1908 filed a suit as a Short Cause against the [373] defendants to recover Rs. 6,377-14-0 with interest due on certain money transactions. A warrant for attachment before judgment was obtained by the plaintiffs and attachment levied, but, later, as the result of an agreement between the parties to refer their dispute to arbitration, a consent order was taken discharging the warrant. Subsequently, however, the defendants, contending that the plaintiffs had delayed in raising the attachment and that therefore the agreement to refer was at an end, refused to proceed to arbitration. The suit came on for hearing in due course, but was adjourned from time to time by consent. Eventually the plaintiffs applied by petition for a stay of the legal proceedings, and notice was issued to the defendants on the 1st April 1909.

*Robertson* for the respondents (defendants) to show cause.

*Strangman* (Advocate-General) for the petitioners (plaintiffs).

MACLEOD, J.—The question in this notice is whether when the parties to a suit agree to refer the questions in dispute to arbitration, one of the parties can apply to the Court under section 19 of the Arbitration Act for stay of proceedings.

It is contended by Mr. Robertson for the respondents that by section 2 of the Act it is clear that the Act only deals with cases where references to Arbitration are made before proceedings are taken and, therefore, it would follow that unless there has been a submission to arbitration before the suit is filed, an application for stay of proceedings cannot be made under section 19. This is supported by the decision of the Appeal Court in Calcutta in the case of *Ranjidas Poddar v. Howse* (1), in which the learned judges were decidedly of opinion that the Act only applied to cases where there had been a submission to arbitration before the commencement of legal proceedings. That case, of course, is entitled to the very best consideration I can give it. But apart from that case, I should certainly be inclined to decide that Mr. Robertson's argument is correct and that the Act only applies to cases where references are made before proceedings are taken. No doubt, it [374] would have been possible for the Legislature to legislate so that the Act should apply to cases where a reference is made after proceedings have been taken, but it is clear that they did not do so when they framed the Arbitration Act of 1899. Section 19 seems to me perfectly clear. It says:

\*Original Suit, No. 788 of 1908.

(1) (1907) 85 Cal. 199



"Where any party to a submission to which this Act applies or any person claiming under him, commence any legal proceedings" &c.

Therefore, such a person must be a party to a submission<sup>1</sup> before the commencement of the proceedings. In this case it is admitted that the submission was made after the proceedings commenced, and, therefore, it is not competent for any party to apply under section 19 to stay the proceedings.

Attorneys for the applicants: *Messrs. Jamshedji, Rustomji and Devidas.*

Attorneys for the opponents: *Messrs. Matubhai, Jamietram and Madan.*

34 B. 374 (=11 Bom. L. R. 1011=4 I. C. 107).

ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.*

SHAPURJI HORMASJI HARVER, *Appellant and Defendant, v.*  
MONOSSEH JACOB MONOSSEH, *Respondent and Plaintiff.\**

[30th July, 1909.]

*Costs—Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal.*

The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian *ad litem* takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

[Ref : 31 M. L. J. 39=35 I. C. 154.]

[375] THIS was an application arising out of an appeal filed by the guardian *ad litem* of a lunatic against a decision of Mr. Justice Macleod. The appeal was dismissed and the respondent awarded his costs out of the estate of the lunatic, the question of the costs of the appellant being reserved. The present application was made by the guardian to have his costs paid out of the estate.

*Padshah* appeared for the applicant.

*Joshi* appeared for the committee of the property of the lunatic, and submitted himself to the order of the Court.

SCOTT, C. J.—This is an application on behalf of the guardian *ad litem* of the defendant in this suit who is an adjudged lunatic, for an order allowing him to have his costs of an appeal filed by him in the suit out of the estate of the lunatic.

The suit was originally filed by the plaintiff against the defendant upon a mortgage and deed of further charge and in consequence of the defendant's state of mind the present applicant was appointed his guardian *ad litem*. The principal defence raised in the suit was that the defendant on the dates of the execution of the documents sued on was of unsound mind and that therefore he was not liable for the amount advanced by the plaintiff on those occasions. The suit was heard before Mr. Justice Macleod at great length and that learned Judge delivered a very careful judgment. The suit was dismissed but the guardian *ad litem* was allowed his costs out of the estate. He was not satisfied, however, with the decision and filed an appeal against it. The appeal was argued before us and

\* Original Suit No. 406 of 1907.

Appeal No. 53 of 1908.



1909  
JULY 30.

—  
ORIGINAL  
CIVIL.

34 B. 374=11  
Bom. L. R.  
1011=4 I. C.  
107.

turned entirely upon the facts of the case and was dismissed. Shortly after the appeal had been filed, committees of the person and property of the defendant were appointed. The committee of the property is on this application represented by counsel.

It is a fact, although our judgment will not be influenced by that fact, that the applicant was personally interested in defeating the claim of the plaintiff, because he is the brother of the defendant and in the event of the defendant's death will succeed to a portion of his property under the Parsi Law. The guardian *ad litem* appointed by the Court usually gets his costs out of the [376] estate of the defendant whom he represents if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

Now the rule is that if proceedings instituted by the next friend are unnecessary or improper, and the next friend might, with reasonable care, have known them to be so, he must pay the costs personally. See Simpson on Infants, (2nd Edn.) p. 484. The same rule has been laid down with regard to trustees who take upon themselves to appeal against the decision of the Court. *In re Walters* (1) the Court of Appeal in England refused to allow trustees their costs of the appeal out of a fund and ordered them to pay the costs. Bowen, L. J., said that in his opinion when there was an unsuccessful appeal relating to a fund, the appellant ought to be ordered to pay the costs; otherwise there would be a premium upon unsuccessful appeals. Fry, L. J. concurred and said:

"The trustees were sufficiently protected by the order of the Court below, and there was no ground for their coming to this Court"

Similarly in *Ex parte Russell* (2), Sir George Jessel said:

"In the County Court the trustees might fairly say, 'We want a decision about the settlement,' but, having had a decision, if they choose to appeal, they must take the consequences."

They were ordered personally to pay the costs of the appeal.

Here, however, it is said that the guardian *ad litem* filed this appeal by the advice of his solicitor and counsel. That, however, is no reason for asking the Court to lessen the lunatic's funds by an order for payment of his costs in the unsuccessful appeal.

In *In re Beddoe. Downes v. Cottam* (3) Lindley, L. J., said:

"But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on Counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to [377] charge them against his *cestui que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate."

Now, if the guardian *ad litem* in the present case had been in serious doubt as to whether he ought not to file the appeal, he could have adopted

(1) (1890) 94 S. J. 564.

(2) (1882) 19 Ch. D. 583 at p. 602.

(3) [1893] 1 Ch. 547 at p. 557.



the course, which was in fact adopted a month later, of obtaining an order of the Court for the appointment of a committee of the property. That committee could then have applied to the Court for advice as to whether an appeal should be filed or not; and the guardian *ad litem* could have filed the appeal, if the Court thought it was a proper case, with the sanction of the committee of the property. We do not think, however, that this is a case in which the Court could have sanctioned the appeal, for the appeal had nothing to recommend it. The guardian *ad litem* having chosen upon his own responsibility to file this appeal, must take the consequences to the extent of having to bear the costs of the appeal incurred by his authority.

We are not asked on behalf of the lunatic to throw the costs of the successful respondent upon the guardian *ad litem*: so with regard to them, we make no order.

We refuse the application.

The applicant must pay the costs of the committee of the property on this application.

*Application refused.*

Attorneys for the guardian: Messrs. Jehangir, Gulabbhoy & Billimoria.

Attorneys for the committee: Messrs. Ardeshir, Hormosji, Dinshaw & Co.

34 B. 378 (=12 Bom. L. R. 21=5 I. C. 612=11 Cr. L. J. 180).

### [378] CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. GANESH BALVANT MODAK.\*

[6th October 1909.]

*High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), section 485—Indian Penal Code (Act XLV of 1860), sections 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.*

It is the settled practice of the High Court of Bombay to refuse to interfere in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the mis-construction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence.

*Queen-Empress v. Shekh Sahab Badrudin* (1); *Queen-Empress v. Mahomad Husan* (2); and *Queen-Empress v. Chagan Dayaram* (3), followed.

Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public.

In cases of sedition, the question of intention is one of fact.

[Ref: 35 Bom. 55.]

\*Criminal Application for Revision No. 379 of 1909.

(1) (1888) 8 Bom. 197.

(3) (1890) 14 Bom. 331.

(2) (1886) Unrep. Cr. Cas. 244.



1909  
OCT. 6.

CRIMINAL  
REVISION.

84 B. 378=12  
Bom. L. R.  
21=51 C.  
612=11 Cr.  
L. J. 180.

APPLICATION for revision under section 435 of the Criminal Procedure Code, against conviction and sentence passed by A. H. S. Aston Chief Presidency Magistrate of Bombay.

The accused was the manager of a newspaper selling agency called the Vartman Agency. This Vartman Agency was the sole agent for sale in India of a fortnightly periodical styled "the Swaraj," which was printed and published in London.

[379] One of the issues of the periodical contained an article entitled "The Ætiology of the Bomb in Bengal," which was charged as seditious within the meaning of section 124A of the Indian Penal Code.

It appeared that the accused received by post an advance copy of the issue of the periodical in question. He advertised the same and also reviewed it in a daily newspaper called the *Rashtra Mat*, which was published under his management. The sale copies of the issue were later on received by him by a steamer parcel and all of them were sold by the Vartman Agency.

The accused was under these circumstances charged with having published the seditious article in India, an offence punishable under section 124A of the Indian Penal Code, 1860. He was convicted of the offence and sentenced to suffer one month's simple imprisonment.

The accused applied to the High Court.

*Baptista*, with *V. V. Bhadkamkar* and *B. V. Desai* for the accused.

*Strangman* (Advocate-General) instructed by *E. F. Nicholson* (Public Prosecutor), for the Crown.

CHANDAVARKAR, J.:—This is an application by Ganesh Balvant Modak for revision of the conviction recorded against and sentence passed upon him by the Chief Presidency Magistrate of Bombay under section 124A of the Indian Penal Code. The learned Magistrate has held that the petitioner has been guilty of the offence of attempting to excite feelings of disaffection towards the Government established by law in British India by the sale of copies of a periodical called the *Swaraj* containing an article headed "The Ætiology of the Bomb in Bengal," which is seditious within the meaning of the section above mentioned.

This finding of the Magistrate has been assailed before us on two grounds: first, that there has been no publication by the petitioner of the periodical in question, containing the article charged as seditious; and, secondly, that the article itself is not seditious within the meaning of section 124A of the Indian Penal Code.

[380] It is to be remarked at the outset that both the question of publication and the question of seditious character of the article are questions of fact, which have to be determined on the evidence and by the light of surrounding circumstances. On these questions of fact, the learned Magistrate has recorded his findings with his reasons therefor in his judgment. What we are asked by the learned counsel for the petitioner to do is to appreciate the evidence and revise the Magistrate's findings of fact. But it has been the settled practice of this Court to refuse to interfere, in the exercise of our revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence, *Queen-Empress v. Shekh Saheb Badrudin* (1); *Queen-Empress v. Mahomed Husan* (2); *Queen-Empress v. Chagan Dayaram* (3).

(1) (1888) 8 Bom. 197.

(2) (1886) Unrep. Cr. C. 244.

(3) (1890) 14 Bom 891.



On the question of publication, it is contended by the learned counsel for the petitioner that the facts proved do not constitute publication. The facts relied upon by him are these:—The petitioner received an advance copy of the *Swaraj* from London on the 2nd of July by post. The bulk of the copies of the periodical sent for sale was delivered to him on the 26th of July, and he sold a number of them on that day. But from the 2nd of July to the 26th of that month, the petitioner was occupied with other business than that of looking after the interests of the *Swaraj*, and he had no time to read the article in it charged as seditious.

These, however, are not all the facts. There is evidence on the record to show that the petitioner is sole agent for the periodical for the whole of India, that he took great interest in it (exhibits S., O. and F.) and that on the 15th of May 1909, he had written to the proprietor and editor of the periodical in London, asking for an advance copy by post that he might know what to expect and make use of his own daily paper in Bombay, the *Rashtra Mat*, for the special advertisement of the [381] *Swaraj*. It is admitted that an advance copy was sent and that the *Swaraj* was advertised in the *Rashtra Mat*, of which the petitioner was manager. Further, on the 10th of July, an article had appeared in the *Rashtra Mat* noticing the *Swaraj* and its contents. Upon all this evidence it was competent for the Magistrate to find as a fact that the accused had read the article and knew its contents and character before the sale of the copies. It is conceded by the petitioner's counsel that, under the circumstances of the case, the *onus* lay on the petitioner to prove that he had not read the article. That *onus*, the Magistrate finds, he has not discharged. No error of law has been pointed out to us to warrant our interference with the Magistrate's conclusion of fact on this question.

But it is urged that there was no publication, because the prosecution has not led any evidence to prove that any of the buyers had read the article. In support of this contention, the petitioner's counsel, Mr. Baptista, relies upon a passage from Odgers on Libel, where it is said that an attempt to libel is not actionable unless it is effectual. That is, there must be a publication in fact. "That the third person had the opportunity of reading the libel is not sufficient, if the Jury are satisfied that he did not in fact avail himself thereof, even though it is clear that the defendant desired and intended publication." But, as the passage and the chapter in which it occurs as also the cases cited in illustration clearly show, the law stated by Dr. Odgers is applicable to actions for libel, not to criminal prosecutions. No suit can lie for damages for an ineffectual attempt to libel, because, the attempt failing, there is no injury, and in actions for libel "proved or presumed injury to reputation" is the cause of action. (Pollock on Torts, p. 245, 6th edition.) It is otherwise in criminal law. An attempt to commit an offence is under our Penal Code punishable. All that is necessary to constitute such an attempt is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. In the present case the attempt was for the purposes of law complete when the petitioner sold the copies. It was [382] none the less an attempt, though something external to him happened which prevented a perusal of the article by the buyers or any other member of the public.

The next question is whether the article is seditious within the meaning of section 124A of the Indian Penal Code. That depends on whether the article was intended to bring the Government into hatred or contempt.

1909  
OCT. 6.

ORIGINAL  
REVISION.

34 B. 878=12  
Bom. L. R.  
21=5 I. C.  
612=11 Cr.  
L. J. 180.



1909  
OCT. 6.

CRIMINAL  
REVISION.

34 B 378=12  
Bom. L. R.  
2, -8 L. O.  
612=11 Cr.  
L. J. 180.

The question of intention in such cases is one of fact. As pointed out by Sargent, C. J., in *Dyami Naik v. Lingappa* (1), relying on a dictum of Lopes, J., in *Northcote v. Doughty* (2), where, on the construction of a document by the light of surrounding circumstances, the question is entirely one of intention, it becomes "a simple question of fact as to which the decision of the Court below is conclusive." Here it was a question *quo animo* the article on "The Ætiology of the Bomb in Bengal" was written. As such it resolved itself into a mere question of fact, on which the Magistrate's finding must be treated by this Court as conclusive, according to its settled practice in the exercise of its revisional jurisdiction, unless some error of law vitiated that finding. No such error has been so much as hinted at by Mr. Baptista, the learned counsel for the petitioner, in his full and careful argument.

But I do not wish to leave this part of the case at that point. Owing to the importance of the question, we allowed Mr. Baptista to argue the case as if it were an appeal and not a mere revisional application. I have read the article most carefully with a view to form my own judgment as to its character. I can come to no other conclusion than that its object and intention is to bring the Government contemplated by section 124A into hatred and contempt. Mr. Baptista's contention is that, though the writer has here and there used unhappy expressions, and language which is to be regretted, yet his intention, upon the whole, is to point out to Government that bombs and assassinations, described as "the outlandish methods of the West," have come into existence in what the writer regards as this land of a spiritual people, because of certain reactionary policy and repressive measures of Government; and that the writer comments on that policy and those measures with a view to secure their alteration by Government. But this contention ignores the leading ideas and the prominent *innuendoes* of the article. The article begins with the statement that the people have become helpless against their "oppressor or opponent," i. e., the Government; it contrasts the European as "material, gross, mean, degrading," with the people of this country as being endowed with instincts "emotional, spiritual, refined and uplifting." The Government is charged with, on the one hand, bringing into existence "the scoundrel patriot," "the self-seeking loyalist who sells his conscience and his country for a post under the Government or a retainer in Crown cases or for the mere refined bribe of an honorary title," and with, on the other, either deporting "the Nationalist" or compelling him by its policy to go into "exile." To petition Government for any relief or right is practically represented as "old mendicancy." The insinuation is that petitioning Government for any right or relief is not only useless but degrading. The Executive is charged with having first resorted to "excesses" "either to terrorise the people or to exasperate them to any acts of counter-violence"; and when that failed, with having taken no action to protect Hindus against Mahomedan lawlessness, out of "secret sympathy" for the acts of Moslem rowdyism." All this, according to the writer, steeped the people in a sense of helplessness, with the result that the newspaper *Sandhya* advised the people to resort to the use of the bomb for self-protection. The writer characterises that advice as "a lawful appeal," and winds up with the observation that, when the *Sandhya's* advice was followed and the bomb appeared, "it was a great achievement for people who had never received any regular training."

(1) (1889) P. J. p. 37.

(2) (1879) 4 O. P. Div. 335.



The intention and meaning of all this is obvious. In short, the Government, according to the writer, is composed of a race which is materialistic and mean ; it has proved the people's oppressor ; it is demoralising them by turning out scoundrel [384] patriots ; it is irritating them by repressive measures ; it has exasperated them to acts of violence ; it has secretly allowed Mahomedan " rowdies " to attack Hindus ; and all this has served to bring the bomb into existence. The rise of the bomb is represented by the writer as " lawful," and " not criminal " under the state of things portrayed by him. Throughout the attempt is to create the impression that the Government exists for the satisfaction of its own cupidity, and has not a single redeeming feature. Even the peace of the country, enjoyed under the Government, is referred to ironically. Such writing cannot but have been meant by the writer to bring the Government into contempt and hatred and to excite feelings of disaffection against it. I agree with the learned Magistrate that the article is seditious within the meaning of section 124A of the Indian Penal Code.

Accordingly the conviction and sentence must be confirmed and the rule discharged.

HEATON, J. :—This is a revisional application ; it has been argued at a great length, and all that is to be said has been said on both sides. What we have to decide is whether there has been any miscarriage of justice. I do not think there has. The article has been read and commented on, and I have read it again very carefully. I summarize it very briefly by saying that the writer tells us that the grievances of the people in Bengal are so pressing ; that the Government is so bad ; that the chance of redress of their grievances is so remote, that the people in self-defence have been driven to the use of the bomb. If that is a correct description of this article, and it seems to me that it is absolutely correct, I can only infer that the writer is animated by the most virulent hatred of the Government in Bengal and that it was his object to spread that feeling of hatred to others. That brings the article and the writer of the article within the terms of section 124A of the Indian Penal Code. We only have to consider whether the distributor (the accused) also comes within that section. There is no doubt that he did distribute this article ; and if he did so consciously, consciously, that is, of the nature and purport of this article [385] then he also comes within this section. I can find no good reason for supposing that the Magistrate has not correctly decided that the accused had read the article ; that he was in a position to appreciate its meaning and that he did consciously take part in disseminating that wicked and seditious publication. Therefore I concur that the conviction and sentence should be confirmed.

*Application rejected.*

34 B. 385 (=12 Bom. L. R. 386=6 I. C. 530).

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

DAYALDAS LALDAS WANI (*original Defendant No. 2*), Appellant, v. SAVITRIBAI AND OTHERS (*original Plaintiffs*), Respondents.\*

[14th October, 1909.]

*Hindu Law—Succession—Stridhan—Anvadheya—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha.*

\*Second Appeal No. 665, of 1907.

1909  
OCT. 6.

CRIMINAL  
REVISION.

34 B. 378=12  
Bom. L. R.  
21=5 I. C.  
612=11 Cr.  
L. J. 180.



1909  
OCT. 14.

APPELLATE  
CIVIL.

34 B. 385=12  
Bom. L. R.  
386=6 I. C.  
630.

A Hindu female, governed by the Mayukha, died leaving property which she inherited from her father, under a deed of gift subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen :—

*Held*, that the property being *anvadhya* stridhan, should be divided equally among the son and daughters : with this difference, however, as to the latter, that the unmarried should have preference over the married.

*Ashabai v. Haji Tyeb Haji Rahimtulla* (1) and *Sitabai v. Wasantrao* (2), followed.

[Ref : 36 Bom. 424; Fol : 34 Bom. 553.]

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thana, confirming the decree passed by S. A. Gupte, Subordinate Judge at Dahanu.

Suit to recover possession of property.

The property in question belonged to a Hindu female, Varubai, who received it from her father by way of gift subsequent to her marriage. She had three daughters and one son.

[386] The parties were governed by the Mayukha law.

Varubai died in 1894. Her son Dinkar died in 1903. After Dinkar's death, his widow leased the property to defendant No. 1 for a term of 51 years, in satisfaction of a debt due by Dinkar. A little later, one Chhotalal, another creditor of Dinkar, obtained a money-decree against Dinkar and in execution of that decree had the property sold to defendant No. 2.

Varubai's daughters then filed a suit to recover possession of the property, alleging that they were the preferential heirs to the same. Their claim was decreed by the Subordinate Judge, who remarked as follows :—

"Varubai received the property in gift from her father. It is, therefore, Saudayik, and the daughters of Varubai, that is the present plaintiffs, are the preferential heirs (*Manilal v. Bai Rewa*, I. L. R. 17 Bom. 759)."

This decree was confirmed by the lower appellate Court, on the following grounds :—

"In 17 Bom 759, Telang J., after examining all the older cases has laid down that in the case of stridhan proper the daughter has a preferential right over a son, though it is not so in the case of improper son. .... The gift here is stridhan proper, and according to 17 Bom 759, there is no doubt that the daughters are the preferential heirs and the Subordinate Judge's order is correct. The appellant says that this view is not in accordance with the ruling in *Sitabai v. Wasantrao* (3 Bom L R 201). But this latter case deals with the difference between the stridhan inherited from the father's family and stridhan inherited from the husband's family and lays down that there is no difference between these as far as the question of inheritance is concerned. But there is no such clear mention of property received by gift of the sort we have to deal with here. The opinion of Telang, J., in 17 Bombay is on the other hand clear on this point. As to the applicability of Mayukha there is no doubt for the plaintiffs have not shown that they have migrated from some other tract where the Mitakshara applies. However, as I have held that the daughters are preferential heirs according to the Mayukha in this case, it does not much matter whether Mayukha or Mitakshara applies. According to the latter, the appellant admits, that the daughters would be the heirs of Varubai."

The defendant No. 2 appealed to the High Court.

*G. S. Rao*, for the appellant—The property in question is the *Anvadhya* stridhan of Varubai. The succession to such species of stridhan is laid down in the Vyavahara Mayukha (Chap IV, sec. X, pl. 13, Mandlik, p 95).

[387] If Manu's text be interpreted literally, then the *Anvadhya* stridhan descends to sons and daughters equally. Mitakshara's gloss upon it, however, is that sons inherit only in default of daughters. Nilkantha

(1) (1882) 9 Bom. 115 at p. 126.

(2) (1901) 3 Bom. L. R. 201.



does not accept the Mitakshara view, for he says that in the opinion of others (*paretu*) both sons and daughters inherit this species of stridhan equally. The use of the word "*paretu*" indicates that Nilkantha differed from the Mitakshara view. The word is used generally when the writer desires to indicate his dissent from writers of established repute. See Nagoji Bhatt's *Paribhashendu Shekhara*, Dr. Kielhorn's Translation, p. 299.

The very next placitum shows how stridhan is to be divided among the daughters. If there be both an unmarried and married daughters, the former takes a share equal to that of a son, while the latter are to receive a trifling portion of the inheritance as a mere token of respect. This placitum would be meaningless if the Mayukha were taken as adopting the view of the Mitakshara.

The Mitakshara makes no distinction between the technical and non-technical stridhan for purposes of inheritance. It lays down one simple rule of devolution for all kinds of stridhan except Shulka. The Mayukha does not adopt the rule. It distinguishes between the technical and non-technical stridhan and provides for separate rules of succession for each. It adopts the Mitakshara rule so far as the technical stridhan is concerned, with this exception that the Anvadhya and Prittidatta descend to sons and daughters alike. But the non-technical stridhan goes to the male issue in preference to the female issue: *Manilal Rewadat v. Bai Rewa* (1).

The text-writers on Hindu law have accepted the same interpretation of the Mayukha view. See West and Buhler, p. 145 (3rd Edn.); Bannerjee on Stridhan, p. 370 (2nd Edn.); Bhattacharya's Hindu Law, p. 583 (2nd Edn.); Ghose's Hindu Law, p. 281 (2nd Edn.); Mayne's Hindu Law, p. 898, section 671 (7th Edn.).

[388] The Mayukha agrees in this respect with other texts: see *Smriti Chandrika*, pp. 125, 126; *Vira Mitrodaya*, pp. 228, 229; and *Vivada Chintamani*, pp. 266, 267.

The decided cases also support my contention, see *Ashabai v. Haji Tyeb Haji Rahimtulla* (2); and *Sitabai v. Wasantrao* (3).

K. N. Koyajee, for the respondent.—The two Bombay decisions cited by the other side were by single Judge and full arguments on the present point do not seem to have been advanced.

I submit that Nilkantha means to lay down in the Mayukha that succession to Anvadhya stridhan goes to the daughters alone whether there be sons or not, and if Nilkantha has not himself expressed any definite opinion on the point, the opinion of the Mitakshara which he quotes in full and from which he does not show an express dissent, must prevail. See *Vasudev Bhat v. Venkatesh Sanbhav* (4) and *Krishnaji Vyanktesh v. Pandurang* (5).

The expression "*paretu*" cannot import dissent. Dr. Kielhorn's remark in parenthesis relied on by the other side cannot be accepted as a general rule. I submit that the very fact that the Mitakshara view is cited and the contrary view is briefly alluded to without naming the authors or without any concurrence, shows that Nilkantha meant to adopt the Mitakshara view.

[CHANDAVARKAR, J.:—The text as to the further distinction between married and unmarried daughters which is ascribed to Manu in *Mandlik* at p. 95, is not to be found in Manu.]

(1) (1892) 17 Bom. 758.

(2) (1882) 9 Bom. 115 at p. 126.

(3) (1901) 3 Bom. L. R. 201.

(4) (1873) 10 Bom. H. C. R. 139.

(5) (1875) 12 Bom. H. C. R. 65.

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34 B. 385=  
12 Bom. L.  
R. 386=6  
L. C. 530.



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The author of the text seems to be Brihaspati and not Manu. Thus, Nilkantha quotes Brihaspati's text and explains it as meaning that the daughter gets the share of a son. I submit that the expression "*tadams-hini putrasamamshini*" does not mean that the daughter takes an equal share *along with* the son, but it only means that she takes a share which a son would have taken. The preference between married and unmarried daughters would only be intelligible if sons are excluded.

The remarks of Telang, J., at the end of his judgment in *Manilal Rewadat v. Bai Rewa* (1) also support my contention.

[389] CHANDAVARKAR, J.:—The facts, material for the purposes of the question of Hindu law argued before us, are shortly these.

One Varubai died possessed of property and left her surviving a son, by name Dinkar, and three daughters. The property in dispute formed the *anvadhya stridhan* of Varubai, she having received it in gift from her father after her marriage.

The daughters of Varubai, who are respondents before us, were plaintiffs in the suit, which has led to this second appeal. They claimed the property as sole heirs of their mother. The appellant before us asserted his right to it under a title derived at a Court sale from Varubai's son Dinkar. His case was that Dinkar was the sole heir of Varubai.

Both the Courts below have awarded the respondents' claim, holding that they were the heirs of Varubai.

The question argued before us is, whether the son and the daughters of Varubai take the property as joint heirs of their deceased mother, or whether the daughters alone take it as heirs in preference to the son.

It was held by Green, J., in *Hurry Shankar v. Krishnarao* (2) that the term *anvadhya* applied only to a gift to a woman from her husband or his family subsequent to her marriage. In *Ashabai v. Haji Tyeb Haji Rahimtulla* (3) Sargent, C. J. sitting as a single Judge, held that sons and daughters were all entitled as heirs to share equally in the *anvadhya stridhan* of their deceased mother. This latter decision was followed by the late Chief Justice of this Court, Jenkins, C. J. also sitting as a single Judge in *Sitabai v. Wasantrao* (4), where he pointed out that, in limiting the meaning of *anvadhya stridhan* to a gift made to a woman by her husband or his family after her marriage, Green J., had been misled by the wrong rendering by Borradaile of the passage in the Mayukha dealing with the question of succession to that *stridhan*. The view taken of the Mayukha law in these two decisions is the same as that taken by West and Buhler in their Digest (page 145, 3rd Edition), by [390] Sir Gurudas Banerjee in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan (page 371, 2nd Edition), and by Mr. Bhattacharya in his "Commentaries on Hindu Law" (page 583, Second Edition).

It is contended for the respondents that the decisions of Sargent, C. J., and Jenkins, C. J., rest upon a misapprehension of the passage in the Mayukha, which deals with the question of succession to *anvadhya stridhan*; that Nilakantha does not state his own opinion on the question whether sons and daughters share equally or whether the daughters take the property to the exclusion of the sons; but that he merely states the opinion of the Mitakshara and that of others who differ from it. Under these circumstances, it is urged, we must apply to the case the law of the

(1) (1892) 17 Bom. 758.

(2) Suit No. 84 of 1876, Unrep. Note. The Editor has not been able to verify this reference as the proceedings in this

suit could not be found.

(3) (1883) 9 Bom. 115 at p. 126.

(4) (1901) 31 Bom. L. R. 201.



Mitakshara on the established principle of this Court, enunciated in *Vasudev Bhat v. Venkatesh Sanbhav* (1) and *Krishnaji Vyankatesh v. Pandurang* (2), that, wherever Nilakantha expresses no opinion of his own, conformity with the Mitakshara should be aimed at, as far as consistency will allow, in cases governed by the law of the Mayukha.

This contention is founded upon a misconception of the import of the language used by Nilakantha in dealing with the question of succession to *anvadhya stridhan* (a gift subsequent to marriage). He first mentions the opinion of the Mitakshara; then he states the contrary opinion in the following terms:—

“Others (however) say that, in the case of *anvadhya* and a gift through affection, the association of daughters and sons is independently laid down (by this text).” (Mandlik's Hindu Law, page 95).

In urging before us that in this passage Nilakantha does no more than express the opinion of those who differ from the Mitakshara without stating his own view, the respondent's pleader loses sight of the fact that the form of expression used in the passage is not uncommonly employed by an author in Sanskrit when he means to state his own view on a point under discussion. He would first state the opinion of the author from whom he means to differ, and then express his own opinion by [391] using such language as “others, however, say”—(*pare tu*\* or *anye tu*, both of which have the same meaning in Sanskrit). Another mode of expressing dissent from the opinion of an author is to state that opinion and say: “Some, however, say,” (*kechit tu*). Of this form of expression, however, it must be observed that, more than the other form, it depends on the context whether it should be interpreted in the same sense as the expression:—“Others, however, say”, because the word “others” is *prima facie* more comprehensive than the word “some.” There is yet a third mode. Where an author differs from older authors on a point, he states the opinion of the latter as that of “ancient authors” and expresses his dissent in these words:—“Modern authors” (*arvanchaha* or *navyaha*) “however, say”. By “modern” the writer is presumed to refer to himself as one falling in the category of authors later than the ancient.

The reason why this indirect form of language is not uncommonly used to express dissent is that it is considered unbecoming and presumptuous on the part of a writer to adopt such expressions as “I think so,” or “I say so,” or “I am of opinion,” especially when he is differing from another author of repute and recognised authority. It is regarded as a mark of culture and scholarship for an author to express his own opinion modestly and humbly, in differing from another author. When he states the latter's opinion and then says “others, however, take a different view,” by “others,” he implies his “own humble self.”

This mode of expressing dissent is employed, for instance, by Nagoji Bhatta in his *Paribhashendushekhara* (page 106, last line: Kielhorn's Edition), and his *Shabdendushekhara*. It is adopted also by Jagannatha in his *Rasagangadhara* (Nirnaya Sagara Edition, page 276 and page 501). Among Sanskrit scholiasts it is a rule of construction that, when these

(1) (1873) 10 Bom. H. C. R. 139.

(2) (1875) 12 Bom. H. C. R. 65.

\* The following note is by the distinguished Orientalist, Dr. R. G. Bhandarkar:—

“When the opinion of an author is quoted by his name and afterwards another opinion is given and introduced by the words *pare tu*, the usual way of understanding is that this last is the opinion of the author himself.”

Chandavarkar, J.



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forms of expression occur in a work, they should be interpreted, generally speaking, as meaning that the author who uses them intends thereby to [392] represent that the dissenting opinion is either his own or is shared by him.

Nilakantha, therefore, in the passage above quoted from the Mayukha, may be fairly presumed to have dissented from the opinion of the Mitakshara and to have stated it as his own opinion that both sons and daughters are joint heirs to the *anvadhya stridhan* of a woman.

This interpretation of Nilakantha's meaning is confirmed by what follows immediately after the passage quoted above from the Mayukha. He proceeds to point out a distinction with reference to the daughters. As to them he says, the unmarried come in as heirs before the married. In support of that distinction he quotes a text of Manu which provides :—

"*Stridhan* (woman's property) goes to her children, (for) the daughter is a sharer thereof, provided she be not given away (in marriage)." (Mandlik's Hindu law, page 95, lines 33 to 36).

Having quoted this text, Nilakantha explains what Manu means by the expression : "the daughter is a sharer thereof," (*tadamshini*). It means, says Nilakantha, that the daughter becomes "the receiver of a share equal to (that of the) son." This explanation would be out of place, if Nilakantha meant to accept the opinion of the Mitakshara that the sons and daughters do not inherit jointly but that the daughters come in the line of heirs first and that the sons take only in default of them. It is because the son is, in Nilakantha's view, a sharer with the daughter that he says that the daughter's share is equal to the son's. That is why he concludes his treatment of the subject by citing Katyayana's text, which provides that "sisters having husbands should share with brothers," (Mandlik, page 96, line 2).

These considerations coupled with the fact that, in dealing with the question of succession to *stridhan* property, Nilakantha treats the two forms of technical *stridhan*, known respectively as *anvadhya* (a gift subsequent) and *priti datta* (gift through affection) separately from the other technical forms, make it clear, beyond doubt, that, in his opinion, daughters and sons are joint heirs to the former and share equally.

[393] It is, however, argued for the respondents that it cannot be so because, later on, after pointing out on the strength of a text of Katyayana that, in default of daughters and their issue, "the sons, grandsons and the rest" (of the deceased) should succeed, Nilakantha remarks : "This right (of inheritance) of daughters and the rest in the mother's property exists only in (respect of) the *adhyagni*, *adhyavahanika*, and other aforesaid (kinds of the) technical *stridhan*." (Mandlik, page, 97, lines 7 to 11). This remark is made merely for the purpose of emphasising the distinction which, in Nilakantha's opinion, exists between *stridhan* technically so called and other kinds of *stridhan*. He says that the right of daughters to succeed to their mother's property exists only as to technical *stridhan*. That does not mean that the right is exclusive of the right of sons in the case of every kind of technical *stridhan* without exception. The daughter succeeds to her mother's *stridhan*, whether she inherits it jointly with a son or to his exclusion. In short, the purpose of Nilakantha's observation is no more than to show that a son excludes the daughter in all cases except technical *stridhan*. It does not follow from that that the son does not share equally with the daughter in certain kinds of technical *stridhan*, such as a gift subsequent (*anvadhya*) and a gift through affection (*priti datta*).



The result is that, as held in *Ashabai v. Haji Tyeb Haji Rahimtulla* (1) by Sargent, C.J., and in *Sitabai v. Wasantrao Nana Moroba* (2) by Jenkins, C.J., under the law of the Mayukha, when a Hindu woman dies possessed of *stridhan* property called *anvadhya* (a gift subsequent to marriage), and the claimants to that property are her son and daughters, these all become entitled to share the property equally as heirs, with this difference, however, as to daughters, that the unmarried have preference over the married.

In the present case, Varubai on her death left her surviving one son and three daughters. The question, whether any of the daughters was unmarried at the time of Varubai's death when the succession opened, was not raised in either of the Courts below, because the daughters claimed the right of heirship jointly [394] to the exclusion of the son. From the conclusion of law we have arrived at, it follows that the son and the daughters of Varubai became co-owners having equal shares in the property. They have no right to eject the appellant, who stands in the shoes of the son. But, though the exclusive title set up by them is negated by our conclusion of law, yet relief can be given to them in this suit for ejectment by way of joint possession with the appellant: *Naranbhai v. Ranchod* (3). But before a decree for joint possession is passed, it is necessary to determine whether all or any of the respondents (plaintiffs) were unmarried when their mother Varubai died, because it is only the unmarried who would be entitled to share in the property with the son in preference to the married. Unless the parties are agreed on this question of fact, we must ask the lower Court to find on the following issue after taking such evidence as either party may adduce:—

(1) Was any, and if so, which of the plaintiffs, unmarried when their mother Varubai died and the succession to the property in dispute opened?

The onus will lie in the first instance on the plaintiffs.

Finding to be returned within three months.

On its return there will be a decree for joint possession in favour of those entitled.

Issue sent down.

34 B. 391 (=5 I. C. 854= 12 Bom. L. R. 105=11 Cr. L. J. 264).

### CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. GANESH DAMODAR SAVARKAR.\*

[8th November, 1909.]

*Indian Penal Code (Act XLV of 1860), sections 107, 108, 121, 124A—Abetment—Sedition—Waging of war.*

The accused published a book containing eighteen poems, of which four were the subject-matter of the charge. The general trend of the poems charged, as well as the remaining ones in the book evinced a spirit of bloodthirstiness and [396] murderous eagerness directed against the Government. conveyed the urgency of taking up the sword, and made an appeal of blood-thirsty incitement to the people to take up the sword, form secret societies and adopt guerilla warfare for the purpose of rooting out the British rule.

Held, that the accused committed the offence of abetting the waging of war (section 121 of the Indian Penal Code), by the publication of the poems charged.

\* Criminal Appeal No. 290 of 1909.

(1) (1882) 9 Bom. 115.

(2) (1901) 3 Bom. L. R. 201.

(3) (1901) 26 Bom. 141.

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34 B. 385=  
12 Bom. L.  
R. 386=6  
I. C. 530.



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NOV. 8.

CRIMINAL  
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34 B. 394=8  
I. C. 854=12  
Bom. L. R.  
105=11 Cr.  
L. J. 264.

*Held*, further, that the Court was entitled to look into the poems other than those forming the subject-matter of the charge, for the purpose of finding out the intention of the writer and the design of the publication.

*Per CHANDAVARKAR, J.* :—Under the Indian Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121: that is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself.

The word "abetment" is defined in section 107 of the Code and one of its meanings, as given there, is "instigating any person to do anything." This meaning is not excluded by anything that occurs in section 121. The general law is laid down in sections 107—120 of the Code. According to it, "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded and abetment which has failed, section 121 does away with that distinction so far as the offence of waging war is concerned, and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

*Per HEATON, J.* :—Under section 107 of the Indian Penal Code there may be instigation of an unknown person.

The word "abet" as used in section 121 of the Code, has the same meaning as is given to it by section 107. The "abetment" meant by section 121 is not necessarily confined to abetment of some war in progress. There may be, and usually, is instigation of rebellion before rebellion actually begins: that kind of instigation is under the Code abetting waging war against the King.

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war.

[Fol. 75 I. C. 299=24 Bom. L. R. 885=24 Cr. L. J. 923.]

[396] APPEAL from conviction and sentence recorded by B. C. Kennedy, Sessions Judge of Nasik.

The accused was charged with offences punishable under sections 121 and 124A of the Indian Penal Code.

The facts were that early in 1908, he published a booklet styled "The Laghu Abhinav Bharat Mala." It contained in all eighteen poems in number, of them, the poems which formed the subject-matter of the charge, were those numbered 5, 7, 9, 17 (verses 4-7). They ran as follows:—

V. An old moral story (1).

Oh! you stout hearted, here an interesting story; lovingly keep in (your minds, the beautiful moral (2), of it.

This (sort of) fun has taken place over and over again from ancient times; the black god of black (people) gives a drubbing to the foreign demons.

2. Madhu and Kaitabh (3) were foreign demons on inimical terms with the creator; Vishnu, the black (god) of the blacks, destroyed them in no time.

3. Similarly when the foreign demon named Hiranyaksha became very powerful, the black Varaha (4) sent (5) him to the kingdom of (the god of) death.

4. The sable Shree Ram took up cudgels on behalf of the blacks and killed the arrogant alien ruler Ravan.

(1) Literally, fun.

(2) Substance.

(3) Names of demons said to have been

killed by Vishnu.

(4) Boar, an incarnation of Vishnu.

(5) Literally, shewed him the darbar.



5. Oh ! alien Kansa : do not truly give yourself airs through the intoxication of royal (authority) ; the dark Krishna the god of the blacks will destroy (1) you.

6. The dark complexioned lord Shivaji (was) to the blacks a good (and) stout hearted friend ; the alien Mlechhas have had (a taste of) his Maratha hospitality.

7. If any foreign Rakshas become irresistibly insolent in future, king Kali of the blacks will drive them beyond the seas (or the Indus).

#### VII. Sentiment of the people of Shivaji's times.

(In these verses the sentiments entertained by the people at the time of Shivaji's birth are described).

1. The Aryans invoke (God) Ganesh to destroy (their state of) dependence. Oh God ! take the sword in hand and be ready for battle. (Chorus). Oh (God) ! the demons of dependence have produced great misery on the earth ; the people have been harassed ; Oh ! auspicious one of the world, fondle them with (thy) loving hands.

[397] 2. This demon is more (2) cruel (and) irresistibly powerful than Sindhur (3). In a drama of fraud we say he is treacherous, a out-throat and a wretch.

3. Petitions and prayers have often been presented and offered in humble prostrations. But he, really the meanest of all, does not yield to our supplications.

4. Only one remedy is left now (and that is) striking (4) with the sword. This wicked being must, anyhow, be destroyed by various means (5).

5. The powerless mouse, (on which you usually) ride, will be crushed entirely on the battlefield ; and, therefore, I tell you to mount on a steed as swift as the wind.

6. O Munificent one ! be similarly armed with new weapons. These old weapons are now not of much use in battle.

7. Never give (open) battle to the enemy, his army is vast. Guerrilla tactics should be resorted to, as they are the mainstay of a small force.

8. The whole of this plan should be carried out secretly by gathering together hardy patriots who are like a bouquet of beautiful flowers.

9. On your achieving some slight success the immortal kings of various places and also their Sardars will, indeed, come to assist you.

10. Oh Lord ! May you kill the demon and give victory to the people, and grant mother earth ! Oh (lord) ! the beautiful and suspicious wreath of independence.

11. Hearing this invocation of the Aryas, God Ganpati was deeply touched and then having incarnated himself as Shivaji, he killed the (demon of) dependence.

#### IX. Who obtained independence without war ?

1. Was glorious Rama, sable as a cloud, a fool to have freed his mother, the earth, from servitude ? Did he then wage war to no purpose ? Who obtained independence without war ?

2. How many petitions did the people of Netherlands send ? Those princes of mendicancy offered many a prayer to (their) enemy. Did (6) they then obtain their kingdom ? Who obtained independence without war ?

3. Ask the Greeks themselves how they achieved their national emancipation. (There are) no other paths leading to emancipation than war. Who obtained independence without war ?

4. The Swiss did not (merely) offer weak resistance (to the enemy) through fear of the armies of wicked persons, (they) quickly proceeded to (perform) the sacrifice of a good war. Who obtained independence without war ?

[398] 5. Tyrol would not bend (the knee) to her enemies. She would not (also) choose (a policy of) beggary. She rather appealed to her own sword. Who obtained independence without war ?

6. Had the great Shivaji any eager desire to sacrifice in vain the lives of others ? (But) of how many (of his) brethren had (he) to shed the blood ? Who obtained independence without war ?

(1) Literally, make turmeric powder of you.

(2) Literally, excessively.

(3) Name of a demon.

(4) Literally, beating.

(5) Literally, efforts.

(6) Literally, did their kingdom then come into their wallet.

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34 B. 394=5  
I. O. 884=12  
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L. J. 264.



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35 B. 394=5  
I. C. 854=12  
Bom. L. R.  
105=11 Cr.  
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7. Similarly, heroic Italy struggled manfully on the battle-field by founding (her) secret societies in good time. Good fortune followed (1) her spontaneously. Who obtained independence without war?

8. The Americans did the same. They fought and drove away their country's servitude. Then that servitude fled towards the East. Who obtained independence without war?

9. Know it to be an established truth of the past that no one is able to obtain independence without war. He who desires Swaraj must wage war. Who obtained independence without war?

The prayer of the Mavalas to God Shiv?

\* \* \* \* \*

XVII. 4. At night the leaders full of love, hold secret consultations in the interest of their country and thoughtfully weigh the strength of the enemies with a view to conquer them.

5. The youths whose minds are longing for battle unfurl the flags over their steeds; like wise \* \* \* .

6. Men by taking exercises in the gymnasium belonging to secret society have, indeed, under difficulties developed strong wrists.

7. And in the like manner, behold, O Lord, the naked (*i. e.*, unsheathed) swords, being as it were the beloved wives of heroes have grown highly impatient to swim in pools of blood.

The accused was tried before the Sessions Judge of Nasik with the aid of assessors: the Judge agreeing with the assessors found the accused guilty of having attempted to excite disaffection towards His Majesty the King Emperor (section 124A of the Indian Penal Code) and of having abetted the waging of war against the King Emperor (section 121A of the Code). The accused was sentenced to undergo rigorous imprisonment for two years for the first offence; and to transportation for life with forfeiture of property, for the second.

The accused appealed to the High Court.

At the hearing, the Court directed all the poems in the book to be translated.

[399] *Baptista* (with him *B. V. Desai*), for the accused.—We submit that the conviction and sentence under section 121 of the Indian Penal Code are contrary to law. First, because, the poems charged have no reference to the Government of India or to the present time; and, second, because (1) the poems charged do not constitute abetment of waging war against the King as contemplated by section 121; and (2) that they do not even amount to abetment as defined by section 107 of the Code.

[Counsel here commented on all the poems charged and contended that all they conveyed was merely mythological allusion; and they referred to times long since past. He said that viewed as such they have no reference near or remote to the present Government of India; and did not constitute any of the offences charged. He went on.]

Assuming for argument's sake that the poems do refer to the British Government, then we say that they do not fall within the purview of section 121. In England, there are two kinds of levying war—one against the person of the King and the other against the Majesty of the King: *In re Gordon* (2). The former kind seems to have been contemplated by section 121; the section does not take in the second kind at all. To wage war in order to subvert the Government of India would be to wage war against the Majesty of the King; but it is no offence under section 121.

Assuming that section 121 includes the waging of war against the Majesty of the King, then even the accused has committed no offence.

(1) Literally, came calling after her.

(2) (1781) 21 St. Tr. 486, 645.



The lower Court has found him guilty of "abetment" of waging war under section 121. We submit abetment under section 121 is not the same as abetment under section 107. To abet under section 121 means joining or aiding an existing insurrection. This appears from the illustrations to the section.

Assuming, however, that abetment under section 121 is the same as abetment defined in section 107, the facts of this case do not constitute abetment under section 107. For first, there is no instigation in fact whatever. Secondly, there must be evidence to show that some person was actually instigated. Thirdly, the [400] instigation must be in the present case "to wage war against the King". To that definite thing a person must be instigated. Of that, there is no evidence here. The poems are, on the face of them, puerile, and nobody should take them seriously. The poems may inflame feeling or excite hatred of foreign rule, but they fall far short of a call to arms or action and therefore do not constitute instigation.

The conviction and sentence passed under section 121 should, I submit, be set aside.

G. S. Rao, acting Government Pleader, for the Crown.—The abetment under section 121 and section 107 is the same. The effect of section 7 is that the term "abetment" is used in one uniform sense throughout the Code. The reason for making a special mention of 'abetment' in section 121 was to make it as highly punishable as the substantive offence. In the same way, section 121-A punishes conspiracy though section 107 provides for conspiracy.

The person instigated would here be the reader of the poems; and the thing instigated would be to wage war. The offence, therefore, is complete.

Baptista was heard in reply.

CHANDAVARKAR, J.—This is an appeal from the judgment of the Sessions Judge of Nasik, convicting the appellant Ganesh Damodar Savarkar, of the offences under sections 124A and 121 of the Indian Penal Code, that is, of exciting disaffection towards His Majesty the Emperor and the Government established by law in British India and of abetting the waging of war against His Majesty. The appellant has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment for the offence under section 124A, and to transportation for life with forfeiture of all property to the Crown under section 121.

The offences arise out of four, from among a series of eighteen, poems, published in a book entitled *Laghu Abhinava Bharata Mala*, i.e., a 'Short Series for New India, and recorded as exhibit 6 as part of the evidence in the case. The four poems are those numbered in the book as 5, 7, 9 and 17, respectively. Of poem [401] No. 17, only verses 4 to 7 form the subject-matter of the offences proved.

When the appeal came on for hearing before us on the 13th of October, Mr. Baptista contended that none of these four poems had or were intended by their writer to have any reference either to His Majesty the King-Emperor or to the British Government in India or to the present political condition of the country. On examining the series of poems in the book, exhibit 6, containing the four poems, it appeared to us that there were other poems in it besides those four, which threw light on the intent of the writer; and that, as the whole book had been allowed in the lower Court to go in as evidence without any objection, all the poems in the book could be referred to for the purpose of determining the intention, character, and object of the poems selected [as] the basis of the charges

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34 B. 394=  
I. C. 804=1  
Bom. L. R.  
105 = 11 Cr.  
L. J. 264.



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NOV. 8.

CRIMINAL  
APPELLATE.

34 B. 394=5  
I. C. 884=12  
Bom. L. R.  
105=11 Cr.  
L. J. 264.

against the appellant in the lower Court. We adjourned the hearing for an official translation of the whole series of poems in the book into English and also to enable the appellant's legal advisers to argue the appeal with reference to the bearing of the whole series on the poems forming the subject-matter of the charges.

In supporting this appeal, Mr. Baptista, the learned counsel for the appellant, has raised two points. First he contends that the poems charged as treason and sedition are either mythological or historical references and do not relate either to the British Government of India or the present times. I cannot accede to this argument. It is true that the writer has chosen either mythological or historical events and personages, but that is for the purpose of illustrating and emphasising his main thesis, that the country should be rid of the present rule by means of the sword. The innuendoes cannot be mistaken or misunderstood. For instance, the 5th poem purports to refer to the destruction of "foreign demons" by Rama, Krishna, and Shivaji. But that it is not a mere description of the past but is meant to be a covert allusion to the British is apparent from the frequent use of the term "black" referring to the people of this country. Any one can see that the frequent play upon the word "black" is intended as a contrast to the word [402] "white" and the implication is that the "black" are ruled by the "white" and that the latter will and must be killed by "a black leader of the black." So also as to the next poem, No. 7. Under the guise of an invocation or prayer to Ganesh, the god who, according to Hindu belief, destroys evil, the writer calls upon him to take up the sword and be ready for war, because "the demons of subjection have spread lamentation all over the world." The "demons" are characterised as "dissembling, notorious, treacherous, out-throat." "Applications and petitions," says the writer, "were frequently made, attended with abject submissions. But this meanest of the mean would not indeed be persuaded by begging." And he goes on to say that "this meanest of the mean" must be killed "by the blows of the sword." This poem is headed "the state of mind of the people at the time of Shivaji's birth." The people are supposed to offer a prayer to the god Ganesh to take up the sword and exterminate the demon who has subjected the country to dependence. The allusion to petitions rejected is obviously to what is called by some "the policy of mendicancy." Ganesh is asked to take birth as Shivaji. The writer evidently has in mind the Ganapati *melas* of the present times and he who runs may read the animus of the lines and the lesson intended to be conveyed. The 9th poem, which is headed "Who obtained independence without war?" winds up with this remark: "He who desires *swarajya* (one's own rule) must make war." The 17th poem professes to be a "prayer of the Maylas to the god Shiva", but one can plainly see that the sting of the verses lies in the covert allusion to the present rulers of British India. The translation of the poems into English brings out the sting clearly enough, but to those who know Marathi, who can either sing or understand the poems sung, the venom is too transparent to be mistaken for anything else than a call to the people to wage war against the British Government. It is idle for counsel to quibble about the meaning of certain words in the poems, such as *parka* and *kala* and argue that they have no reference to the present times.

No doubt the writer has used several words, each having a double meaning, but that meaning only serves to emphasise the fact that the writer's main object is to preach war against the [403] present



Government, in the names of certain gods of the Hindus and certain warriors such as Shivaji. Those names are mere pretexts for the text which is: "Take up the sword and destroy the Government because it is foreign and oppressive." For the purpose of finding the motive and intention of the writer, it is unnecessary to import into the interpretation of the poems, sentiments or ideas borrowed from the Bhagavad Gita. The poems afford their own interpretation, and no one who knows Marathi can or will understand them as preaching anything but war against the British Government. Mr. Baptista has conceded that, if the poems be construed as referring to the British Government, they fall within the meaning of sedition under section 124A of the Indian Penal Code. That they are such as to excite disaffection goes without saying.

The only question is whether these poems also fall within section 121 of the Code and amount to an abetment of the waging of war against the King-Emperor and his rule in India. Mr. Baptista's contention is that the word *abet* in this section must be construed as excluding all idea of mere instigation, and that, for the purposes of the offence of abetment under this section, there must be some actual insurrection; that, in other words, it must be shown that a large multitude was collected and had weapons for mischief. Under the English law "mere words spoken, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King, or the levying of a war against him, and in the contemplation of the speaker, do not amount to treason." And the same has been held to apply to writings: *King v. Andrew Hardie* (1). But under our Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121. That is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself. The word "abetment" is defined in section 107 of the Code and one of its meanings, as given there, is "instigating any person to do anything." This meaning is not excluded by anything that [404] occurs in section 121. The general law as to abetment is laid down in sections 107 to 120 of the Code. According to it "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, section 121 does away with that distinction, so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

But it is urged that in the present case there has been no instigation by the appellant of any person or ascertained body of persons by means of these poems to wage war. It is in evidence and is admitted before us by appellant's counsel that the book containing the poems was exposed for sale and published and that copies of it were circulated among the public, that is, among a large number of persons. Because that number cannot

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34 B 394=  
I. C. 854=  
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105=11 Cr.  
L. J. 264.

(1) (1820) 1 St. Tr. (N. S.) 610 at p., 625.



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CRIMINAL  
APPELLATE.

34 B. 394=5

I. C. 854=12

Bom. L. R.

105= Cr.

L. J. 264.

be definitely ascertained or counted, it cannot be said that the publication was not to "a body of persons."

Mr. Baptista's last argument is that these poems do not instigate any one to wage war but merely prepare the minds of the people for war and constitute no more than constructive treason. That is asking us to put too mild a construction on the poems—a construction which is not supported by the plain words, not to say the innuendoes of the poems. The fifth poem does not indeed contain any direct instigation to war, but the seventh poem, in the name of the god Ganesha, is substantially an appeal to people to take up the sword and fight with "the demons" who, it is said, "have spread lamentation [405] throughout the country" by subjecting it to their rule. And the ninth poem concludes by saying that he who wishes for *Swarajya* must wage war. And that is the dominating idea or text of the whole book. We are entitled to look into the poems other than those forming the subject-matter of the charges for the purpose of finding out the intention of the writer and the design of the publication. In poem No. 6 the writer calls upon Aryans to devise some remedy against what he calls the slavery of foreign rule and says that the kingdom of independence can be obtained only through "pools of blood." Poem No. 2 is a most direct appeal to young men "to gird up their loins," "cast off foreign yoke," "take up sticks," and "out out the cage of slavery." Merely saying that independence cannot be gained without fighting may not amount to treason, but here it is more than that. A spirit of blood-thirstiness and murderous eagerness directed against the Government and "white" rulers runs through the poems: the urgency of taking up the sword is conveyed in unambiguous language, and an appeal of blood-thirsty incitement is made to the people to take up the sword, form secret societies, and adopt guerrilla warfare for the purpose of rooting out "the demon" of foreign rule. All this is instigation.

For these reasons the convictions and sentences under sections 121 and 124A must be confirmed and the appeal dismissed.

HEATON, J.—The appellant in this case has been tried for, convicted of, and punished for sedition and abetment of waging war against the King under sections 124A and 121 of the Indian Penal Code, in that he published certain poems. The correctness or otherwise of the conviction depends entirely on the character of the poems. Certain of them are specifically referred to in the charge. The rest have been referred to in argument and a perusal of the whole is necessary in order to ascertain the true character of those specifically referred to in the charge.

There are in all eighteen poems.

No. 1 is a prayer to God to grant independence.

No. 2 is a lament that India is enslaved and is without independence.

[406] No. 3 is a dialogue between Shivaji and others, in which Shivaji exhorts his hearers to plant the banner of independence.

No. 4 is loving advice to a drunkard.

No. 5 recites how in the past the gods or heroes of the blacks punished the enemies of the blacks (or aliens) and that if hereafter foreign (or inimical) demons become arrogant they will be driven beyond the sea.

No. 6 is a hymn to the goddess of independence.

No. 7 describes how, prior to the birth of Shivaji, there was a desire that subjection should be overcome by making war, and how Shivaji came and conquered. The poem is suggestive of the need of similar action now.

No. 8 is a prayer for independence amongst other things.



No. 9 is a prayer with the refrain " who ever got independence without battle "?

No. 10 is a lament that the country has fallen into servitude and an exhortation to get independence even by fighting.

No. 11 is an exhortation to the young to fight for independence.

No. 12 holds up those who are not in favour of independence to scorn and the patriot to reverence.

No. 13 is a prayer to God to put an end to the dependence and servitude of the country and to bring independence.

No. 14 is described as a morning song to dependence, and ends thus :—

" O dependence ! let the star of independence, the bestower of knowledge and joy, the wife of the Lord of the Universe, who is as the moon, rise again in the land of the Aryas."

No. 15 is a dialogue implying that the tyrant will be overcome and the land be free.

No. 16 inculcates that the patriot has no fear of prison and contains a good deal favourable to independence.

No. 17 is a prayer to Shiva to come to lead the people to battle.

[407] No. 18 is described as the " Utterances of Nana Puadnavis " and is an incitement to war.

The poems specially referred to in the charge are Nos. 5, 7, 9 and parts of 17.

Briefly summarised, the teaching of this book is that India must have independence : that, otherwise, she will be unworthy of herself : that independence cannot be obtained without armed rebellion and that, therefore, the Indians ought to take arms and rebel. This is quite plain though the teaching is thinly veiled by allusions to mythology and history. It is sedition of a gross kind and very little attempt was made to show that the conviction under section 124A of the Indian Penal Code was not correct.

But it was earnestly argued that the conviction under section 121 was wrong.

It was argued that there was not any instigation and therefore there was not any abetment. With this I will deal later. Then it was argued that there was not any instigation of any known or definite person and that short of this there could not be abetment. The foundation of this argument is to me unintelligible. So far as I am able to understand the meaning of the word ' instigate ' as used in section 107 of the Indian Penal Code, there may be instigation of an unknown person. Then it was argued that the instigation, if any, falls under section 117 of the Code which provides a penalty for abetting the commission of an offence by the public or by more than ten persons. Three thousand copies of the book were printed and admittedly it was intended to sell as many as possible. Therefore the instigation was undoubtedly intended to be of the public or of more than ten persons. Consequently the offence committed is punishable under section 117. But it was further argued that it was therefore not punishable under section 121. That argument I am unable to accept. A prosecution under section 121 requires a complaint by the Government (section 196, Criminal Procedure Code). That complaint has been instituted. Having been instituted the accused had to be tried and it had to be determined whether he has committed an offence under section 121. If he has, then he must be punished under that section, whether the offence also falls under some other section or not.

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34 B. 394=5  
I. C. 854=12  
Bom. L. R.  
105=11 Cr.  
L. J. 264.



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34 B. 394=5  
I. C. 884=12  
Bom. L. R.  
105=11 Cr.  
L. J. 265.

[408] Therefore the question to be determined is whether the offence under section 121 has or has not been committed. Briefly stated, the most cogent argument for the defence is this:—So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war. That is, it seems to me, a correct statement. Therefore it has to be determined whether the poems recited in the charge do clearly instigate to action. It is contended for the defence that they do not. In my opinion they do. In unmistakable language they tell the readers of the book to form secret societies, to take arms and to revolt against the Government. That is clearly to my mind an instigation to action. Therefore I think the conviction is correct and should be confirmed.

I attach no importance to the argument that the word 'abet' in section 121 means something less than that word as used in section 107 of the Indian Penal Code. Section 7 of the Code refutes that argument. Nor am I impressed by the argument that the abetment meant by section 121 means abetment of some war in progress. There may be and usually is instigation of rebellion before rebellion actually begins. Under the law of this country, instigation of that kind is abetting waging war against the King.

*Appeal dismissed.*

34 B. 408 (=12 Bom. L. R. 223=5 I. C. 968).

#### APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

BASANGOWDA HANMANTGOWDA PATIL AND OTHERS (*original Plaintiffs*), Appellants, v. CHURCHIGIRIGOWDA YOGANGOWDA AND ANOTHER (*original Defendants*), Respondents.\*

[27th January, 1910.]

*Practice—Court—Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside.*

In the course of a suit, a compromise was presented which was signed by the defendants' pleader who was not specially authorised in that behalf. The Court [409] passed a decree in terms of the compromise. The defendant then applied to the Court to set aside the decree on the ground that he did not engage the pleader and that he had not authorised the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing.

*Held*, that it is the inherent power of every Court to correct its own proceedings where it has been misled.

*Held*, also, that under the circumstances, the compromise was not binding upon the defendant and the decree passed upon it was void as to him.

[Fol: 84 Bom. 502; Ref: 19 C. W. N. 419=27 I. C. 623; 77 I. C. 14=1923 Pat. 197; 79 I. C. 48]

CIVIL extraordinary application from the order passed by G. N. Kelkar, First Class Subordinate Judge at Dharwar.

The plaintiffs filed a suit against defendants Nos. 1 and 2 in the Court of the First Class Subordinate Judge at Dharwar. In that suit, the defendant No. 1 engaged a pleader for him and for his brother (defendant No. 2). The pleader, it appeared, never had any interview with

\* Civil Extraordinary Application No. 215 of 1909.



defendant No. 2. Defendant No. 1 compromised the case with the plaintiffs; and at his instance the paper of compromise was signed by the leader. The Court passed a decree in terms of the compromise.

Defendant No. 2 thereupon applied to the Court stating that he had not engaged the pleader and that he had not authorised him to enter into the compromise.

The Court set aside the decree and set down the suit for hearing.

The plaintiffs applied to the High Court under its extraordinary jurisdiction.

*S. R. Bakhale*, for the applicants.

*K. H. Kelkar*, for the opponent No. 2.

CHANDAVARKAR, J.:—It is contended that the lower Court has erred in law in upsetting the decree, which was passed in terms of what purported to be a compromise between the parties. The compromise ended in a decree, because it was stated to the Court that the present opponent (defendant) Bhimangauda, who was represented by his pleader, had authorized the latter to enter into the compromise. Bhimangauda, after the decree had been passed, applied to the Court to set aside the compromise on the ground that the pleader had not been instructed to [410] appear for him in the suit and that he had given him no instructions in the case, authorizing him to enter into any compromise. If that was so, the compromise was not binding upon Bhimangauda, and the decree passed upon it was void as to him. It was *ultra vires*. The Court had been asked to put its seal upon and sign a document, which had no legal foundation to rest upon, and if that decree goes out, then the whole suit is re-opened. But it is said that the procedure adopted by Bhimangauda is not in accordance with law; that there is no section in the Code of Civil Procedure which entitles a party in the situation in which the defendant is to ask the Court to re-open the suit and set aside the decree in a summary manner. Now, where limited authority was given to Counsel to enter into a compromise and Counsel entered into a compromise beyond that authority, it has been held by the House of Lords that Counsel, having exceeded his authority, the party was entitled to have the agreement to refer set aside and the cause restored to the list for trial: *Neale v. Gordon Lennox* (1). What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented, and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled. We must, therefore, discharge the rule with costs.

*Rule discharged.*

(1) [1902] A. C. 465.



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FEB. 7.

34 B. 411 (=6 I. O. 518=12 Bom. L. R. 354).

[411] APPELLATE CIVIL.

APPELLATE  
CIVIL.*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Chandavarkar.*34 B. 411=6  
I. O. 518=12  
Bom. L. R.  
354.HAJI UMAR ABDUL RAHIMAN (*original Plaintiff*), Applicant v. GUSTADJI  
MUNCHERJI COOPER (*original Defendant*), Opponent.\*

[7th February, 1910.]

*Civil Procedure Code (Act V of 1908), section 24—Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*

The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial.

The plaintiff having objected that the order of the Assistant Judge was without jurisdiction.

*Held*, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction.

Section 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order [412] passed by K. Barlee, Assistant Judge of Poona in the matter of an application for the transfer of a suit from the Court of the First Class Subordinate Judge.

The plaintiff sued the defendant in the Court of the First Class Subordinate Judge of Poona for the recovery of Rs. 18,797-13-0 due on a promissory note. The suit was filed on the 14th January 1909. It was heard by the Subordinate Judge on several days and was allowed to stand over till the 19th July 1909. The defendant, however, on the 17th July presented a miscellaneous application, No. 197 of 1909, to the District Judge of Poona for the transfer of the suit to another Court on the ground that the First Class Subordinate Judge was biased against the defendant and that he illegally granted plaintiff's application for the examination of two witnesses after the evidence for the defence was taken.

The District Judge transferred the said application to the Assistant Judge for disposal.

The Assistant Judge heard the application and found that the Subordinate Judge was absolutely free from any bias against the defendant. He, however, ordered the suit to be transferred to the District Judge of Poona on the following grounds:—(1) That the defendant had a genuine belief that he would not obtain justice from the First Class Subordinate

\* Application No. 187 of 1909 under extraordinary jurisdiction.



Judge and (2) that the order of the Subordinate Judge granting the plaintiff's application for the examination of two witnesses after evidence for the defence was taken, was illegal and if it were carried into effect it would prejudice the defendant.

Being dissatisfied with the said order, the plaintiff preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that the District Judge had no jurisdiction to transfer the miscellaneous application to the Assistant Judge, that the Assistant Judge had no jurisdiction to dispose of the said application and that there was no ground whatsoever to transfer the suit as ordered by the Assistant Judge. A *rule nisi* was issued requiring the defendant to show cause why the order of the Assistant Judge should not be set aside.

[413] *Strangman* (Advocate-General) with *G.S. Rao* and *A.G. Sathaye* appeared for the applicant (plaintiff) in support of the rule:—The Assistant Judge found that the Subordinate Judge was not at all biased against the defendant. Therefore he should have dismissed the defendant's application for the transfer of the suit. No ground has been made out for the transfer. Even admitting that the order of the Subordinate Judge granting our application for examining witnesses after the defendant had commenced his case was illegal, still we submit the order would afford a ground for appeal and not for transfer. The application for transfer was in the nature of appeal.

Next we contend that the Assistant Judge had no jurisdiction to entertain the application. Under section 24, sub-section 3 of the Civil Procedure Code, only the High Court or the District Judge can exercise jurisdiction and not the Assistant Judge who is subordinate to the District Court. If the Assistant Judge had jurisdiction, he could have transferred the suit to his own file. But he could not do so because under the Bombay Civil Courts Act, section 16, the limit of his pecuniary jurisdiction is Rs. 10,000 while the claim in the present suit amounts to Rs. 18,797 and odd. The jurisdiction exercisable is a personal one, that is, peculiar to the High Court or the District Court. The section expressly differentiates the Assistant Judge from the District Judge.

*Raikes* with *M.B. Chaubal* (Government Pleader) and *J.R. Gharpure* appeared for the opponent (defendant) to show cause:—The Assistant Judge is an assistant of the District Judge in the District Court. Therefore he forms part of the District Court. Sub-section 3 of section 24 of the Civil Procedure Code recognizes the fact that the Assistant Judge is part of the District Court: see also Bengal Act XII of 1887, section 8 (2). Section 16 of the Bombay Civil Courts Act must be read in that light.

The present application is not in the nature of appeal. The prayer for transfer is not co-extensive with the right of appeal, as for example, Small Cause Suits are transferred to the High Court: *Abdul Karim v. The Municipal Officer, Aden* (1).

[414] Under the Regulations and the Civil Procedure Code the Assistant Judge can transfer to the District Court only and not to his own file.

SCOTT, J.:—The applicant obtained this rule calling on the opponent to show cause why an order of the Assistant Judge of Poona should not be set aside as being without jurisdiction.

The material facts are that a suit filed by the applicant in the Court of the First Class Subordinate Judge of Poona against the opponent

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APPELLATE  
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34 B. 411=6  
I. C. 518=12  
Bom. L. R.  
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(1) (1903) 27 Bom. 575.



1910  
FEB. 7.  
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APPELLATE  
CIVIL.  
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34 B. 411=6  
I. C. 518=12  
Bom. L. R.  
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claiming Rs. 18,797-13-0 had been heard by that Judge for some days when the opponent filed an application in the Court of the District Judge for transfer of the suit to another Court.

The District Judge transferred the application to the Assistant Judge for disposal.

The Assistant Judge heard the application and ordered that the suit be transferred to the District Court, Poona, for trial.

It is objected that this order was without jurisdiction as the application was under section 24 of the Code (Act V of 1908) which gives power to the High Court or District Court (b) to withdraw any suit pending in any Court subordinate to it and (i) try or dispose of the same or (ii) transfer the same for trial or disposal to any Court Subordinate to it, whereas the Assistant Judge has ordered the withdrawal of the suit from a Subordinate Court and transferred it for trial to a Court superior to him. The answer of the opponent is that the order is legal as the Assistant Judge is one of the Judges of the District Court and his order is in effect the order of the District Court. In order to judge of the position of the Assistant Judge we must turn to the Bombay Civil Courts' Act XIV of 1869, Part V, which is concerned with the creation and functions of Assistant Judges. It is to be observed that the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in the case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000 an appeal in appealable cases lies to the District Judge. The Assistant Judge is therefore not a Judge of co-ordinate jurisdiction with the District Judge. He is therefore not a Judge of the District Court and [415] the order complained of is not made by the District Court which alone had jurisdiction.

The same conclusion follows from a consideration of the words of section 24 of the Code. The District Court may withdraw any suit and try and dispose of it. Here the suit withdrawn was for a sum exceeding the jurisdiction of the Assistant Judge and he therefore could not try and dispose of it. He therefore is not a judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction.

Again section 24 provides that for the purposes of the section the Courts of Assistant Judges shall be deemed to be subordinate to District Courts but the opponent's argument is based on the contention that for the purposes of the section the Court of the Assistant Judge is part of the District Court.

The rule must be made absolute setting aside the order with costs.

CHANDAVARKAR, J. :—I do not think that an Assistant Judge's Court can be held to be a District Court or even part and parcel of it for the purposes of *all* suits and miscellaneous applications. An Assistant Judge's decree passed in suits is generally appealable to the District Court; probate applications and cases arising under the Land Acquisition Act heard and determined by him have been held by this Court to be similarly appealable. Therefore, whether the Assistant Judge's Court is a District Court or not must depend upon the law under which that Court exercises jurisdiction in any given case. In the matter of the present application, the jurisdiction exercised was under section 24 of the Code of Civil Procedure. Now, it is true that in the present case under the Bombay Civil Courts' Act, section 19, the District Court "referred" the application for transfer made to it to the Assistant Judge's Court for disposal; but a power to decide a case referred to it by a higher Court does not necessarily



make the Court, to which it is referred, the equal of the former, unless the provision of the law under which the case has to be decided confers jurisdiction on the lower Court. Section 19 of the Bombay Civil Courts' Act is a merely enabling section, giving power of reference to the District Court in respect of suits and [416] miscellaneous applications, but section 24 prescribes the conditions of the jurisdiction of the District Court. These are restrictive conditions and those of them which apply here require that the Court exercising jurisdiction must be one which is competent, according to law, to try or dispose of the suit withdrawn from a lower Court. Here the Assistant Judge's Court, it is conceded, was not so competent.

The rule must be made absolute by setting aside the order of the Assistant Judge and directing the District Court to retake the application on its file and dispose of it according to law. Rule absolute with costs.

*Rule made absolute.*

84 B. 416 (=4 I. C. 241=11 Bom. L. R. 921).

### ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

HARGOVAN RAMJI, *Appellant and Plaintiff*, v. MULJI HARJIVAN,  
*Respondent and Defendant.\**

[4th March, 1909.]

*Res judicata—Capacity of parties—Matter substantially in issue—Civil Procedure Code (Act XIV of 1882), section 13.*

The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager.

*Held*, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*.

If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply.

[Ref : 63 I. C. 717.]

[417] THIS was a suit filed by the plaintiff for possession of certain premises, and for ejectment of the defendant therefrom. The facts previous to the filing of the present suit were as follows:—

In the year 1879 Champa, the paternal aunt of the plaintiff's mother, and the admitted owner of the premises in question, died leaving a will dated the 22nd September 1865. In a clause of this will she announced her intention of making a dedication to charity. A few years before her death, namely in 1873, she had affixed an inscription upon a shrine forming part of the premises, purporting to dedicate it to religious uses, and appointing the plaintiff and his brother to be managers thereof after

\* Original suit No. 764 of 1907.  
Appeal No. 50 of 1908.



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her own death. After Champa's death various mortgages were made on the property by the plaintiff, and finally these charges were all acquired by one Merwanji Cama. About the year 1900 the present defendant managed to obtain possession, and in 1902 the plaintiff as owner and Merwanji Cama as mortgagee, filed suit No. 254 against him to recover possession. The first Court decided in the plaintiff's favour. On appeal by the defendant, the Appeal Court went into the question of the dedication to charity, and held that Champa had intended to dedicate this property and had given valid effect to that intention. Under these circumstances they refused to uphold the plaintiff's title as owner, but suggested that he should modify his claim and ask for a decree as manager. On the plaintiff declining to do this, the decree was reversed and the suit dismissed with costs.

After a lapse of five years the plaintiff filed the present suit, claiming possession as manager. The defendant in his written statement set up (*inter alia*) the plea of *res judicata*, and Mr. Justice Russell, before whom the case was heard, decided this preliminary point in his favour and dismissed the suit.

The plaintiff appealed.

*Chitre* (with *Desai*) for the appellant:—Section 13 of the old Code of Civil Procedure, under which this point was decided, must be considered in conjunction with sections 42 and 43 which lay down that a plaintiff must include the whole of the claim which he is entitled to make in respect of the cause of action. But he need not join distinct causes of action, and in the present [418] case the two claims as owner and as manager are not such as ought to be joined: see *Ramaswami Ayyar v. Vythinatha Ayyar* (1) and *Babajirao v. Laxmandas* (2).

Explanation II to section 13 only applies where the relief claimed in the former suit was identical with that claimed in the subsequent suit: see *Sarkum Abu Torab Abul Waheb v. Rahaman Buksh* (3).

*Inverarity* (with *Raikes*) for the respondent:—The claim made by the plaintiff in this suit ought to have been put forward in the former suit: see *Guddappa v. Tirkappa* (4).

SCOTT, C. J.:—The question in this case is whether the plaintiff is entitled to maintain this suit, having regard to the proceedings in a previous suit instituted by him in the year 1902. In that year he filed suit No. 254 against certain persons whom he alleged to be in possession of a room used as a temple in a house which was his property. In the plaint he did not set out his title to the property and, as appeared in the course of the trial, he had avoided stating circumstances which raised a question as to whether the whole property was not the subject of a religious trust. He succeeded in the first Court in getting a decree for ejectment against the defendants with respect to the room used as a temple. In the Court of Appeal it was held that the house was impressed with a religious trust and his only possible claim must be based upon his right as manager. He was then offered an opportunity of altering his case so as to base it upon his right as manager under the will of the person who established the trust. That offer was however refused and the suit was dismissed. He has now filed this suit alleging what he ought to have alleged in the first suit, the will of Champa who established the trust, and relying upon a passage in that will to show that he is entitled as manager to eject the defendant as manager from the room used as a temple and to get an

(1) (1903) 26 Mad 760.

(2) (1903) 28 Bom. 215.

(3) (1896) 24 Cal. 89.

(4) (1900) 25 Bom. 189.



account from the defendant of the profits and emoluments which he has received as manager.

[419] Now whether he can maintain this suit in the face of the provisions of section 13 of the Civil Procedure Code of 1882 depends upon the question whether he is now suing in a capacity in which he is a stranger to the capacity in which he sued in the former suit. If he is not so suing, then the claim which he is now putting forward is a claim which might and ought to have been put forward in the previous suit. If he is so suing, then it is a claim which has no proper connection with the previous suit. That is the conclusion to be drawn from the two most recent Bombay cases which have been relied upon in argument, namely, *Guddappa v. Tirkappa* (1) and *Babajirao v. Laxmandas* (2). It has been argued by Mr. Chitre, in his excellent argument, that in this case the plaintiff really sues on behalf of the temple and therefore, on the authority of the case last referred to, he must be taken as suing as a stranger to the interest in which he sued in the first suit. It is, however, pointed out by Sir Lawrence Jenkins in that case that in connection with the property of a Math there are two distinct classes of suits: those in which the manager seeks to enforce his private and personal rights, and those in which he seeks to vindicate the rights of the Math.

Now this is clearly a case in which the manager seeks to assert his right to be a manager against another person who claims the right to manage. He is not seeking to vindicate the rights of the Math against a stranger to the temple who is improperly using the property of the endowment. He is therefore asserting a purely personal right in his own personal interest and it is a right which, in my opinion, might and ought to have been put forward in the previous suit. As remarked by Mr. Justice West in *Girdhar Manordas v. Dayabhai Kalabhai* (3) the cases show that all the grounds relied on by the plaintiff and so connected together as to be properly the subject of a single investigation ought to be brought forward together. Both in this case and in the previous case, the investigation would be concerned with the terms of Champa's will and the inscription on the [420] property which she dedicated to religious purposes. The whole matter might have been decided in one single investigation and therefore we are of opinion that Mr. Justice Russell was right in holding that this suit is not maintainable.

We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

Attorneys for the appellant: Messrs. *Captain and Vaidya*.

Attorneys for the respondent: Messrs. *Bhaishankar, Kanga & Girdharlal*.

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34 B. 416—4  
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(1) (1900) 25 Bom. 189.

(2) (1903) 28 Bom. 215.

(3) (1882) 8 Bom. 174 at p. 180.



34 B. 420 (= 11 Bom. L. R. 1054=1 I. C. 130).

ORIGINAL CIVIL.

Before Mr. Justice Davar.

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Bom. L. R.  
1054=1 I. C.  
130.VASSONJI TRICUMJI AND Co., *Plaintiffs*, v. ESMAILBHAI SHIVJI  
AND OTHERS, *Defendants*.*In re* MAHOMEDBHAI ALLARAKHIA NANJI.\*

[17th July, 1909.]

*Practice—Civil Procedure Code (Act V of 1908) O. 1, r. 8—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit.*

Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him.

In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties.

[Ref: 24 O. L. J. 448=21 C. W. N. 310=38 I. C. 835=44 Cal. 890; 80 I. C. 28.]

THIS matter came before Mr. Justice Davar in Chambers, on a summons taken out by the applicant, Mahomedbhai Allarakhia Nanji, to show cause why he should not be made a party. The facts appear sufficiently from the judgment.

*Padshah* for the plaintiffs, *Jinnah* for the 1st and 2nd defendants, *Jardine* for the 3rd and 4th defendants appeared to show cause.

[421] *Bahadurji* appeared for the applicant in support of the summons.

DAVAR, J.:—This suit has been filed by Vassonji Trioumji and Co., a firm, on behalf of themselves and other creditors of the estate of the deceased Ebrahimbhai Hassambhai against the executors, the widow and the daughter of the deceased, for the administration of his estate. The applicant, one of the creditors of the deceased, desires to be added as a party. There is no doubt that under O. 1, rule 8, sub-rule 2, he is entitled to apply and the Court as a discretion, if it thinks fit, to add him as a party. The principles on which one of a body on whose behalf a suit has already been filed can claim with some show of justice to be added as a party are well defined. He must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason indeed that the person who has filed the suit on their behalf is not conducting it in the proper way. In an administration suit all that has to be done is for the Court to supervise the realisation of the estate, to direct that accounts be taken, and to direct how the assets are to be distributed amongst the creditors and parties interested in the residue. So an administration suit differs in its constitution very materially from those suits reference to which has been made by Mr. Bahadurji. No doubt the applicant has stated that he is coming in at his own risk and that he is willing to bear all the

\* Suit No. 487 of 1909.



costs, but that does not cover the whole ground. In the first place there must be considerable delay caused by another party coming into the suit, and there will be many items of costs which have to be incurred by the other parties, if the applicant is added as a party, which they will never be able to recover. But apart from that, after reading the affidavits and specially the affidavit on which the summons was obtained, I can find no ground whatever for any suggestion that the estate of the deceased is not being properly administered by the Court or that [422] the interests of the applicant are in any way being prejudiced. At his instance an officer of the Court was appointed one of the joint receivers and he relies on the fact that when the application was made for the appointment of receivers it was suggested that one of the executors should be appointed receiver together with the plaintiff. There was nothing wrong in that. It was only desired to save costs. Plaintiffs are a well known firm and as a large amount is due to them it is to their interest to realize the estate in the most advantageous way. The executors are also respectable people and there is no suggestion that they will in any way neglect the interests of the estate or of the creditors.

The result of the application being granted by me would be that the final decision of the suit would be delayed, the applicant would be able to intervene in every proceeding, the costs would be largely increased, and eventually the interests of the general body of the creditors and residuaries would be very much prejudiced. I do not want to prejudice the applicant. He may make an application in future if he can show good grounds that his interests are being injured in any way. On the present application I can see no reason to say that the estate of the deceased is not being properly administered. When the administration decree is passed, there will be the usual direction for accounts, creditors will be asked to file their claims in the Commissioner's office, and they can take part in the proceedings there. As regards the realization of the assets, I am sure that is in perfectly safe hands. If the applicant can make out a case in the future, he is at liberty to apply again.

Summons will be dismissed with costs.

*Summons dismissed.*

Attorneys for the applicant:—Messrs. *Captain and Vaidya*.

Attorneys for the plaintiffs and the 1st and 2nd defendants:—*Messrs. Matubhai, Jamietram and Madan*.

Attorneys for the 3rd and 4th defendants:—*Messrs. Payne and Co.*

34 B. 423 (=4 I. C. 131=11 Bom. L. R. 1056).

[423] ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

W. & A. GRAHAM AND CO. (Plaintiffs) v. CHUNILAL  
HARILAL AND CO. (Defendants).\*

[24th July, 1909.]

*Practice—Third party procedure—Directions, refusal to give—Discretion.*

The general principle on which a Court will issue third party directions is:—

(1) That there must be a clear case of contribution or indemnity from the third party.

\* Suit No. 399 of 1909.



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(2) That all the disputes arising out of a transaction as between the plaintiff and the defendant and between the defendant and third party can be tried and settled in one suit, and

(3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party.

Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party.

*Baxter v. France* (No. 2) (1) followed.

ON 30th January 1908 the plaintiffs entered into a contract with the defendants under the terms of which the latter agreed to purchase 50,000 tons of coal, and to take delivery thereof in 10 monthly shipments of 5,000 tons each. This original contract was subsequently slightly varied, but the variation was immaterial.

The first shipment (of 5,080 tons) arrived in Bombay on 16th January 1909, and a delivery order was duly tendered by the plaintiffs to the defendants. The latter handed the delivery order over to Messrs. Karaka and Co., with whom they were under a contract, and this firm took delivery of 400 tons. The balance of the cargo was re-sold by the plaintiffs at the defendants' risk, and was in fact ultimately bought by the defendants. The plaintiffs then sued the defendants for the price of the 400 tons of which delivery had been taken, and for damages for the loss incurred by the refusal to take delivery of the balance.

[424] The defendants thereupon obtained an order for the issue of a third party notice to Messrs. Karaka and Co., and after duly serving the same, took out a summons for third party directions.

*Cohen* for the plaintiffs submitted to the order of the Court.

*Jardine* for the third parties showed cause:—

This is not a case for third party directions. We are not aware of the terms of the contract of 30th January 1908 between the plaintiffs and the defendants, nor of their arrangements with regard to bunkering. No question of contribution or indemnity arises. Our contract with the defendants was wholly distinct, originating in and continuing generally from an arrangement made in November 1908 with regard to the bunkering of S. S. Singapore. We have disputes with the defendants, but they have nothing to do with the plaintiffs, and cannot be disposed of in this suit.

The defendants can give evidence of the quality of the coal better than we can, as they bought all but 400 tons.

Counsel cited the following cases: *Speller v. Bristol Steam Navigation Co.* (2), and *Baxter v. France* (No 2) (1).

*Robertson* for the defendants in support of the summons:—

Messrs. Karaka and Co. had knowledge of the contract of 30th January 1908, and by their subsequent agreement with us—which was not in the same terms as the original agreement with regard to S. S. Singapore, as they alleged,—clearly became liable to indemnify us. If this suit does not dispose of all questions between the third parties and us, it will at least dispose of all that arise out of this transaction. Specially important is the question of the quality of the coal, and the evidence of the third parties is necessary on this point. Finally, the plaintiffs themselves have no objection to the third parties being brought in.

(1) [1895] 1 Q. B. 591.

(2) (1884) 13 Q. B. D. 96.



MACLEOD, J.—The plaintiffs have filed this suit against the defendants to recover damages suffered by them in consequence of the defendants not taking proper delivery of a cargo of coals as they were bound to do under a contract made between the plaintiffs and defendants on the 30th January 1908.

[425] The plaintiffs say that by that agreement the defendants agreed to purchase from the plaintiffs 50,000 tons of coals, shipment January to May and August to December 1909, 5,000 tons monthly. I am told this agreement has been altered so as to extend the time to delivery of 25,000 tons in 1909 and 25,000 tons in 1910. But that is not material for the purpose of the summons.

On the 16th January 1909, the plaintiffs gave notice to the defendants that the S. S. Blake had arrived in harbour with a cargo of 5,080 tons of coal; and tendered a delivery order in pursuance of the above mentioned agreement.

Delivery was taken of only 400 tons by the defendants or their assigns and the balance of the cargo was sold at the defendants' risk. Hence the suit.

On the 25th day of May, the defendants obtained an order for the issue of a third party notice to Messrs. J. F. and B. F. Karaka, partners in the firm of Messrs. J. F. Karaka & Co.

The third party notice was issued on the 26th May. Messrs. Karaka filed their appearance on 31st May.

On the 7th June the defendants took out a summons for third party directions. At the argument of the summons before me the plaintiffs adopted a purely neutral attitude; they did not allege that they would be in any way prejudiced or embarrassed by the introduction of the third parties into the suit.

Messrs. Karaka and Co. strongly objected to any directions being given on the summons.

Very lengthy affidavits have been filed but the main dispute between the defendants and the third parties appears to be that while the defendants set up a contract between them and the third parties whereby the third parties agreed to buy from the defendants the coals of which the defendants were under contract with the plaintiffs to take delivery in 1909, the third party deny that any such contract had been made between them and the defendants and assert that the contract which did exist between them and the defendants was of quite a different nature. The general principle on which a Court will issue third party directions seems to be (1) that there must be a clear case of contribution or indemnity from the third party, (2) that all the disputes [426] arising out of a transaction as between the plaintiffs and the defendants and between the defendants and a third party can be tried and settled in one action, and (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. In this case if directions are given there must be a preliminary issue tried as regards the terms of the contract or contracts which existed between the defendants and the third parties. Until that has been decided it is impossible to say whether the contract between the plaintiffs and the defendants has been imported into a contract between the defendants and the third parties. This alone would be sufficient reason for the Court declining to give directions. But even if there was a clear case of indemnity, I am satisfied that all the disputes

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between the defendants and the third party could not be jointly determined in this action: *Baxter v. France* (No. 2) (1). It has been urged by the defendants that there is one question which is common as between the plaintiffs and the defendants and as between the defendants and Messrs. Karaka and Co., namely, the quality of the coal which arrived in the S. S. Blake and that if this were so, it was most undesirable that this same question should have to be decided twice over in different suits. It was further urged that Messrs. Karaka and Co. knew all about the quality of the coal ex S. S. Blake as they had taken delivery of some of it and the defendants had only passed on to them the delivery order from the plaintiffs. The answer to this is that as the defendants themselves bought all the coal ex S. S. Blake except the 400 tons taken delivery of by Messrs. Karaka and Co., they are in a better position to lead evidence as to its quality than Messrs. Karaka and Co. In England before 1883 if there was one question in the action, identical as between the plaintiff and the defendant and as between the defendant and the third party, the third party could have been cited so that he could be bound by the trial of that particular question, but that can no longer be done under the rules now in force, however desirable it might be, and the rules of the High Court are practically the same as the English rules.

[427] In my opinion, this is clearly a case in which the Court should exercise its discretion in refusing to give third party directions. The summons is discharged and the third parties must be dismissed from the action. The defendants must pay the costs of the third parties and the plaintiffs.

Attorneys for plaintiffs: Messrs. *Craigie, Lynch & Owen*.

Attorneys for defendants: Messrs. *Little & Co.*

Attorneys for third parties: Messrs. *Thakurdas & Co.*

34 B. 427 (=12 Bom. L. R. 73=5 I. C. 676.)

ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*

DULLABHJI SAKHIDAS SANGHANI, *Plaintiff*, v. THE GREAT  
INDIAN PENINSULA RAILWAY COMPANY, *Defendants*.\*

ANNA RAO, *Plaintiff*, v. THE GREAT INDIAN PENINSULA  
RAILWAY COMPANY, *Defendants*.†

[28th August, 1909].

*Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.*

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

\* Original Suit No. 706 of 1909.

† Original Suit, No. 751 of 1908.

(1) [1895] 11 Q. B. 591.



The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.

[Not fol : 37 Bom. 575.]

[428] THESE two suits arose out of the same incident. The plaintiffs were passengers in an up local train of the defendant Company, proceeding from Mazagaon to Masjid. At a point just before Masjid, a down mail train passed, with the door of one of its compartments open and swinging. The door caught the arms of the plaintiffs which were projecting slightly outside the carriage windows and inflicted severe injuries. As a result these two suits were filed against the Company for damages, and, as they involved the same points of law and of fact, were consolidated and heard together.

The plaintiff charged the defendant Company with negligence in allowing the door to swing open and further in having infringed the statutory regulations with regard to the dimensions of carriages and of the open way between the tracks.

The defendant Company denied negligence, and alleged that the accident was due solely to the negligence of the plaintiffs in putting their arms outside the windows in spite of notices to the contrary, and relied alternatively on the plea of contributory negligence.

It was agreed that the question of liability should first be decided, and that, if necessary, the question of damages should be considered afterwards.

*Baptista* (with *Joshi*) for the plaintiff in the first suit, and (with *Rajji*) for the plaintiff in the second suit :—

The open door is evidence of negligence : *Gee v. Metropolitan Railway Company* (1), *Bromley v. The G. I. P. Railway Company* (2).

The guard neglected his duty. See the general rules published by Government under section 47 of the Indian Railways Act, and also the Traffic Instructions Book of the G. I. P. Railway.

The Company has in addition infringed the standard dimensions. The width of the carriages is too great, while the space between the tracks is too small.

In the case of a breach of a statutory duty, the defendant is liable without further proof of negligence : *David v. Britannic Merthyr Coal Company* (3).

[449] The position of the windows is such that a person in the plaintiff's seat naturally puts his arm out.

The notices forbidding leaning out of the windows were in English, a language which very few 3rd class passengers can read. The defendant Company knew the notices were disregarded. Since the accident, an additional bar had been put on the windows.

*Robertson* (*Strangman*, Advocate-General, with him) for the defendant Company :—

The plaintiffs took the risk themselves. It would be a serious responsibility for the Company to have to look after passengers and prevent them leaning out of windows. All the cases show that a Company does not insure its passengers, but is bound only to take reasonable care for their safety, and that only when they remain inside the carriage : *Simon v.*

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(1) (1873) L. R. 8 Q. B. 161.

(2) (1899) 24 Bom. 1.

(3) (1909) 2 K. B. 146.



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*London General Omnibus Co. (1), Hase v. London General Omnibus Co. (2), Pirie Caledonian Railway (3). See also Beven on Negligence, p. 988.*

The leading case on the general responsibility of railway companies is *Readhead v. Midland Railway Company (4)*. See also *The East Indian Railway Company v. Kalidas Mukerji (5)*, and *Hanson v. Lancashire and Yorkshire Railway Company (6)*.

If the plaintiffs had remained wholly inside the carriage, the accident could not have happened. This is therefore most apparent contributory negligence.

As regards standard measurements, we had permission to increase the width of carriages. There is no connection between the width of the space between the tracks and the width of carriages.

The placing of an additional bar on the windows after the accident is no evidence of negligence. *Hart v. Lancashire and Yorkshire Railway Company (7)*.

Evidence shows that the guard did actually lock the door, so that the presumption of negligence is rebutted.

[430] There is no case similar to this in England, but in America the case of *Todd v. Old Colony, etc., Railroad Co. (8)* in the Massachusetts Court is wholly in my favour.

*Baptista* in reply :—

True the Railway Company does not insure, but it must exercise great care. It is liable for the smallest negligence, though not for unforeseen accidents. For the degree of care to be taken, see *Macnamara on Carriers, p. 577*, and *Beven on Negligence, p. 33*.

This case is of course distinguishable from *McCawley v. Furness Railway Company (9)*, see also *Thatcher v. Great Western Railway Company (10)*.

With reference to the standard dimensions, the Company ought to have widened the centre way of the track before building wider carriages. The circulars relied on as sanctioning the increased width of carriages do not really do so, as the centre way was not widened in proportion. The Company's construction of the circulars leads to absurdity.

BEAMAN, J.—These are two consolidated suits by two third class passengers, on the defendant Company's train, for damages. The plaintiffs complain of injuries received and attribute them to the defendants' negligence. The defendants deny negligence in fact and further plead that, if there was negligence on their part, there was contributory negligence on the plaintiffs' part disentitling them to recover.

The facts, which are virtually undisputed, are, that the plaintiffs were travelling by the 1-30 local up train from Matunga to Masjid on the 22nd March 1908. A short way before Masjid station, between Mazagaon and Masjid, the down Nagpur mail passed at high speed. A door of one of the compartments on that train was open and swinging. It caught the projecting limbs of the plaintiffs inflicting very serious injuries. The first question I am to decide is the question of liability. As to the second plaintiff, the defendant contends that he had opened the door and was standing with his arm on the outside sill. About the position of the first plaintiff, there is virtually no dispute. [431] He was sitting with his

(1) (1907) 23 T. L. R. 468.

(2) (1907) 23 T. L. R. 616

(3) (1907) 17 Rettie, 1165.

(4) (1869) L. R. 4 Q. B. 379.

(5) (1901) 28 Cal. 401.

(6) (1872) 20 W. R. 297.

(7) (1869) 21 L. T. N. S. 261.

(8) 89 Mass. 207.

(9) (1872) L. R. 8 Q. B. 57.

(10) (1898) 10 T. L. R. 18.



back to the engine, on a window seat, with his arm resting on the sill. The upper part of the arm naturally projected a little, and just before the accident he was turning to the window to spit, which may have caused the arm to project a little further. But whether it was five or seven inches outside the window appears to me to be of no consequence. The second plaintiff makes a like case for himself. And again the extent to which the limb was outside the window seems unimportant; though it might be important for the defendant to show that he had opened the door while the train was on the track and not in a station, and so voluntarily exposed himself to an unusual risk.

The defendant Company denies, first, that it was in any way guilty of negligence. I had better, therefore, deal with that contention. If it be found in the defendant's favour, there is an end of the case. The defendant alleges that before the Nagpur down mail left Victoria Terminus the guard in charge of the train went down its whole length closing the doors. It is to be observed that while the train lay at the platform the doors on the platform side were the doors which became the off-side doors as soon as the train was on the open track. There is a statutory obligation on the Company to close all doors. This they say they did. They go further and point to their own rules by which guards are ordered not only to close but lock all doors on the off-side. Kinsley, the guard in charge of the mail, swears that he entered the carriage to which the door which caused the injuries belongs. It was a compartment reserved for ladies. It was unoccupied. Accordingly, he swears that he put the shutters up, got out, closed and locked the door. He remembers having done this distinctly. Munro, the rear guard, Kinsley's subordinate, corroborates him. He swears that he saw Kinsley going down the train closing and locking the doors. Dr. Fonseca, a passenger by the train, has also been called to swear to this. But I cannot attach much value to his evidence. It is quite possible that he may have seen Kinsley closing some doors and yet not have seen him close this door. This evidence shows that all the off-side doors were closed and locked in three minutes or so before the train started. I confess it seems to me [432] a little doubtful whether that would prove conclusively that the doors were all closed and locked when the train started. Certainly it would not in England, where belated passengers seek to enter trains up to the last moment, and railway officials may open doors that have been closed to let them in, and forget to close and lock them again. In the particular case, however, there were no lady passengers and the compartment was, in fact, empty. It is still possible that after Kinsley closed and locked the door, assuming that he did, some passengers got a member of the platform staff to open it for him, and then finding it was a lady's reserved compartment, rushed off, and so the door got left open. The alternative suggestion that a passenger with a railway key came up, opened the door, and left it open seems to me too improbable. The truth appears to me to lie between two possibilities neither of which is highly improbable. The first is that Kinsley is mistaken, and thought he had closed and locked this door, but had not. The other is that, after he had done so, some member of the railway staff opened the door and forgot to close it. In either case, there would be evidence of negligence to go to a Jury. The fact that a door on a moving train is open, is evidence of negligence on the part of the Company: *Gee v. Metropolitan Railway Company* (1); *Richards v. Great Eastern Railway Company* (2). Evidence

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(1) (1873) L. R. 8 Q. B. 161.

(2) (1873) 28 L. T. N. S. 711.



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only, be it observed, is not necessarily a conclusive proof. And a very great Judge doubted whether the fact alone ought to be even evidence of negligence. Taking that, however, to be settled as matter of law, I should find on this point that there was negligence on the part of the Company in respect of the open door on carriage 1846 of the Nagpur down mail. For, whether Kinsley forgot or omitted to close and lock the door, or whether another servant of the Company opened it after Kinsley had locked it and forgot to close it, I apprehend that the Company would be equally affected with negligence. It is not alleged by the plaintiffs that there was any defect in the lock or catch of the door, so that once it was closed and locked it could not possibly have opened of itself. And it is not the Company's case that any one unauthorizedly opened it after the train had left Victoria Terminus. I do not [433] accept the suggestion that any one did so unauthorizedly by the use of a private railway key in the three minutes which intervened between Kinsley having, as he swears, closed and locked the door and the train starting.

That, then, must be taken to be my first finding of fact upon the evidence. I do not wish to reflect in any way upon the honesty of either Kinsley or Munro. But it is plain that Kinsley was bound to swear what he did, and it is quite possible that he may have sworn the truth, just as it is quite possible that he may have been mistaken, without shaking my conclusion. As to Munro, I have no doubt that he has told the truth to the limit of his knowledge and belief.

I will now deal with the next question of law which has given rise to a great deal of argument and minute analysis of measurements. Briefly, I take the rule of law to be that where there is a statutory obligation, any breach of that which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach of the duty must, in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. If I am right, the result will show that this part of the case is of little importance. The plaintiffs' contention is that the dimensions of carriages were exceeded. The defendants reply that they were within their circulars of 1896 and 1905 and that the latter read with the special sanction obtained in 1904, completely covers them. The plaintiffs meet this by alleging that the sanction and circulars are all to be read with the orders regulating the minimum width of central track. Thus when the Company were permitted to widen their carriages to ten feet, that permission was conditioned by a minimum width of twelve feet, and a recommended width of fourteen feet between central track points. Whereas in fact the Company widened their carriages without widening their track. The result of this was to narrow the distance between passing trains from a minimum of three feet five or six inches to a minimum of about two feet six inches at the outside. Assuming, for the sake of argument, though I am not prepared to hold that it is so, that the plaintiffs are right, then while no doubt the breach of the statutory obligation coupled with the negligent act of the defendant in leaving the door open contributed to the accident, it was not in itself the cause of the accident, nor could it alone have caused the accident. As a special legal argument, then, standing alone, this appears to me to lose all point. It is left to be a factor of the whole negligence charged upon the defendant which the plaintiff must prove. And it is therefore, in my opinion, quite unnecessary to go into all the minutiae of the measurements and the terms of the circulars and sanction. The



defendant Company admits that in the existing state of the track, the carriages being of their actual dimensions, when the door swung open, it reached to within four and a half inches of the limit of the crossing carriages. (I am not particular to the fraction of an inch because, in my opinion, that makes no real difference and I therefore say, roughly, four and a half inches.) Now the defendant's case is that it is only bound to carry its passengers safely inside the carriages provided for their use. No obligation whatever lies upon it to look to their safety if they get outside the carriages. Therefore, it being admitted that the plaintiffs sustained their injuries outside the limits of the carriage or carriages in which they were travelling, they took their own risk and the defendant Company is in no way responsible. If that proposition is correct, it is plain that there is an end of the case. For no matter how near the open door of carriage 1846 came to the surface exteriors of carriages on the up local, no matter what negligence the Company was guilty of in leaving that door open, no matter how much or how little they had exceeded the dimensions prescribed by statute, no injury could possibly have been done to the plaintiffs had they kept within the carriages provided for them. And this brings me to a consideration of the very difficult question of contributory negligence.

The defendant's case is that a passenger, who puts any part of his person outside the carriage and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage but of contributory negligence which disentitles him to recover against the Company, provided that, no matter what negligence the Company has been guilty of, that could not have caused the passenger any injury so long as he remained inside the carriage. The plaintiffs, on the [435] other hand, contend that resting their arms on the sills of the windows was an ordinary natural every-day act, which was not even negligence, and certainly could not have been contributory negligence disentitling them to recover for injuries done to them in such positions by an act of negligence on the part of the defendant Company. It will probably be seen that these contentions approach the central question from different points; the Company appears to rest mainly upon its contractual obligations, the plaintiffs on the general principles of the common law. We contracted, say the defendants, to carry passengers inside and not outside our carriages. If they put themselves outside the carriages they exceeded their rights under our contract, and were to that extent mere trespassers. We cannot be made answerable for any injuries which they courted, and actually suffered by such unauthorized acts. The plaintiffs reply, we had a right to be carried safely, and to be protected against all ordinary and expected risks. A person is not bound to do more than look out for what ordinarily happens; he is not bound to guard against wholly unusual and unforeseen contingencies. Such a contingency was the open door of a passing train. No one can be expected to anticipate that a train will pass at speed with a door wide open, reaching to within four and a half inches of the windows of another train. In placing our arms on the sills of the windows, we did what millions of passengers in this country do every day, on the same track, with perfect safety. Our acts in themselves were not negligent. They were common every-day acts; every one does them; and not one in twenty million has ever incurred or been supposed to incur any risk by doing them. It is this possibility of putting the case in different ways, looking at it from different points of

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view, involving the application of different principles, that makes the decision difficult.

The general rule was thus stated by Baron Alderson in *Blyth v. Birmingham Waterworks Company* (1). "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of [436] human affairs, would do, or doing something which a prudent and reasonable man would not do." It was not necessary for him to state (goes on Pollock in his work on Torts), but we have always to remember that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. This, it will be observed, says nothing of the party's state of mind; and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them. This is the kind of ground which the plaintiffs would take. They would allege, and I cannot help feeling with great show of reason, that the circumstances were not such as to impose upon them the duty of taking special care. They would say, all passengers in this country sitting by open windows on an open track are, and have always been, in the habit of resting their arms for comfort or convenience on the sills of the windows. The distance between the tracks if maintained and not invaded by some object which never ought to have been there, and the presence of which could not possibly have been anticipated, makes this practice so perfectly safe, it has been so firmly established, that no passenger ought to be affected with a false kind of contractual negligence merely because he followed it, and, owing to an utterly unforeseen piece of negligence on the part of the Railway Company, was seriously injured. Before going, as shortly as may be, into the case-law, I will mention the philosophical ground of the doctrine of contributory negligence derived by philosophical jurists from Aristotle. The four categories of causation are—

(1) The essence of formal cause. That would, I suppose, in the present case, be the actual contact of the door with the arms of the plaintiffs.

(2) The necessitating conditions or the material cause. These would be the open door, and the arms of the passengers within its reach.

(3) The proximate mover, the efficient cause.

[437] (4) The final cause, that for the sake of which the act was done. The last category has no bearing upon a question of this kind, being restricted, as I understand, to motive and therefore to the intentional acts of sentient beings.

The doctrine of contributory negligence resolves itself into the second and third categories and the determination upon all the factors found existing within them of the question which of these factors was the efficient cause? A plaintiff's act may make one of the necessitating conditions, and so be negligence. But to take it further and convert it into contributory negligence, it must further be found to have been the efficient cause of the accident.

Then the text-book writers and the Judges have deduced a rule of practice, which may be roughly stated thus. Where there is negligence on both sides, the test to be applied in trying to find out which was the efficient cause is, who had the last chance of averting the accident? A

(1) (1856) 11 Ex. 781 at p. 784.



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consideration, however, of the numerous cases giving rise to an enquiry into contributory negligence will show that this rule, though sometimes of great use, cannot be made universally applicable. In the present instance, since the plaintiff at any rate could hardly in fairness be deemed to have known that the door which injured him was open, how was he to avert the accident? True he had, in one sense, the last chance of doing so, but merely on the supposition that neither he nor the defendant knew that the danger existed. If the defendant knew that the door was open, it would be as fair to say that they should have stopped their train as that the plaintiff should have pulled in his arm. I apprehend that the application of the rule must be restricted to cases in which both parties or one party at any rate is in fact aware of the danger before the accident actually happens. I will now deal with some of the authorities. I take this opportunity of thanking Mr. Baptista for the great industry he has shown in collecting every case which has any bearing on the point, his ability in commenting upon them and the text-book writers and the zeal and thoroughness which he has shown in presenting his clients' cases to the Court. I may frankly add that my [438] sympathies have been throughout and still are with the plaintiffs. I cannot help feeling that these poor men, doing what their fellows have always done with impunity, very naturally believe that they are entitled to the protection of the law when they find that, owing to an utterly unforeseen occurrence, they are maimed for life or seriously injured; and if the law should turn out to be against them, I still think that the sense of most average men would be with them on the general merits of their grievance. On the other hand, I can quite understand that the Company is obliged to lay aside all sentimental considerations when a principle, so far-reaching and of such vital importance to the conduct of their business, is at stake. But for that, I do not doubt that common humanity would have impelled them to offer some compensation at any rate to these poor men whose injuries, whatever the strict legal rights of the parties may be, were, no doubt, caused by the Company's negligent act. But a Judge has nothing to do one way or the other with sentiment. My duty is to find out, if I can, what the law enjoins and keep myself strictly to that.

Now, it is a singular thing that, notwithstanding the millions and millions of passengers who have travelled over railway lines in England, and the doubtless innumerable instances of putting parts of their persons outside the carriage windows, the point I have to decide is absolutely, as far as English Courts go, *res integra*. There is not a single reported case of the kind. No passenger in England has ever sustained injuries in this way, or, if he has, has sued to recover damages from the Company for them. Two of the State Courts of America have considered the question. The Pennsylvanian Court has held that the Company is liable, "where the road is so narrow as to endanger projecting limbs, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put his limbs outside the window." *New Jersey Railroad Co. v. Kennard* (1). Stripped of the rather ambiguous language in which the principle of liability is stated (which I quote from Beven), this amounts [439] to fixing the Company with liability in every case where the road is so narrow as to endanger passengers who may put their limbs out of the carriage. For the remainder of the qualification amounts to this only, that no accident could have happened. Of course, if the Company make

(1) 21 Pa. St. 283.



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it impossible for a passenger to put his arm or hand out of the window, he could not possibly receive any injury by doing that which is, *ex hypothesi*, impossible. Waiving that and going to the more intelligible ground of the decision, it seems to me to really go all the way, and impose upon the Company the duty of making accidents of the kind impossible, or if the Company cannot do that, then of imposing upon them liability for the consequences. If the track is so wide that putting an arm or hand out of the window could not bring about an accident, there could be no liability upon the Company, because there could be no accident. But taking the sense of the decision, I think that it is clearly in favour of the plaintiffs. For what the Court fixed its mind upon was the risk to the passengers from a standing and permanent peril—the narrowness of the track. If the Company did not or could not guard against that, it was liable. *A fortiori*, it would be liable for a peril independent altogether of the width of the track and against which it could guard. Such for example, as allowing a train to start on a double track with one of its doors wide open. On the other hand, the Massachusetts Court decided that there was no liability in such circumstances upon the Railway Company. That Court has adopted the rule, that if a passenger's elbow extends through the window beyond the place where the sash would have been if the window had been shut, the passenger's conduct would indicate such carelessness as would disentitle him from recovering. *Todd v. Old Colony & Co. Railroad Co.* (1). Upon this Beven comments: "The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted." And he adds that since the above was in type, *Simon v. London General Omnibus Company* (2) and *Hase v. London General Omnibus Company* (3) have [440] been decided in accordance with the above forecast. I entertain some doubt whether this is a strictly accurate application of the rulings in those two recent cases. In the first place, there appears to me to be a clear distinction between the case of a man in a railway carriage travelling on an open track, and that of a man on an omnibus, which, every one knows, has to thread dense traffic and frequently risk close shaving. Referred back to the general fundamental principle of negligence, it might be doubted whether the same kind of duty, or at any rate, a duty of the same degree, is imposed upon persons respectively so situated. What might be ordinary and reasonable care in the one case might fall far short of it in the other. A man on an omnibus knows that he will be constantly at varying distances from vehicles and pavement structures, that at any moment he may be brought into almost actual contact with them. A man in a railway carriage does not know this. He expects—every one expects—that the track distances will, on an open line, be maintained, and that nothing will come much nearer to him than the face of a passing train. Again, he knows that in all ordinary circumstances that will be some distance away from him, certainly more than a few inches. This is a matter of common every-day experience on which passengers, who are to be judged by the standard of ordinary reasonable care and prudence, may well claim to rely. That is one reason why I think the two omnibus cases do not as fully make good Beven's forecast as that eminent writer is disposed to think. Another reason is that in both these cases the Omnibus Company was found in fact not to have been guilty of any

(1) 89 Mass. 207.

(2) (1907) 28 T. L. R. 468.

(3) (1907) 28 T. L. R. 616.



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negligence at all. In one case the passenger was actually within the limits of the omnibus and was injured by a projection from some structure on the pavement. It was held that the driver could not have known of this, and, in taking the course he did, acted with perfect propriety. The resultant injury in that case had to be put down to unavertable accident. In the other case the passenger leant over the rail of the omnibus, and again it was held that the course the driver took was perfectly proper and there was no negligence at all on the part of the defendant [441] Company. These cases, therefore, are distinguishable and the point I am to determine is, in my opinion, entirely *res integra*, except for the American decisions. True, there is the great weight of Beven's own authority. The opinion of a text-book writer is not binding on any Court. But where he is of such eminence as Beven, there can be little doubt that the expression of his opinion in this book has contributed to the absence of all claims like the present being formulated in the English Courts. Further, while I admit that Beven's opinion does not bind me, I set a high value on it, as the considered opinion of a very profound and philosophical student of this particular branch of the law and an authority amongst text-book writers of the first eminence. The nearest case to this is a Scotch case—*Pirie v. Caledonian Railway Company* (1). There a woman seized with sudden illness put her head out of the carriage window and was killed by a mail bag on an apparatus put up by the Company to give facilities to the Post Master-General for putting the mails on and off trains. The case was much relied on by the defendant Company. But it appears to me that, standing alone, it is about as favourable to the one side as to the other. The Jury found for the Company. But it was never thought, I believe, that the decision went so far as to cover every case in which a passenger might put his head out of a train window and so sustain injuries. The facts were very special and Lord Adam's direction to the Jury shows that the verdict really turned upon the reasonableness or otherwise of the manner and extent to which the Company had complied with the Post Master-General's requisitions. Beven says: "The case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so". I confess that I find some difficulty in reconciling this expression of opinion with that which shortly preceded it, that a passenger putting his arm through the window does so at his own risk, and that there can be no doubt that the English Courts, should such a case come before them, would follow the rule of the Massachusetts Courts and disallow the plaintiff's claim.

[442] *Adams v. Lancashire and Yorkshire Railway Co.* (2) was decided on the ground that the injury was not the necessary consequence of the Company's negligence in leaving the door open. It was afterwards much reflected upon and has little bearing on the present case.

In *Gee v. Metropolitan Railway Company* (3), the facts were that the plaintiff got up and placed his hand on the door in order to look out at the lights of an approaching station. The door flew open, the plaintiff fell out and was injured. The case was argued on a rule before the Exchequer Chamber, and Kelly C. B. laid it down that there was not only evidence of negligence on the part of the defendant Company but evidence of liability (which is a different thing) to go to the Jury; further, that

(1) 17 Rettie 1165.

(2) (1869) L. R. 4 C. P. 739.

(3) (1873) L. R. 8 Q. B. 161.



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there was no question of contributory negligence raised on the rule, so that was not to be considered. Martin B. thought that there was a question of contributory negligence which was properly left to the Jury. And his observations on the point are instructive. He relies a good deal upon the railway being an under-ground railway, where there is little to look at but walls, and also upon the windows being barred, thereby warning passengers that there was danger in putting their heads or hands out of the windows. He says: "Therefore it seems to me that you cannot possibly shut out from the consideration of the Jury, whether or not a man may not do wrong and know that he is doing wrong in putting his head or hand out of the window." As I understand the gist of that learned Judge's remarks, even had the passenger put his head or hand out of the window, that would have been matter proper to be left to the Jury on a plea of contributory negligence and ought not to have been withheld from the Jury as matter of law conclusively disentitling the plaintiff from recovering. The whole of Brett J.'s judgment is useful. He says "was there evidence that it (i.e., the Company's negligence) was the sole cause? Now that becomes somewhat complicated. If during the plaintiff's case an act of his was proved, which was so clearly contributory to the accident, that it would be unreasonable for any reasonable man to find to the contrary, and if that act was so clearly a negligent act that it [443] would be unreasonable in reasonable men to find that it was not negligence, so that any Court would, upon either of those points, immediately set aside a verdict of the Jury, finding the contrary of either, I am not prepared to say that the Judge might not then rule that the plaintiff had failed to put forward evidence upon which a Jury might find in his favour that the accident was solely caused by the defendant's negligence." Now this appears to me hard to reconcile with what had already fallen from Kelly C. B. and Martin B. For if merely putting a head or hand out of window is negligence of the kind indicated by Brett J., then that fact being proved, would justify a Court in withholding the question from the Jury and at once non-suiting the plaintiff. This was what the Scotch Court did in another case. In *Toal v. North British Railway Company* (1), the pursuer complained that while standing on the platform of one of the Company's stations, one of their trains was set in motion, with a carriage door open, and that the door struck and injured him. The Court of Session non-suited the pursuer on the ground that there was no relevant averment. This, however, was reversed in the Lords. I only mention this case, otherwise having no bearing on my present enquiry, as an illustration of the length to which the Scotch Courts will go in deciding upon the pleadings whether or not there are facts to be laid before a Jury at all; possibly, therefore, useful in considering whether, when the plaintiff admits that he was travelling with a part of his person outside the carriage, any injury to that part would entitle him to maintain an action for damages against the Company.

*Richards v. Great Eastern Railway Company* (2), is a case following *Gee v. The Metropolitan Railway Company* (3), and the two cases together seem to me to be direct authority for this proposition and this proposition only, that the fact of a door being open on a train is evidence of negligence on the part of the Company.

*Graham v. North Eastern Railway Company* (4) was the case of a guard on a dominant railway, who suffered injuries to his head [444]

(1) [1908] A. C. 852.

(2) (1878) 28 L. T. N. S. 711.

(3) (1878) L. R. 8 Q. B. 161.

(4) (1865) 18 O. B. N. S. 229.



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from a post on the servient railway while looking out in the discharge of his duty. The ground of the decision against the defendant Company was the Jury's finding of fact that the post was put up in a position dangerous to a guard whose duty it was to look out of his van. It cannot be inferred from this that the decision or the Jury's verdict would have been the same had the guard been under no obligation to look out. Passengers are under no such obligation. But read with some of Beven's own observations on the Scotch case of *Pirie v. Caledonian Railway Company* (1), an impression may be created that a Company is bound not to construct its track in such a way as to be a trap for unwary passengers. So that were an injury occasioned to a passenger whose head or arm was out of the window by some structure on the track, which came very close to the window, and could fairly be regarded as a trap, it would appear that Beven would qualify, or might qualify, the opinion he has expressed against the right of passengers, who extrude any portion of their persons from the carriage, to recover for injury. For this rule must be uniform and reducible to a definite principle if it is to be a rule at all. It could not be a rule, and yet susceptible to modification in such cases as Beven suggests. Nor would its application in such circumstances, as far as I can see, be helped by adding that if the Company built a line full of such traps, its construction as a whole would be deemed to be negligent and careless. For, *ex hypothesi*, if the passenger did not put any part of his person out of the window, no number of such traps, no degree of propinquity could possibly cause him an injury. These appear to me to be the only cases which have anything like a direct bearing on the present question.

*Dublin, Wicklow, and Wexford Railway Company v. Slattery* (2) decided that there was evidence to go to a Jury on a disputed question of fact, though several of the learned Judges of appeal thought that on the facts alleged by the plaintiff himself there was not. The plaintiff was crossing the line at a place where this was forbidden. He was caught and killed by the incoming express. The express was bound to whistle, and the engine [445] driver swore that he had whistled twice, other servants of the Company supported him. The plaintiff's evidence was that if the whistle had been sounded they must have heard it but did not. Apart from that, the point of interest was that where there was evidence that notwithstanding the Company had put up warnings and prohibitions, these were consistently disregarded, and no effort was made to enforce them, that too was evidence to go to a Jury. In this case the defendant Company contends that it put notices in the compartments with the words "Do not lean out of the window" legibly written in English. Evidence too has been given that the guards of the Company frequently tell passengers who are leaning out of window not to do so.

In *Hanson v. Lancashire and Yorkshire Railway Company* (3) the plaintiff was injured while sitting in his carriage by a projecting piece of timber which was being carried on a passing goods train. The timber was loaded on a truck secured by a chain only, and not in the best way by stan-  
chions. The question was whether the plaintiff had successfully proved negligence. The mere happening of the accident was thought not to be sufficient. That early doctrine was founded on a decision of Lord Denman in *Carpus v. London and Brighton Railway Company* (4). In some cases *res*

(1) (1907) 17 Rottie 1165.  
(2) (1878) 3 App. Cas. 1155.

(3) (1872) 20 W. R. 297.  
(4) (1844) 5 Q. B. 747.



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*ipsa loquitur*, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale. That is now, I think, the accepted rule. And here while the swinging door might be thought at first to be a strong instance of *res ipsa loquitur*, the Company's defence has to be taken into account. It then appears that if that defence is sound, it was not the open door which was the cause of the accident at all, but the fact that the passengers were outside and not inside their carriages. If they had been inside the door might have swung as it did and done them no harm. Had the door struck the compartments and so caused injury to the passengers inside, then indeed, I think, that the Company would have had to admit that [446] *res ipsa loquitur* and would have found it hard to plead that there was no negligence on their part, which being the cause of the accident rendered them liable to the persons injured.

The next case cited by Mr. Baptista is *Cooke v. Midland Great Western Railway of Ireland* (1). Here the Company kept a turntable unlocked and therefore dangerous to the children near a public road. The children obtained access to the turntable through a well-worn gap in a hedge which the Company were bound by Statute to keep in repair. A child playing on the turntable was seriously injured and it was held that there was evidence of actionable negligence on the part of the Railway Company. It was found that there was a gap in the hedge although the Company were bound by Act of Parliament to maintain the hedge, but it was also held that this mere breach of the statutory obligation was not the effective cause of the accident.

*David v. Britannic Merthyr Coal Company* (2) was a case under the Coal Mines Regulation Act, and the Court held that a breach of the statutory duties imposed by that Act rendered the defendant Company liable for negligence without special proof of particular personal negligence. But there the injury was directly caused by the breach of the obligation.

In *McCawley v. Furness Railway Company* (3) it was held that the plaintiff, a drover who was carried free at his own risk, according to his contract with the Company could not recover for an injury, although it was alleged to have been caused by the "gross and wilful negligence of the Company." The principle of this decision may be extended to such a case as the defendant Company here relies on; for if it be truly a part of the implied agreement between passengers and the Company that the former are to be carried inside and not outside the carriages, then it appears to me that if they insist upon putting themselves outside the carriages they do so at their own risk like the drover McCawley save only that he consented to take all risks inside or outside the carriages in which he was travelling. This [447] decision brings into strong relief the contractual basis of the respective rights and liabilities of passengers and carriers. And it goes some way at least towards confirming the defendant's contention, that in questions of this kind, no liability at all can be fixed on the Company which they did not contract themselves into.

*Croker v. Banks* (4) was a case of a girl employed in a soda water manufactory. She was injured by the explosion of a bottle. She had been warned to wear a mask and such masks were provided. Nevertheless, the defendant Company was held liable, although the plaintiff had neglected

(1) [1909] A. C. 229.

(2) [1909] 2 K. B. 146.

(3) (1872) L. R. 8 Q. B. 57.

(4) (1888) 4 T. L. R. 824.



to put on the protecting mask. This case is cited, I suppose, to show that the defendant Company here cannot evade liability on the ground that they had put up notices warning passengers not to lean out of the windows, and had also barred the windows. It was said by the Master of the Rolls in giving judgment that the precautions which the defendant had taken showed that he was aware of the danger. And an argument from that is directed against the Company. It was held not to be contributory negligence on the part of the plaintiff that she had refused to obey the caution and avail herself of the protection of the mask. So here, I suppose, it might be contended that it was not contributory negligence on the part of the plaintiffs to disregard the notice in the carriage and ignore what was implied by putting bars across the window. But I do not think that the analogy is very close, or the authority directly in point. Much in *Croker v. Banks* (1) appears to have turned on the tender age of the plaintiff. Further, it does not appear to have been decided on the basis of a strict and defined contractual relation.

*Bluth v. Birmingham Water-works* (2) was a case of injury caused to the plaintiff by the bursting of some of the defendant's pipes under pressure of extreme cold. I do not think it has much bearing on this question. It was cited, I believe, in support of the same general argument as that which was founded on the preceding case. The judgment of Alderson B., however, [448] contains the general definition of negligence which has met with the approval of subsequent text-book writers, and on which the plaintiffs here rely.

In *Wakelin v. London and South Western Railway of Ireland* (3) it was held that, assuming there was negligence on the part of the defendant Company, there was no evidence to go to a jury connecting that negligence with the death of the man killed at the level-crossing. There are weighty observations by Lord Watson in giving judgment which, I think, I may quote with advantage. "It appears to me that in all such cases the liability of the defendant Company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." Now, applying those observations to the facts here, we may go so far as to hold that the plaintiff has proved an act of negligence which (apart from the strict contractual relations set up by the defendant) materially contributed to the injury. But if it only contributed "materially" or, for that matter at all, because of a breach on the plaintiff's part of his contractual obligation to remain inside the carriage, if apart from that breach there would have been no material contribution to the accident by the defendant because there could have been no accident at all, the

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(1) (1888) 4 T. L. R. 324.

(2) (1856) 11 Ex. 781.

(3) (1886) 12 App. Cas. 41.



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bearing of these remarks, at any rate so far as they might be [449] supposed to favour the plaintiff, appears to me to be entirely changed. Lord Watson goes on—"If the plaintiff's evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury, and throw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence." Those remarks were made with reference to the facts of that case. The man who was killed was found dead on the line, and no one knew how the accident had happened. But that is not the case here. For the Court is in full possession of every fact. The Court knows exactly how this accident happened. It happened owing to two contributing causes: the door of the down mail being open, and the arms of the plaintiffs being out of the windows of the up local. The only question, therefore, here is whether the latter circumstance is to be taken as the efficient cause of the accident? There is no question here of the shifting of the onus of proof, which 'was the point most debated in *Wakelin v. London and South Western Railway of Ireland* (1), for all the facts have been virtually admitted from the commencement, excepting, of course, the manner in which the door came to be opened, and the precise extent to which the plaintiff's limbs protruded.

In *Cockle v. London and South-Eastern Railway Company* (2), the Judges appear to have taken different views of the liability of a railway company, in such circumstances as were there disclosed. This, however, was the case of an alighting passenger, and different principles apply. I do not think it needs any further notice.

Now if I turn to some older cases, I find that Parke B. laid it down in *Bridge v. The Grand Junction Railway Company* (3), approving *Butterfield v. Forrester* (4), "there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester* (4), and that rule is, that, [450] although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

In *Scott v. London Dock Company* (5) it was held in the Exchequer Chamber by a majority of the Judges that "in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant a Judge in leaving the case to the jury. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Arguing from that case, which was a dockyard case, where an inspector was injured by six bags of stuff falling on him, the plaintiffs might, I suppose, say that here the door of the down mail was in the management of the defendants, and that what happened was what does

(1) (1886) 13 App. Cas. 41.

(2) (1870) L. R. 5 Q. B. 457.

(3) (1888) 3 M. & W. 244.

(4) (1809) 11 East. 60.

(5) (1865) 3 H. & C. 596.



not ordinarily happen, and so forth. But although I see that arguments of that kind may be drawn from many of these cases, I miss in all of them the one point of identity with the present case which I so anxiously seek. These are not cases founded on the contractual relation of the defendant to the plaintiff and the resulting obligation to do certain things and avoid doing certain things, and not others, which are not in the scope of the risk fairly raised by the understood terms of the contract.

I might indefinitely extend this examination of the case-law. I have carried it this length rather to satisfy the plaintiffs and leave them no room to think that the Court has not given the fullest and most careful attention to every point in their case, than for any practical use, to which I feel I shall be able to put [451] it. For, after studying these and many other cases, as well as the dicta of the text-book writers, the point I have to decide appears to me to remain precisely where it was—unamplified, unilluminated. We have these facts. Passengers in this country habitually and almost universally travel with their arms thrust out of the windows of their crowded compartment; not infrequently they thrust their heads out too. When they are sitting by windows it is almost impossible for them to help resting their arms on the sills, and when they do this some part, at least, of their arms must project outside the limits of the carriage. Before the new type of carriage was introduced, they could do this, in reason, with perfect safety. For other projecting parts of the carriages would have afforded them complete protection against such an accident as has overtaken these unfortunate plaintiffs. But with the new type of corridor car the conditions have changed. There is nothing outside the car to shelter limbs against passing objects. So far, then, as the simple rule of observing ordinary care goes, the plaintiffs may quite fairly claim to be within it. Indeed, as I have said, any number of passenger might do what these passengers did any number of times and come to no harm.

But although they may do this at their own risk and usually with impunity, ought they to do it, and if they do it, and are injured, can they make the Company liable to compensate them? The Company has put up notices forbidding passengers to "lean out of the windows." And I think that no distinction can fairly be drawn to the Company's disadvantage between "leaning out" and putting arms or heads out.

Again, the Company have placed bars across these windows. The bars are not close enough to prevent passengers protruding their arms. But they would be a warning. Men of sense might suppose that the Company would not bar the windows were there no risk at all, if travellers chose to loll out of them. Again, whatever may be said of the limits of reasonable care and prudent conduct while the train is running on an open track alone, the conditions are changed as soon as another train crosses. Ordinarily the most rash and curious English traveller, who, as [452] long as there is no apparent risk of that kind menacing him, will lean out of window to admire the view, instinctively draws himself well within the compartment while another train is passing. True he has every reason to believe that nothing on that train will reach his carriage window; he may rely upon the Company seeing to that. But however that may be, instinct seems to side with the strict rule of contract and remind him that he ought to be inside and not outside his carriage. For no human foresight and care are infallible. Such an accident as an unfastened door is always a possibility—a remote possibility. But the

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English traveller would not take the chance. He would almost certainly draw back into his carriage the moment he knew that another train was about to pass him. Indians are differently constituted. They have not, perhaps, had the same amount of experience, and the conditions of travelling by train in this country are different from those which obtain in a country like England or America. So that perhaps the same instinct of self-preservation has not yet been developed in the average Indian passenger. But is the Company to know and reckon with this? The point is of vital importance to the defendant Company and to all railway companies in this country; it is essential that they should have a clear decision upon it—a decision, too, upon the principle for which the defendant here contends. The true issue comes to this—is the defendant Company liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling? To decide the case upon any other ground, any ground less sharply defined than that, would defeat the object with which alone, I believe and hope, the defendant Company has contested the plaintiffs' claims. In my opinion the defendant is not liable. I cannot whittle away the principle of this decision by any qualifying words. It must stand or fall upon its own principle. And that principle, if it be good law, would set all questions of this kind for ever at rest. If Courts attempt to refine upon it by qualifying words and phrases such as that passengers may extrude their limbs in reason, or anything of that kind, there will be no end to disputes. But if it be once held that a passenger has no right of action against a railway Company for injuries suffered to any part of his person voluntarily placed at the moment the injury was inflicted outside the carriage, all future uncertainty is dispelled, and I do not doubt a vast amount of litigation will be averted. I cannot allow, if the principle is sound, that a passenger is in any better case if he puts half an inch of his person only outside the carriage, than if he puts a yard of himself outside. If any distinction of that kind are admissible at all, I should say at once that this is a case in which the plaintiffs were entitled to the full benefit of them. I do not believe that even the second plaintiff was standing outside the carriage as the defendant contends. I am quite prepared to accept his own account of the manner in which he came to be so seriously hurt. I do not attach any weight to the evidence led by the defendant Company to prove that he had opened the door and was standing with virtually his whole arm outside the carriage. I do not think the witnesses who speak to this would have been in the least likely to have observed what the second plaintiff was doing. Besides, had he been so standing with the door open and facing the approaching train, I can hardly believe that he would not have noticed the swinging door and withdrawn himself into safety. The case of the first plaintiff is plain. I have no doubt that he has spoken the truth. I am quite prepared to accept his story and his brother's measurements. I will take it to be the fact that his arm was not more than five inches or so at most outside the window. According to the principle upon which I am deciding, that makes no difference at all. His arm ought not to have been outside at all, not the fraction of an inch. Now, accepting the principle as the basis of this rule of law, that a passenger must travel inside and not outside his compartment, and therefore that if he does travel outside, he does so entirely at his own risk and the Company cannot be held liable for any injury which he suffers in consequence, it comes to this, that a passenger who gets injured owing to



putting any part of his person outside his carriage is guilty of contributory negligence. And it would follow that where the plaintiff admitted that he had incurred the injury in this way, no matter what negligence there might be on the part of the Company, he would have no case to lay before a Jury. The Judge would be bound to enter a verdict [454] for the defendant on the pleadings. And that I take to be the true law, notwithstanding the apparently conflicting dicta of many of our most eminent Judges, to which I have already referred. Supposing I am wrong here, and that this is a case which in England ought to be left to a Jury, then the further question would arise, whether the accident was caused by the negligence of the plaintiff in putting himself in a position of risk, or to the negligence of the defendant. In this particular case were that question to be tried by me as it would be tried by an ordinary Jury, I should hesitate long before I decided that the plaintiffs were not entitled to compensation. I am pretty sure that any average English Jury would find that they were. And if I were not bound by any rule of law such as I have enunciated, which restricts the Company's liability for accidents to such as happen to passengers inside their compartments, were I merely to treat the case on general principles of ordinary prudence and average conduct, I think that I should find that the accident was caused by the negligence of the Company, and not by the negligence of the plaintiffs. I do not feel at liberty to give effect to that strong leaning of my own mind. I cannot resist the conviction that the principle upon which the defence to this claim is based, is the true principle. And while on the one hand it may appear to work great hardship on these unfortunate men, on the other any derogation from it (if it really be the law, as I believe that it is) would expose all railway companies to unfair risk, harassment, and expense. There are two sentimental sides even to this particular case, though railway companies are little in the habit of expecting, still less of receiving, sentimental indulgence.

I must therefore hold, looking to the peculiar obligations under which a railway company lies—essentially, as I understand, contractual obligations—that their liability in these two suits is discharged by the admitted facts that the injuries complained of could not have been suffered had the plaintiffs remained inside the carriages in which they were travelling. It therefore becomes unnecessary to go into the question of damages. Looking to all the circumstances of the case, bearing in mind that it is a new point upon which the plaintiffs might very reasonably have expected in this country, at any rate, to succeed, looking too to the injuries they have suffered, I think that it will be fair while dismissing their suits against the defendant Company to leave all parties to bear their own costs.

Attorney for the plaintiffs : *S. B. Mehta.*

Attorney for the defendants : *Messrs. Little & Co.*

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## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

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GADIGEYA, ADOPTIVE FATHER ADIVEYA HIEMATH (original Plaintiff),  
Appellant, v. BASAYA BIN MALLAYA RAPATI AND OTHERS  
(original Defendants), Respondents.\*

[7th February, 1910.]

*Regulation II of 1827, section 21—Caste question—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.*

The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff.

*Held*, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court.

*Held*, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the [456] Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another.

APPEAL from the decision of A. D. Brown, Assistant Judge of Dharwar, confirming the decree passed by R. G. Bhadbhade, First Class Subordinate Judge at Dharwar.

Suit to obtain a declaration that the plaintiff being the *Ayya* of the *Hiremath* at Kamalapur was alone entitled to the fees, &c., of *Hiremath* and for a perpetual injunction restraining the defendant from using the surname of *Hiremath*.

There was at first no *math* at Kamalapur. The people of the village therefore repaired to the adjoining village of Malapur and paid their respects to such *Ayyas* there as they chose. Latterly the people founded a *math* and installed a predecessor of the plaintiff as the *Ayya* of the *Hiremath*. It appeared that a second *math* was started and a predecessor of the defendant was installed as its *Ayya*.

In 1905, the plaintiff filed this suit.

The Subordinate Judge found that the subject matter of the suit could be adjudicated upon, excepting as regards the declaration about the privileges and dignities attached to the *Hiremath*. He further held that the plaintiff's claim was time-barred; and that the plaintiff was not entitled to any relief.

On appeal the lower appellate Court came to the same result, holding that the suit was maintainable in a Civil Court, that the plaintiff was not entitled to the office of *Ayya* of *Hiremath* at Kamalapur; that the claim

\* Second Appeal No. 133 of 1909.



was not in time; and that the defendant had the right to use the surname *Hiremath*.

The plaintiff appealed to the High Court.

*Jayakar* with *M. B. Chaubal*, for the appellant.

*Branson* with *D. A. Khare*, for respondents Nos. 1, 2, 4 and 5.

CHANDAVARKAR, J. :—This was a suit brought by the appellant to obtain a declaration that he was entitled to the fees and privileges appertaining to the *Hiremath* at Kamalapur by reason of his title to be called the *Ayya* of that *Hiremath*, and he asked for a perpetual injunction to restrain the defendants from using the name [457] "*Ayya* of *Hiremath*". The Subordinate Judge, First Class, at Dharwar, who tried the suit, raised several issues, the first of which was, "Whether the matter in dispute in this suit cannot be adjudicated upon by a Civil Court." His finding upon that point was that the subject-matter could "be adjudicated upon excepting as regards the declaration about the privileges and dignities attached to the *Hiremath*." He held that, so far as those privileges and dignities were concerned, the question raised was one relating to "caste" within the meaning of the Bombay Regulation II of 1827, section 21.

In the appeal Court the learned Assistant Judge disposed of the case on the following issue: "Whether the plaintiff was entitled to the office of *Ayya* of *Hiremath* at Kamalapur." His finding on the evidence, on that issue, was in the negative. He held upon the evidence that the plaintiff had not proved an exclusive right to the name claimed by him.

Before us Mr. Jayakar in support of the second appeal contends that the issue raised and decided by the Assistant Judge had not been raised in the Court of first instance; and that the suit, having been brought by the plaintiff owing to the usurpation by the defendants of a name to which the plaintiff alleged he had an exclusive right, fell within the jurisdiction of the Court, on the well-known principle of law that an unauthorized use of the name of one person by another gives a cause of action to the former, where the use is calculated to deceive and inflict pecuniary loss.

Now, the law on the point so raised is clear. It has been laid down by the House of Lords in *Earl Cowley v. Countess Cowley* (1) where Lord Lindley at p. 460 says: "The law on this subject has been examined in a very instructive note from the pen of the late Mr. Waley in 3 Davidson's Conveyancing, pt. I, p. 283, 2nd Ed. The judgment of Tindal, C. J., in *Davies v. Lowndes* (2) and of the Privy Council delivered by Lord Chelmsford in *Du Boulay v. Du Boulay* (3) leave no doubt about it. Lord Chelmsford in *Du Boulay v. Du Boulay* (3) stated that 'in this country we do [458] not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger.' ..... 'The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress'."

The question, therefore, is whether any damages have been incurred or not. In examining the case from that point of view it must be remembered that, closely scrutinized, the plaint in the present case does not afford any clear indication that what was complained of was the user of a name by the defendant in a manner calculated to deceive any one.

(1) [1901] A. C. 450.

(3) (1869) L. R. 2 P. C. 480.

(2) (1885) 1 Bing. N. C. 597 at p. 618.



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When we read the summary of the plaint as given by the Subordinate Judge, who tried the case in the first instance, it appeared to us that what the plaintiff complained of was trespass on plaintiff's property by the defendant. It appears that it was under that impression that the Subordinate Judge decided the first issue raised by him partly in favour of the plaintiff. But Mr. Jayakar has candidly admitted before us that, so far as any property is concerned, there has been no trespass by the defendants upon the plaintiff's right; that all that the plaintiff complains of is that the defendant has assumed a name to which the plaintiff has alone exclusive right; and that that assumption will enable, and has enabled, the defendant to attract to himself a large number of the plaintiff's followers and thereby appropriate to himself fees, which would have gone into his (plaintiff's) pockets. When the case is thus put, it resembles *Murari v. Suba* (1). It is a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honours at the hands of the members of the caste in virtue of that office. That is a caste question, not cognizable by a Civil Court. The fact that there has been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that, after all, the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant, show that what the parties have been fighting for is [459] merely a question of dignity under the cover of a religious office. If we were to interfere in such cases, we should be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. We think, therefore, that the point raised by Mr. Jayakar, namely, that the suit is for damage incurred by his client by reason of the unauthorized use by the defendant of the name, to which the plaintiff alone is entitled, does not arise upon the pleadings.

On these grounds we confirm the decree with costs.

*Decree confirmed.*

34 B. 459 (=12 Bom. L. R. 366=6 I. C. 523).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

PIROJSHAH BIKHAJI AND OTHERS (original Caveators Nos. 1, 2 and 3), Appellants, v. PESTONJI MERWANJI (original Applicant), Respondent.\*

[22nd February, 1910.]

*Probate and Administration Act (V of 1881), section 81—Indian Succession Act (X of 1865), section 250—Will—Probate—Caveator—Interest possessed by the caveator.*

The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865) enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.

\* Appeal No. 28 of 1909.

(1) (1882) 6 Bom. 725.



*Abhiram Dass v. Gopal Dass* (1) followed.

[Rel. 20 I. C. 342.]

APPEAL from an order passed by E. J. Varley, District Judge of Surat. Proceedings for probate.

This was an application by Pestonji to take out probate of a will made by one Meherwanji Bomanji.

[460] In the proceedings that followed caveats were filed by four persons of whom the appellant Pirojshah claimed a share in some of the property which the testator had disposed of claiming it as his own: and the other two claimed that certain property disposed of by the will was mortgaged by them to the testator who had treated it as his own.

The preliminary question that arose in the lower Court was whether those three persons were entitled to come in as caveators at all. The District Judge held that they were not on the following grounds:—

It appears that caveator No. 1 is mentioned in paragraph 10 of the will as having an interest in certain joint property, or rather the surplus which might remain after the defraying of certain charitable charges. The other caveators are only interested to this extent that they have litigations pending with the deceased testator.

The English practice as to caveats is regulated by Statute 20 and 21 Victoria 77 section 53 and rules thereunder framed. For obvious reasons the validity of a will can only be contraverted by a limited class of persons—relations beneficiaries under the will propounded as a former will, etc.

A creditor unless he has also had letters of administration granted to him cannot dispute a will (William's Law of Executors pages 279-280).

The English Procedure as to 'Caveats' does not appear to have been in any way abrogated by anything incorporated into either the Probate and Administration or Succession Acts (Acts V of 1881 and 10 of 1865). Nor as argued by opponent's pleader does the appearance of a party claiming to be interested after entry of caveat *ipso facto* make the proceedings "contentious" Cf. sections 253 and 253A of Act X of 1865, nor is section 261 imperative until the *locus standi* of the caveator, if challenged, has been established. The caveator as mortgagor has no *locus standi*. I. L. R. Calcutta XIX, p. 48 refers to mortgagees.

I. L. R. Calcutta VI, pages 429—460 decide that an attaching creditor may oppose. The case is an old one, and the remarks of Field J. seem to go beyond the English practice. So far as the caveators are concerned, there is no interest of theirs which would in any way be prejudicially affected by the grant of Probate to an Executor, with whom the existing litigation would be carried on.

The mere fact of citations having issued under section 250 calling upon persons claiming to have an interest, does not estop the propounder of the will from challenging the interest set up by the caveator, nor make the proceedings "contentious."

[461] The caveators appealed.

L. A. Shah, for the appellants:—The appellants have an interest enough to contest the will. The will contained recitals against the appellant's interest, which if allowed, would be evidence of title. See *Nobeen Chunder Sil v. Bhobosoonduri Dabee* (2). Even attaching creditors and mortgagees of the estate of a deceased person, are held to have interest to oppose a will: See *Kishen Dai v. Satyendra Nath Dutt* (3); *Kashi Chundra Deb v. Gopi Krishna Deb* (4).

N. K. Mehta, for the respondent:—A person who is entitled to oppose the grant of probate to a will must derive his interest from the testator and not have a right against him. See *Abhiram Dass v. Gopal Dass* (1).

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(1) (1899) 17 Cal. 48.  
(2) (1880) 6 Cal. 460.

(3) (1901) 28 Cal. 441.  
(4) (1891) 19 Cal. 48.



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Further in proceedings for grant of probate, Courts cannot go into questions of title : *Ochavaram Nanabhai v. Dolatram Jamistram* (1). See also *Rahamtullah Sahib v. Rama Rau* (2).

In the cases relied upon by the appellants, the caveators had no interests adverse to the testator.

*Shah* was heard in reply.

CHANDAVARKAR, J. :—We think the case falls within the principle of *Abhiram Dass v. Gopal Dass* (3). The provisions of section 250 of the Indian Succession Act, X of 1865, and section 81 of the Probate and Administration Act, V of 1881, are that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is to say, there should be no dispute whatever as to the title of the deceased to the estate, but the person who wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise. That is the construction which the Calcutta High Court has put upon the section in the case above referred to, and that seems to be in accordance with the language of the section itself. In the present case caveator No. 1 claims adversely to the alleged testator. According to the latter, the caveator has no interest whatever in the property. But according to caveator No. 1, he and the alleged testator were sharers in the properties concerned. Therefore, to the extent of the share which this caveator alleges he has in the properties, he claims adversely to the testator. So also as regards caveators Nos. 2 and 3, the alleged testator claims complete ownership of the property by reason of a sale to him, whereas the caveators in question claim the properties as their own mortgaged to the testator. Therefore, that is an adverse interest claimed by them.

We confirm the order with costs.

*Order confirmed.*

34 B. 462 (=12 Bom. L. R. 491=7 I. O. 546.)

#### APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

DATTAMBHAT RAMBHAT JOSHI (*original Plaintiff*), Appellant,  
v. KRISHNABHAT BIN GOVINDBHAT JOSHI AND SIX OTHERS  
(*original Defendants*), Respondents.\*

[24th February, 1910.]

*Transfer of Property Act (IV of 1882), section 67—Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.*

Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.

*Mahadaji v. Joti* (4) and *Krishna v. Hari* (5), explained.

[Ref. 65 I. O. 666=1922 Pat. 58.]

\* Second Appeal No. 425 of 1909.

- (1) (1904) 28 Bom. 644.
- (2) (1894) 17 Mad. 373.
- (3) (1889) 17 Cal. 48.

- (4) (1892) 17 Bom. 425.
- (5) (1908) 10 Bom. L. R. 615.



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SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum with appellate powers, confirming the decree of S. S. Phadnis, Second Class Subordinate Judge of Chikodi.

[463] The plaintiff sued to recover possession of the property in dispute or to recover the mortgage debt by its sale under the following circumstances:—The property belonged to the father of defendants 1 and 2 and grandfather of defendant 3. He mortgaged it to the plaintiff's father on the 29th October 1893. The mortgage-deed provided as follows:—

I have taken from you (a loan of) Rs. 300 (in words) three hundred of the Government coinage in cash for my private purposes. It is agreed that interest upon this should be at the rate of 12 (in words) twelve annas per cent. per mensem. As regards the period (of repayment) of this, I shall repay your money in two years from to-day. For this (amount) the following is mortgaged, namely, land *khata* whereof is in my name and which is situated in Mouze Nipani of Taluka Chikodi in Belgaum District, and land situated in Mouze Gavan, the *khata* whereof is in the name of Vasudevbbhat Balambhat, being lands held as Inam on account of Joshipan. The details of the same are as given below:—

The lands thus described have been mortgaged to you and given into your possession. Accordingly, you are to cultivate (or lease out) the said four lands and enjoy them in lieu of interest. And you are to write off the profits that may be yielded, in the interest, and appropriate the same. I shall, on my personal responsibility, pay whatever balance of interest may remain. You are to pay me the surplus of profits of land, if any, remaining after the interest is paid off. Immediately after the expiry of the agreement, I shall, on the *pratipada* (the first day) of the cyclical year, pay off the whole of your money and redeem the land, at the same time. I shall not interfere with the land within that time. I have received the said rupees in cash and given this mortgage deed in writing duly and of my own free will. Dated the 29th of October, 1893.

On the 15th March 1907 the plaintiff brought the present suit alleging that possession of the property marked A in the plaint was made over to the mortgagee and the right of collecting rent with respect to the property marked B was also made over, that in this manner the mortgagee remained in possession of the mortgaged property till the end of the cultivating season in the year 1896-97, when he was forcibly dispossessed by the defendants and that since then they had been wrongfully in possession. Hence the present suit for the recovery of possession or of the mortgage debt by sale of the property. Defendants 4—6 were joined because they were puisne-mortgagees under defendants 1—3.

[464] Defendants 1—3 contended that the mortgage sued on was a hollow transaction, that neither the plaintiff nor his father ever had possession of the land, that they mortgaged the property to the family of defendant 4 and that the claim was time-barred.

Defendants 4—6 set up the mortgage to them.

The Subordinate Judge found that the plaintiff could not recover possession of the property as the suit was not brought within twelve years of the mortgage, that he was not entitled to sell the property, the mortgage being usufructuary, and that the remedy for a personal decree against the defendant was time-barred as the suit was not brought within six years from October 1895 when the cause of action arose. The suit was, therefore, dismissed.

On appeal by the plaintiff the Appellate Judge framed two issues, namely, "(1) Whether the claim of plaintiff for the possession of the land is in time? and (2) Whether he can realize his money by sale of the mortgaged property?"



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The findings in appeal on both the said issues were in the negative and the decree was confirmed. In the course of his judgment the Appellate Judge observed as follows:—

As regards the 1st issue, the mortgage-deed was executed on 29th October 1893, and the suit was brought more than 12 years after that date. Plaintiff alleged, however, that his father had possession of the property till 1896-97. The lower Court has carefully reviewed the evidence on the question of possession and has come to the conclusion that the mortgagee did not as a matter of fact obtain possession of the property.

On the whole I agree with the conclusion arrived at by the lower Court and held that the claim for possession not having been brought within 12 years from date of mortgage is barred by limitation.

As regards the 2nd issue, the question is whether the mortgage is simply a usufructuary mortgage. There are two contrary decisions of the Bombay High Court on the point. According to the ruling at 17 Bombay, page 425, the mortgagee would have the right to recover his money by sale of the property. In the later ruling (10 Bombay Law Reporter, page 615) a contrary decision has been arrived at. The lower Court has followed the later decision in preference to the earlier one, and I think that that is the only course open to Subordinate Courts until the point be again raised in the High Court. As the mortgage is only a usufructuary one, the mortgagee cannot recover his money by sale of the mortgaged property.<sup>1</sup>

[466] The plaintiff preferred a second appeal.

*H. G. Kulkarni* for the appellant (plaintiff):—The mortgage-deed in suit clearly contains a covenant to pay the mortgage debt within two years. Thus the transaction is not purely a usufructuary mortgage. It is a usufructuary mortgage and there being no condition to the contrary, the mortgagee is entitled to recover the amount by sale of the mortgaged property: *Mahadaji v. Joti* (1). In *Krishna v. Hari* (2) there was no express covenant to pay the debt, therefore, that decision cannot govern the present case. The Madras High Court has in the Full Bench ruling in *Sivakami Ammal v. Gopala Savundram Ayyan* (3) taken a similar view about the right of the mortgagee to bring the mortgaged property to sale. The Bombay High Court also has taken the same view in *Parasharam v. Putlajirao* (4).

*N. A. Shiveshwarkar* for respondents 1—3 (defendants 1—3):—The transaction is purely a usufructuary mortgage and that being so, under the terms of section 67 of the Transfer of Property Act a usufructuary mortgagee as such, unless there is anything in the contract which would imply a right, cannot sue either for foreclosure or sale: *Luchmeshar Singh v. Dookh Moohan Jha* (5).

The mortgage transaction in *Parasharam v. Putlajirao* (4) was governed by section XV clause (3) of Regulation V of 1827. The mortgage transaction in dispute was effected in 1893. Therefore it is governed by the provisions of the Transfer of Property Act.

In *Krishna v. Hari* (6) it was held that a mere covenant to pay, unaccompanied by the hypothecation of the property, cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment.

SCOTT, C. J.:—The question in this case is whether the appellant has a right to an order for sale of mortgaged property the subject of the mortgage-deed of the 29th October 1893.

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.

(3) (1891) 17 Mad. 181.

(4) See ante p. 128.

(5) (1897) 24 Cal. 677.

(6) (1908) 10 Bom. L. R. 615.



The learned Judge of the lower Court has considered that there are two contrary decisions of this Court upon the point [466] and that he was bound to follow the later ruling, and he has accordingly followed what he believed to be the effect of the judgment in *Krishna v. Hari* (1) in preference to one in *Mahadaji v. Joti* (2). In giving this preference to the judgment in *Krishna v. Hari* (1) he has lost sight of the provisions of section 3 of the Indian Law Reports Act XVIII of 1875.

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We think, however, that he has misread the judgment in *Krishna v. Hari* (1), which was shown by the judgment of this Court in *Parasharam v. Putlajirao* (3), to fall within a different class of cases to that in *Mahadaji v. Joti* (2). In the last mentioned case, there was a distinct covenant to pay after five years from the date of the bond. In *Krishna v. Hari* (1) there was no covenant to pay the principal amount at any particular date. In the mortgage which we now have under consideration the mortgagor covenants "as regards the period of repayment of this, I shall repay your money in two years from to-day. For this amount the security is the land described below." It is, therefore, not a case of a purely usufructuary mortgage, but a case in which the mortgage-money has become payable by the mortgagor and therefore in the absence of a contract to the contrary the mortgagee has the right under section 67 of the Transfer of Property Act to an order that the property be sold.

We therefore reverse the decree of the lower Court and pass a decree for the plaintiff ordering that in default of the defendant paying the amount of principal and interest not exceeding *damdapat* within six months from this date, the property be sold and the proceeds of the sale paid into Court and applied in payment of what is found due to the plaintiff and that the balance if any be paid to the defendants or other persons entitled to receive the same.

The plaintiff will be entitled to add his costs of this suit to the mortgage debt.

*Decrees reversed.*

34 B. 467. (=11 Bom. L. R. 1014=4 I. C. 103.)

[467] ORIGINAL CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Macleod.*

JETHABHAI NARSEY, Appellant and Defendant, v. CHAPSEY  
COOVERJI, Respondent and Plaintiff.\*

[12th August, 1909.]

*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1882), sections 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), section 151.*

As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan.

\* Original Suit No. 687 of 1905, Appeal No. 1480.

(1) (1908) 10 Bom. L. R. 616.

(3) See ante p. 128.

(2) (1892) 17 Bom. 425.



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*Held*, that as trustee of the Derasar and Sadharam funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed.

*Bank of Bombay v. Suleman* (1) referred to.

*Held*, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance.

*Held*, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed.

*Held*, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste.

The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savaichand* (2). *Lalji Shamji v. Walji Wardhman* (3) referred to and distinguished.

[463] *Held*, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

[Ref. 11 Bom. L. R. 1267=1 I. C. 569 ; 59 I. C. 785=22 Bom. L. R. 1416=45 Bom. 512.]

THIS was a suit filed by the plaintiff for a declaration that he had the right to inspect and take copies of all books of account, minute-books and documents of the Mahajan, Managing Committee, Sub-Committee, and Trustees of the Cutchi Dassa Oswal caste, and for an injunction restraining the defendant from interfering with him in the exercise of that right. Both the parties were trustees of the Derasar and the Sadharam funds of the caste and both were similarly members of the Managing Committee, the defendant being President of that body.

The plaintiff alleged that complaints had been made to him that certain of the caste funds had been misapplied and irregular resolutions passed by the Managing Committee, and it was with a view of investigating these complaints that he claimed the inspection. While admitting that his right to inspection as a member of the caste was subject to the permission of the President or Secretary of the Managing Committee, he asserted that, under the caste rules, as a trustee he had an absolute right.

The defendant denied the plaintiff's right, and contended further (*inter alia*) that the question was purely a caste question, and not one which the Court could entertain.

The case came before Mr. Justice Chandavarkar, who gave judgment for the plaintiff with costs.

The defendant appealed.

*Strangman* (Advocate-General) with *Joshi* and *Taraporewalla* for the appellant:—

In the first place, the plaintiff in his capacity as member of the caste or as member of the Managing Committee has neither at common law, nor under the caste rules, any such right as alleged. See *Bank of Bombay v. Suleman* (4). As trustee he bases his claim both on the common law and on the caste rules. [469] His trusteeship of the Derasar

(1) (1903) 32 Bom. 466 at p. 474.

(2) (1880) 5 Bom. at p. 84 F. N.

(3) (1895) 19 Bom. 507.

(4) (1908) 32 Bom. 466.



and Sadharan funds, however—and these are the only funds of which he is a trustee—cannot improve his position, as the documents in question (the minutes of the Sub-Committee and the correspondence file of the Mahajan) do not in any way appertain to these funds. Rule 8 of the caste rules, on which he relies, excepts trustees from the general prohibition only in respect of the particular documents relating to their trusts.

In the second place, even assuming that the plaintiff has such a right, has it ever been denied him by the defendant? The correspondence shows this was not so. On this point see Taylor on evidence, Article 1502.

Finally, assuming all the above points in the plaintiff's favour, he has no cause of action in a Court of law. It is a caste question entirely and he must go to the caste for relief. No right of property is involved. A decree of this Court based on a caste rule would be worth nothing, inasmuch as the caste could at once render it nugatory. *Murari v. Suba* (1), *Pragji Kalan v. Govind Gopal* (2), *Raghunath Damodhar v. Janardhan Gopal* (3), *Lalji Shamji v. Walji Wardhman* (4).

*Padshah* with *Jinnah* for the respondent:—

The defendant was also a trustee of the Mahajan fund. The resolution of 19th January 1905 appointed him trustee, and he wrote accepting the office on 3rd February. As trustee of this fund he certainly had the right of inspection claimed.

In *Bank of Bombay v. Suleman* (5) the plaintiff had no special interest as the plaintiff has here, as a trustee and member of the Managing Committee. This is not a caste question, but the invasion of the right of a trustee, non-exercise of which would put him to damages which cannot be assessed.

The plaintiff's right was certainly denied by the defendant, who was one of several joint tort-feasors. Action by the Court in the matter would not interfere with the autonomy of the caste.

[470] *Strangman* in reply:—

The plaintiff was not a trustee of the Mahajan fund. No trust-deed was executed, although the resolution of 19th January 1905, on which he relies, clearly intended a deed to be executed. This fund was definitely held to be a secular fund in *Thackersey v. Hurbhum* (6), and as such comes under the Indian Trusts Act. Sections 5 and 6 of that Act require a written instrument and a transfer of the property for the trust to be valid. The plaintiff thus cannot claim to be a trustee of this fund merely by reason of the resolution and his letter of acceptance. Further, he never demanded inspection as a trustee of the Mahajan fund. Nor did he put forward this claim in the Court below.

*Cur. adv. vult.*

BATCHELOR, J.—This rather heavy litigation was the unfortunate result of a division or faction in the Cutchi Dassa Oswal caste, to which both the parties belong. At the time of the suit the defendant was President and the plaintiff was a member of the Managing Committee of the caste while both the plaintiff and defendant were trustees of two trust funds established by the caste, under separate trust deeds, called the Derasar and Sadharan funds.

The plaintiff sued for a declaration that he was entitled to inspect and take copies of all the books and documents of the Mahajan, the Man-

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(1) (1882) 6 Bom. 725.

(2) (1887) 11 Bom. 534.

(3) (1891) 15 Bom. p. 610.

(4) (1895) 19 Bom. 507.

(5) (1908) 32 Bom. 466.

(6) (1883) 8 Bom. 432.



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aging Committee, the Sub-Committee and the Trustees; and for an injunction restraining the defendant from interfering with the plaintiff's exercise of his rights in this regard. The defendant's main answers to the suit were that the question in dispute was a purely caste question outside the jurisdiction of the Court; that the plaintiff was not entitled to inspect the minute books of the Sub-Committee or the correspondence file; and that no cause of action had arisen against the defendant who had never refused or denied the plaintiff's right to take inspection of such documents as he had a valid claim to see.

[471] The learned judge below found that the suit was properly cognizable by the Court; that the plaintiff had a right to free inspection of all the books and documents of the caste; and that the defendant had on the 7th September 1905 denied the plaintiff's right. He, therefore, made a decree declaring that the plaintiff was entitled to inspect and take copies of all or any of the books, and restraining the defendant from interfering with the plaintiff's exercise of his right.

From that decree, the defendant now appeals, and the learned Advocate-General on his behalf has addressed to us a three-fold argument. He contends, first, that the plaintiff has no right to inspect the minute books of the Sub-Committee or the correspondence file, these being the two documents about which alone there is any controversy; secondly, that, if such a right exists in the plaintiff, it was never denied by the defendant; and, thirdly, that in any event the question between the parties is a purely caste question involving no rights to property, and is not within the Court's jurisdiction.

Mr. Padshah for the respondent-plaintiff seems to have felt some difficulty in supporting the decree on the grounds assigned in the learned Judge's judgment, and has accordingly directed the main stress of his argument towards establishing that his client was a trustee not only of the above-mentioned Derasar and Sadharan funds but also generally of the whole Mahajan property. If that is so, it is argued that his capacity as a trustee of the whole caste property would give him a valid claim to inspect all the books and documents of the caste. Bearing in mind the character of the two documents now in dispute, we seriously doubt whether even on this hypothesis they would be necessarily exposed to the plaintiff's inspection; but this point need not be decided because we think that the plaintiff's claim to be a trustee of the whole Mahajan property must be disallowed. It is sufficiently answered, in the first place, by the fact that there was never any demand made by the plaintiff for inspection on this footing. Upon this point the most important evidence is Exhibit K, the correspondence immediately preceding the institution of the suit, and if reference be made to this correspondence, particularly to the plaintiff's solicitor's letter of 15th [472] August 1905, it will be seen that plaintiff's demand was grounded upon his being a member of the Managing Committee and a trustee of the Derasar and Sadharan funds. So, in the suit which the plaintiff has subsequently filed to set aside the order of the caste purporting to dismiss him from his trusteeship, the only trusteeship alleged is that of these two funds. It appears, indeed that the now alleged trusteeship of the whole Mahajan property is a new point, which was not taken before the trying Judge. It is true that in the first para of the plaint it is stated that "the plaintiff and defendant are both trustees of the property of the caste," but we think that these somewhat general words must be read as mere description, not specifically raising



any title beyond that arising from the trusteeship of the separate funds. This view receives support from the voluminous record, which may be searched in vain for any such distinction as is now sought to be drawn. From that record it appears to us indisputable that, in the Court below, the suit was tried out upon the understanding between the parties that the only trusteeship relied on by the plaintiff was that of the two separate funds. It was at first denied for the defendant that the plaintiff was even a trustee of those funds, the contention being that he had been dismissed by the caste; later, however, this contention was abandoned as the alleged dismissal was subsequent to the date of suit. It was therefore, formally admitted by counsel for the defendant that "the plaintiff was a trustee". But it is, we think, quite certain that counsel for the defendant could never have admitted the plaintiff's claim to be a trustee of the whole caste property.

Then, admitting for the sake of the argument that the point is now open to the plaintiff, has he shown that at date of suit he was a trustee of the whole caste property? To make good the position he relies on Exhibit D, the caste resolution of the 19th January 1905, and Exhibit U, the plaintiff's acceptance of that resolution on 3rd February 1905. Exhibit D is the record of a successful motion at a meeting of the Mahajan that the plaintiff and other members named "be appointed (or named) and they are to get the properties of" the Mahajan transferred to their names, and that, getting a trust-deed of the Mahajan fund prepared they are to take "charge of the management of the [478] Mahajan." In Exhibit U, the plaintiff acknowledges that he has been "selected", and accepts, or agrees to, the action of the caste. We are, however, of opinion that these two Exhibits do not suffice to constitute the plaintiff a trustee of a Mahajan property. Admittedly this was not a case of a new appointment to an existing trust, for no trust of the Mahajan property had ever before been created and the property was then vested in the caste, on whose behalf the powers of management were delegated to the Managing Committee under rules 1 and 2 of the caste rules, Exhibit J. Now Exhibit D clearly contemplates that, to carry into effect the announced intention of creating a trust, a trust deed should be prepared divesting the caste and vesting the property in the persons chosen to be trustees. No such deed has ever been executed or even prepared, and the legal title to the property still remains with the caste. This fact becomes the more significant when contrasted with the other fact that in regard to the Derasar and Sadharan funds regular deeds of trust were prepared and executed: see Exhibits A and B. In these circumstances it appears to us that the intention to create a trust of the Mahajan fund remained unexecuted. Upon this point reference may be made to sections 5 and 6 of the Indian Trusts Act, which require for the creation of a valid trust an instrument in writing and a transfer of the property. It is true that the Trusts Act does not apply to public or private religious or charitable endowments; but it has already been held by this Court in *Thackersey Dewraj v. Hurbhum Nursey* (1) that the Mahajan fund of this caste is a purely secular fund, and we think that the principles of sections 5 and 6 of the Act are properly applicable. Upon these grounds we come to the conclusion that no trust of the Mahajan fund was created, and that the plaintiff cannot claim to have been a trustee of the whole caste property.

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If that is so, then the question is narrowed down to the form which alone we understand it to have assumed in the lower Court, that is to say, the question whether the plaintiff is entitled to claim this inspection.

[474] (a) in his character as a trustee of the Derasar and Sadharan funds, or

(b) in his character as a member of the Managing Committee, or

(c) in his character as a member of the caste.

Now as to the plaintiff's capacities under heads (b) and (c) Mr. Padshah, whose forcible and exhaustive argument has omitted nothing capable of telling in his client's favour, has candidly admitted that the plaintiff's privileges in regard to inspection must be determined solely by reference to the rules of the caste, and that these rules—see rule 8—formally exclude the right of inspection. The caste having made a rule in regard to inspection no other line of argument was possible but even if the rules of the caste had been silent on the question of inspection, we do not think that a right to inspection existing in any person by virtue of his being a member of the caste or of its Managing Committee could be evolved by a reference to English law. That unique aggregation, the Hindu caste, is so wholly unknown to the English law that, as it seems to us, English decisions concerning English corporations and partnerships tend rather to confusion than to guidance upon such a question as that now in hand. A Hindu caste may have points of resemblance to English corporations and partnerships, but its points of difference appear to us even more numerous and more radical. We have, therefore, had no hesitation in accepting Mr. Padshah's admission upon this part of the case, though when we come later to the question of the caste's autonomy we shall have occasion to adduce further reasons in support of our view.

If we are right so far, then, the result is that the plaintiff can make no claim to this inspection except as a trustee of the particular funds known as Derasar and Sadharan. We propose in discussing the whole question to follow the order of the Advocate General's argument, to inquire that is to say, first, whether plaintiff had any such right; secondly, whether if so, it was definitely demanded by the plaintiff and was denied by the defendant; and thirdly whether in any case the question is not a caste question beyond the Court's jurisdiction.

[475] Upon the first of these questions it is plain that, as trustee of the two funds, the plaintiff has certain legal rights apart altogether from any privileges which he may have under the regulations of the caste; for though it is competent to a caste to appoint a man a trustee or not to appoint him, it cannot, having once so appointed him, restrict the legal rights incidental to his position as trustee. We must, therefore, examine separately the plaintiff's legal rights as trustee and his caste rights, for it is enough for him to succeed upon either.

His legal rights as trustee of the Derasar and Sadharan funds, cannot, in our opinion, entitle him to inspection of the two contested documents which do not appertain to either of these trusts. This, as we understood his argument, was not seriously contested by Mr. Padshah, who upon this point relied on the larger contention that the plaintiff was a trustee of the whole caste property; and it would seem that the distinction and its consequences were not prominently brought before the learned Judge below. The documents of which inspection is claimed are, as we have said, the Sub-Committee's minute book and the correspondence file of the Mahajan. The Sub-Committee's minute book contains the record of what



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is called the Judicial Branch of the caste, that is, of the inquiries made by the Sub-Committee into caste offences alleged to have been committed by various members. The correspondence file contains the letters written and received by the Managing Committee on behalf of the whole caste. These documents in no sense belong to the Derasar or Sadharan trusts, which have separate books of their own, and there is no allegation that these books have been incorrectly kept. As trustee of these two funds only, the plaintiff could, we think, have no legal claim to a roving inspection of all caste documents on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trusts, and no such power is implied in the deeds creating the trusts, Exhibits A and B.

This part of the case need not, however, be further pursued because we were not pressed to allow the plaintiff's claim on the footing of his legal rights as trustee of the Derasar and Sadharan [476] funds only. The plaintiff in the Court below and his counsel before us have preferred to rely upon the plaintiff's privileges as a trustee by virtue of the rules of the caste, and the argument is that, though the trusteeship would not suffice to found a valid claim in law, it does suffice to found a good claim under No. 8 of the caste rules to be found under the heading "Secretary." This rule is in the following words:—

"Without the permission of the Secretary or the President no person or persons whatever except the trustees can inspect any book or document whatever, nor can he or they remove it even outside the office."

This is the official translation from the Gujarati. We have referred to the original, but it throws no further light on the meaning of the rule as to the position of trustees. At the time the rule was made the only trustees in existence were the trustees of the Derasar and Sadharan funds, though there are indications that the caste even then contemplated appointing the same persons to a trust to be created of the whole Mahajan property. The question is, what rights to inspection are conferred upon the trustees by the rule cited. The learned Judge below has read the rule as meaning that the trustees are authorised to inspect all caste documents whatsoever, but, though we have hesitated before differing from his opinion, we are constrained to regard a narrower interpretation as more consistent with the actual words, and with the probable intention of the framers of the rules. It appears to us that the rule enacts a general and sweeping exclusion, from which the trustees are excepted; that is, it is not true to say of the trustees that they are excluded from inspecting all documents whatsoever. But it does not seem to be implied that they are entitled to inspect all documents whatsoever, but rather that they are entitled to inspect some documents (undefined), and in that case the documents referred to would be those belonging to their trusts. In other words, the rule, as we construe it, first prohibits all inspection by any members without permission, and then saves the legal rights of trustees as such. This interpretation seems to us to be the more reasonable when regard is had to the extreme frequency of factious divisions in Hindu castes, and to the ease [477] with which rights of inspection can be exercised for purposes of dissension and litigation. This particular caste has, as the reports show, been more than once involved in litigation owing to these intestine feuds. We think it more likely therefore that the caste should have narrowly limited these rights of inspection than that it should have lavished them without check on the trustees of the two special funds. We may add that



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if the broader construction of the rule were to be preferred on the sole ground which appears tenable, namely, the theory that the caste intended to have the existing trustees appointed to a new trust of all caste property then the plaintiff's case would not, in our opinion, be advanced, for upon that supposition he would be seeking to take advantage of an intention or design which the caste never carried into effect. Finally, upon this branch of the case, we think that the actual result will not depend upon the precise construction of rule No. 8. For, let us suppose that the rule does confer upon the trustees—that is, the trustees of the two funds, who alone existed—an unfettered right of inspection of all caste documents; that, as we have shown, would be a mere caste privilege altogether in excess of any claim which the trusteeship of the two funds would legally justify. But what the caste gave yesterday, they could withdraw tomorrow and no decree could be based on a caste privilege of this kind inasmuch as the caste could at once render it nugatory. Nor is this an unreal apprehension; on the contrary, in a view of the trustees' action on the 10th September (see Exhibit 36) and the other evidence brought to our notice, it appears to us very probable that the majority of the caste would, as they could, override any decree made in the plaintiff's favour.

This completes our observations on the first question as to the plaintiff's right to claim inspection of these documents, and, for the reasons given, we must hold that the plaintiff had no such right either at law or under the rules of the caste.

For the next question we must assume that that view is wrong and proceed to inquire whether the plaintiff's right was ever denied by the defendant so as to give to the plaintiff a good cause of action. What is required to found a suit of this character is stated, we think correctly, in the following [478] terms in Taylor's Evidence, Article 1502: "It must be established that an express demand was addressed to the proper quarter and was distinctly refused, or, at least, that the other party showed by his conduct that he was determined not to do what was required." Let us see whether these conditions are satisfied here. First, what was the proper quarter? According to the plaintiff's case, as stated in para 2 of his plaint, the proper and actual custodians of these books were the trustees; and the learned Judge below, for reasons which have not been canvassed before us, held that that case was proved. We are of the same opinion. But the defendant is only one of the trustees, and there is the less reason for allowing the plaintiff to sue him alone inasmuch as he was not present at the meeting of the 10th September, where, for the first time, we meet with a plain refusal to give inspection. As we understand the matter, it is not a case of selecting at will any one of joint tort-feasors. The demand for inspection was not made in the proper quarter, and the defendant cannot alone be held answerable for a resolution of the other trustees at a meeting which he did not attend.

Then assuming there was a demand made to the defendant at the proper quarter, was there such a refusal or denial by the defendant as would justify this suit? We think not. Here we must look a little closely at the facts preceding the institution of this suit, and must bear in mind the obvious consideration that dilatoriness and excuses for inaction are not, at least in India, to be regarded as necessarily equivalent to denial of right. The all important evidence is, in our opinion, the correspondence Exhibit K from 16th August to 11th September 1905. That correspondence discloses to us the plaintiff watching for a favourable opportunity to launch



his suit, and on the 1st September his solicitors declare that the plaint is already in draft. It was declared on the 12th September, having on the previous day been sent to counsel for formal settlement. Now para 4 of the plaint, which alleges the refusal of the right, is significantly reticent as to the date when the refusal occurred, and it appears that this allegation was already made when the plaint was put in draft. But the only events on which the plea of refusal is sought to be grounded are those which occurred on the 7th September, if we except a certain faint suggestion [479] that events of the 8th to 10th may also be prayed in aid. It seems to us clear that these later events cannot be used to support the case against the defendant who was away in Poona when they occurred, and who, as already stated, did not attend the trustee's meeting of the 10th. It is true, as the learned Judge says, that the resolution of the 10th was a denial of the plaintiff's right, but that was a resolution by other trustees, not parties, and the defendant took no part in it. Now if we refer to the correspondence, Exhibit K, we shall see that it is this resolution of the general body of trustees (without the defendant) which alone is referred to as constituting a denial of the plaintiff's right. That follows from the plaintiff's attorneys' letter of the 11th September where we first meet a plain allegation of a refusal, that is, the refusal by the other trustees on the 10th. But the latest letter which can be used against the defendant, owing to his subsequent absence from Bombay, is that from the plaintiff's attorneys, dated the 8th September, referring to the events of the 7th. This letter, however, does not even allege a refusal, despite the plaintiff's then anxiety to make a case; it alleges only "frivolous objections" to conceding the demand and a "pretext" that a certain necessary key was with the Mehta; but even the "pretext" is not apparently disbelieved, for, the plaintiff says that he objects to the key remaining with the Mehta. Even as late as the 11th September, we find the plaintiff saying, through his solicitors, that *unless* the defendant takes a certain course he will conclude that the defendant "objects to the inspection." We must infer from all this that nothing that happened on the 7th September was understood even by the plaintiff himself to amount to a denial or refusal, and in view of the plaintiff's position, to which we have alluded, it is certain that he did not understate his own case. If further assurance were needed, it would be found in the plaintiff's own deposition, where he says in examination-in-chief: "I attended on the 7th September to take inspection and copies. Inspection of the Mahajan book was allowed, but as to the correspondence file I was told it could not be found"; and he goes on to confirm the facts as stated in his solicitors' letter of the 8th September. It is true that, after the lapse of a considerable interval, which enabled him to reconsider his evidence, the plaintiff in cross-examination seized an opportunity to endeavour [480] to improve his story, but in all the circumstances we can attach no importance to this attempt. Thus the occurrences of the 7th September, which are wholly, or almost wholly, relied on to support this suit, fail in their purpose because it is manifest that the plaintiff himself never understood them to amount to a denial of his right. For the events between the 7th September and the filing of the suit the defendant was not responsible; they were the acts of the other trustees in the defendant's absence. As to Exhibit M, the record of the trustees' meeting of the 2nd September, we read that as a plain indication that defendant made no refusal, but that the plaintiff was actively endeavouring to discover or to make an excuse for litigation.

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Again, the right claimed was an unqualified right to hand over all the caste books for the years 1903, 1904 and 1905. But the plaintiff never became a trustee of the two funds till he signed the two trust deeds, exhibits A & B, on the 7th September 1905, and in any case his claim to inspect earlier documents would have been inadmissible. Therefore, though we hold there was no denial, it would be difficult to say that a denial of an excessive claim would have been unwarrantable. In this context it is relevant to observe that, when pressed as to the purposes for which he wanted inspection, the plaintiff said: "At first I merely wanted to look into the minutes of the Sub-Committee. That was for no particular purpose. I must look into a thing first before I can say why I want to look into it." We read this as meaning that, as the evidence generally suggests, the plaintiff's real object was to make a fishing inquiry in the hope of finding some materials wherewith further to embarrass the majority of the caste. If that is so, reference may usefully be made to the observations of their Lordships of the Judicial Committee in the *Bank of Bombay v. Suleman* (1).

There now remains the single point, whether this is a caste question and so beyond the jurisdiction of the Court. That, of course, must be discussed on the assumption that our foregoing findings are wrong. In our opinion this point also must be determined in the defendant's favour. As we have tried to show [481] in an earlier part of this judgment, the plaintiff's claim cannot be supported by reference to his legal rights as trustee of the two funds. If he is to succeed at all, the plaintiff must succeed, as indeed he himself puts his case, under the rules of the caste, so that the question comes down to this, is the plaintiff by reason of his holding a certain caste office, entitled under the caste rules to inspection of all caste documents? It appears to us that that is eminently a question for the caste, and not for the Court.

Upon this subject we must notice that there is visible a growing tendency to endeavour to enlarge the jurisdiction of the Courts beyond the limits set by existing authorities, but in our judgment the tendency ought not to be encouraged. The records of our Courts show that a Hindu, whose own preferences or inclinations do not commend themselves to his caste, is apt to try and use the Civil Court as a means whereby his wishes may be forced on the majority, and we are of opinion that this suit is an illustration of the practice. Mr. Padshah admitted that the authorities of the caste would, as he phrased it, have "concurrent jurisdiction" with the civil Court to determine the question now in issue; and that appears to us to be a dangerous admission. For, though the decisions are not perhaps altogether harmonious, there is no doubt that their general weight favours the test which received the high authority of Sargent C. J. in *Murari v. Suba* (2) and was followed by Farran J. in *Lalji Shamji v. Walji Wardhman* (3). That test is, "Would the taking cognizance of the matter in dispute be an interference with the autonomy of the caste?" Now autonomy is rather a large word, and, without attempting to define it, we think it must mean at least as much as this, that where rights to property are not involved all matters of internal management must be left to the decision of the caste. This proposition has the support of several cases which we do not cite as the proposition itself was not challenged before us. No rights to property are involved here, yet the Court's interference is

(1) (1908) 82 Bom. 474.

(2) (1882) 6 Bom. 725.

(3) (1894) 19 Bom. 507.



sought on a question for which the rules of the caste make provision. If we are to take the decision out of the hands of the caste, it is difficult to see either what would be left of the caste's autonomy or where the process is to stop; yet it is on many grounds very undesirable that the Courts should assume the jurisdiction, or be burdened with the duty, of deciding the numberless small points of religious or social usage and etiquette which form the common subjects of difference. In *Murari's case* there was a claim to property *viz.*, to the fees appurtenant to a caste office, yet Sir Charles Sargent held that, the office being a caste office, the Court was not vested with jurisdiction by reason of the annexed fees. That decision was, no doubt, under the Regulation of 1827 which does not govern suits on the Original Side of this Court, but it has not been argued that the practice on the Original Side under section 9 of the Civil Procedure Code of 1908 differs from the course prescribed by the Regulation, and we can see no reason whatever why the rules as to the admissibility of caste suits should be one thing for the mufassal and another thing for the presidency town. The plaintiff relies on Farran J.'s decision in *Lalji's case*, which was a case among members of the caste now before us, but, if the facts there be examined, we do not think that the decision assists the plaintiff. Upon reading the whole judgment attentively, we think that Farran, J. felt that he was going as near the limit of interference as was possible but it is not necessary for us to consider the correctness of his decision as we find that it is easily distinguishable from the present case. For, in *Lalji's case* a question of property was involved, *viz.*, the right to the use of the caste cart, and the learned Judge was satisfied that his decree would give effect to the wishes of the majority. Those, as we read the report, were the principal *rationes decidendi*, and both of them are absent here. Here, as the learned Judge below points out, the suit is not in form a suit against the caste, but even in form it is a suit to enforce a caste privilege and for that redress the proper tribunal to approach is the caste whose rule is said to have been infringed, and not the civil Court. The real character of the suit, however, is we think, a claim against the present constituted authorities of the caste; substantially it is a suit to obtain from the Court an order, which the plaintiff knows the caste would never make, as to a matter concerning the internal arrangement of the caste affairs, and this explains why the claim was brought before the Court and not before the caste, [483] though the caste admittedly had jurisdiction to decide it. The question in dispute is in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it is outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savaichand* (1) which was approved by Sargent, C. J., in *Metha Jethalal v. Jamaitram Lalubhai* (2). *Nemchand's case* was decided by a Full Bench consisting of Sir Richard Couch, C. J., and four other Judges. The plaintiffs, who represented one of the factions into which the caste was split, claimed a declaration that they were the proper recipients of half the compensation which had been allowed by the Collector for certain shops belonging to the caste. It will be seen, therefore, that there was a distinct and specific claim to property; yet the Full Bench held that the Courts had no jurisdiction. In our opinion the plaintiffs there had a stronger case than has the plaintiff before us and if this appeal has to be decided on a comparison of the authority of the two cases, *Lalji Shamji v. Walji Wardhman* (3) and *Nemchand v. Savaichand* (1)

(1) (1880) 5 Bom. at p 84 F. N.

(2) (1887) 12 Bom. 225.

(3) (1894) 19 Bom. 507.

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there can be no question that the authority of the latter must prevail. For, though it is competent to us not to follow the ruling of a single Judge, we are concuded by a decision of the Full Bench whether we agree with it or not. But in fact for the reasons given we do entirely agree with the decision in *Nemchand v. Savaichand* (1) which so far as we are aware has been the law of this Presidency since 1866: compare *Girdhar v. Kalya* (2) and the already cited case of *Metha Jethalal v. Jamiatram Lalubhai* (3); and in our opinion the decision in *Lalji's case* cannot be regarded as authority for extending the jurisdiction of the Court beyond the point at which it is left by the earlier cases.

Finally, as to section 151, Civil Procedure Code, that has no bearing on the present discussion for, when according to well established principles certain questions have been removed from the jurisdiction of the Court, we do not think they can be brought within the jurisdiction on the plea that the Court has inherent [484] jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court, but to meet the objection often raised that in matters within the jurisdiction the Court can only exercise such powers as are expressly given by the legislature and no others.

On the foregoing grounds, then, and with very sincere respect for the learned trying Judge and his exhaustive treatment of the suit as it was presented to him, we have felt compelled to adopt a different view as to the rights of the parties in this case.

We reverse the decree under appeal, and order that the suit be dismissed with costs throughout.

*Decree reversed.*

Attorneys for the appellant: Messrs. *Wadia Gandhi & Co.*

Attorneys for the respondent: Messrs. *Matubhai, Jamietram and Madan.*

34 B. 484 (=4 I. C. 135=11 Bom. L. R. 1062).

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

A. HAJI ISMAIL & CO., *Plaintiffs, v. RABIABAI AND ANOTHER,*  
*Defendants.\**

[28th August, 1909.]

*Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Charging order—Solicitors' lien for costs.*

The rule at common law that a solicitor is entitled to alien for his costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

*Ridd v. Thorne* (4), followed.

Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous [485] partnership suit, his proper course is not to issue execution against those

\*Original Suit No. 523 of 1907.

(1) (1880) 5 Bom. at p. 84 F. N.

(2) (1880) 5 Bom. p. 83.

(3) (1887) 12 Bom. 225.

(4) (1902) 2 Oh. 344.



assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court.

*Kewney v. Attrill* (1), followed.

PROCEEDINGS in chambers on a garnishee notice. The facts appear sufficiently from the judgment.

*Captain*, of Messrs. *Captain and Vaidya*, for the plaintiffs.

*Thakordas A. Gandhi* for first defendant.

MACLEOD, J.—The two defendants in this suit were partners and in a suit No. 96 of 1907 filed by the first defendant against the second defendant for dissolution of partnership, a receiver was appointed to get in the assets. The receiver has now in his hands a sum of about Rs. 1,698 as assets and it is not considered likely that he will recover anything more.

The plaintiffs in this suit having obtained a decree against the defendants were granted leave to issue execution against the assets of the partnership in the hands of the receiver and a prohibitory order was issued on the 19th June 1908. They have now taken out a garnishee notice against the receiver to pay to the plaintiffs the money in his hands. I am told that no other claims have been made against these assets but a question arises whether they are not subject to the lien of the solicitors in the partnership suit for their costs.

The rule at a common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court and the case of *Ridd v. Thorne* (2) is a direct authority for holding that where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

Apart from that the procedure adopted by the plaintiffs in this suit is, in my opinion, wrong. They should not have issued execution against the assets in the hands of the receiver. The proper course was to ask the Court for a charging order in the [486] form granted by Kay, J., in *Kewney v. Attrill* (1). The assets of the partnership can then be dealt with by the Court by giving directions to the receiver and it is desirable that this procedure should be followed in future.

I discharge the prohibitory order and garnishee notice and give the plaintiffs a charge on the moneys which are in the hands of or which may be taken possession of by the receiver and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest and the costs of this order. The lien of the solicitors for their costs in the partnership suit will take priority over this charging order.

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34 B. 484=4  
I. C. 135=11  
Bom. L. R.  
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(1) (1886) 34 Ch. D. 345.

(2) (1902) 2 Ch. 344.



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CIVIL.

34 B. 486 (=4 I. C. 278 =11 Bom. L R 1176.)

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

34 B. 486=4  
I. C. 278=11  
Bom. L. R.  
1176.IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF  
GOVERNMENT AND SUKHANAND GURUMUKHAI AND ANOTHER.\*

[6th September, 1909.]

*Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—  
Elements to be considered—Evidence before Acquisition Officer—Practice.*

The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration.

In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity.

The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration.

[487] It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

REFERENCE under s. 18 of the Land Acquisition Act.

The facts appear sufficiently from the judgment of the Court.

*Robertson with Jardine* for the claimants.

*Weldon (Strangman, Advocate-General, with him)* for Government.

MACLEOD, J.—This is a reference by the Special Acquisition Officer under s. 18 of the Land Acquisition Act relating to a piece of land measuring 3,009 square yards with a bungalow erected thereon situated on the Matunga Road which runs between Matunga station on the G. I. P. Railway Company's line and Mahim station on the B. B. & C. I. Railway Company's line. The property was notified by Government for the purpose of being handed over to the G. I. P. Railway Company which required additional land for traffic sidings and waggon sheds. A considerable area of the surrounding land has already been the subject matter of previous references before me. The claimant purchased the land in reference about 1901 at the rate of Rs. 2 per square yard, and after filling it in all over to the extent of about 2 feet built a substantial upper storied bungalow with out-houses. The whole was surrounded with a low wall surmounted by a wooden fence. The compound has been laid out as a garden. This neighbourhood after the plague broke out in Bombay towards the end of 1896 was the first resorted to by persons who wished on that account to live outside the city. A considerable quantity of land changed hands and houses began to be built, but further development was checked when it was ascertained that the Bombay Improvement Trust had notified for acquisition all the land between the two Railways from Dadar to Matunga, so far back as 1898 or 1899. That notice was cancelled about the year 1905 and a fresh notice was issued by Government for acquisition for the Railway Company on the 22nd February 1906. The demand, however, for suburban residences continued unabated, though it could only be satisfied by erecting houses in Salsette.

\* Reference No. 40 of 1908.



[488] Mr. Murphy, the Special Acquisition Officer, has valued the property on the basis of an hypothetical rent, to the exclusion of all other methods. The claimant after the bungalow had been completed, had occupied the upper floor himself and had occasionally let out the ground floor and parts of the out-houses, so there was no possibility of arriving at the letting value of whole except by guess-work. Mr. Chambers, for Government, estimated that a fair rent would be Rs. 100 per mensem. Mr. Murphy based his award on a rental of Rs. 120. In his decision he has complained of the attitude adopted by the claimant's legal advisers. The first valuation they brought in was one by Mr. Bryant based on his estimate of the then value of the land plus the value of the buildings. The Company's solicitor contended that this valuation was on a wrong basis, the correct basis being the rental value. Mr. Murphy adopting this contention summarily rejected the claimant's valuation, and apparently expected him to immediately produce a valuation on a rental basis. At a later stage of the proceedings after the Railway Company had opened their case the claimant was allowed as a matter of grace to bring in a valuation also based on an hypothetical rent. Before me both parties have argued the case on the same basis.

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Now the income of a property whether actual or imaginary is no doubt one of the recognized starting points for a valuation. The mistake everyone has made in this case lies in thinking that that is the only element to be taken into consideration. In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property is such a commodity, and here, by residential property I mean property which a purchaser wishes to acquire for his own residence. The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration. A man who buys land and builds thereon, does not necessarily produce a marketable commodity of the value of [489] his outlay but it does not follow that he never does, for if there is a demand for residences in a particular locality and the supply is limited a purchaser will consider not only the procurable rent of houses in the market but the cost to himself of building a new one.

Now I am satisfied that in February 1906 there was a demand for residential property in this locality, that the supply was extremely limited, and that persons of means residing in the native town were anxious to obtain accommodation outside the town during the plague season; further, that the situation of the claimant's property was eminently favourable and that his expenditure on land and building was absolutely normal.

Mr. Chambers, the expert witness for Government, admitted that there was nothing extravagant about the building and that the property could be valued as a residence without fixing on an imaginary rental. Unfortunately Mr. Murphy's award precluded him from forming an unbiased opinion of the value of the property on this basis. The claimant proved that the cost to him had been about Rs. 26,000 but beyond that, he had laid out the compound, planted trees, and brought into existence, as is evident from the photographs put in, an eminently desirable residence available for sale as a going concern. It is not unreasonable



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for the Court to assume that a purchaser wishing to acquire such a residence in this neighbourhood would realise he could not build at any less cost, in addition he would have to incur considerable trouble and wait for a considerable time before he could enter into residence. If any authority were required for valuing on the basis of cost it can be found in the case of *Government v. Dayal Mulji*(1), where the Court went further than I am prepared to go, by awarding the claimant in addition to the estimated cost of his incomplete building, the present value of his land instead of the original cost. There is no reason why this method should be absolutely barred and the owner compensated on the basis of an imaginary rental merely because he happens to have completed his building before the notification. Taking into account the demand for residential [490] property in this locality, the cost of the property to the owner, its favourable situation and the fact that it possesses absolutely normal features, I consider its market value on the 22nd September 1906 was Rs. 25,000. The claimants' valuation on the basis of a rental of Rs. 185 all the year round cannot be considered a reasonable one. If I am to consider an imaginary rent I do not think any one would pay more than Rs. 140 at the outside. The claimant moreover has attempted to increase his valuation by setting up a scheme for separating 816 square yards from the south end of the compound which he alleges would have a value of its own without interfering with the value of the bungalow. No doubt he did ask his engineer before the 22nd February 1906 to prepare plans for a chawl on the south and west boundaries of his property, but I do not feel confident that he ever meant to carry this into execution. A chawl accommodating 80 or 100 people would certainly have prevented the bungalow from being considered a desirable residence.

Apart from that I am entirely against taking such schemes into consideration. There is no objection to giving surplus land a valuation, but it must really be surplus land. In this case the claimant has walled in and laid out the whole of the land which he clearly bought for the purpose of building a bungalow on it. Supposing I valued 816 square yards proposed to be cut off, at Rs. 3 per square yard, I should certainly consider that the value of the bungalow as a residence would be depreciated to a far greater extent. I regret that there should have been any friction between the Special Acquisition Officer and the claimant's solicitor. I am sure the latter intended no disrespect to an officer who was carrying out with great consideration and ability the work entrusted to him by Government. Unfortunately, having fixed in his mind that the only way to value the property was on the basis of an imaginary rent, he seems to have considered himself precluded from accepting any information or suggestions which were not directly pertinent to such a method. On the other hand it is not desirable that legal practitioners attending before an Acquisition Officer should make reference to what may happen if the case is taken to Court. It is their duty to assist the officer in arriving at a valuation by putting [491] before him all the information and materials at their disposal. At the same time I deprecate any tendency to treat all such information produced by a claimant with suspicion, and to throw out everything which is not proved according to the rules of evidence which prevail in a Court of Justice, thus necessitating a claimant incurring heavy costs and extending the time occupied by the inquiry to an inordinate length. The Acquisition Officer is in a position

(1) (1906) 9 Bom. L. R. 99.



to make any inquiry that he 'may think may help him in making his award but he can hardly expect each individual claimant to produce substantial proof to support his case in respect of details which in the opinion of the officer should be taken into account in making his award.

The claimant has been awarded Rs. 20,205'20. That must be increased by Rs. 4,794'80 to which must be added 15 per cent and interest on the whole at 6 per cent since Government took possession. The claimant must also be paid the costs of this reference.

Attorney for Government: *E. F. Nicholson*, Government Solicitor.

Attorneys for the claimant: Messrs. *Bicknell, Merwanji and Romer*.

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34 B. 491 (=4 I. C. 277=11 Bom. L. R. 1172).

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

WALBAI, *Plaintiff*, v. HEERBAI AND OTHERS, *Defendants*.\*  
[3rd September, 1909.]

*Hindu law—Adoption—Mother's sister's son also father's brother's son.*

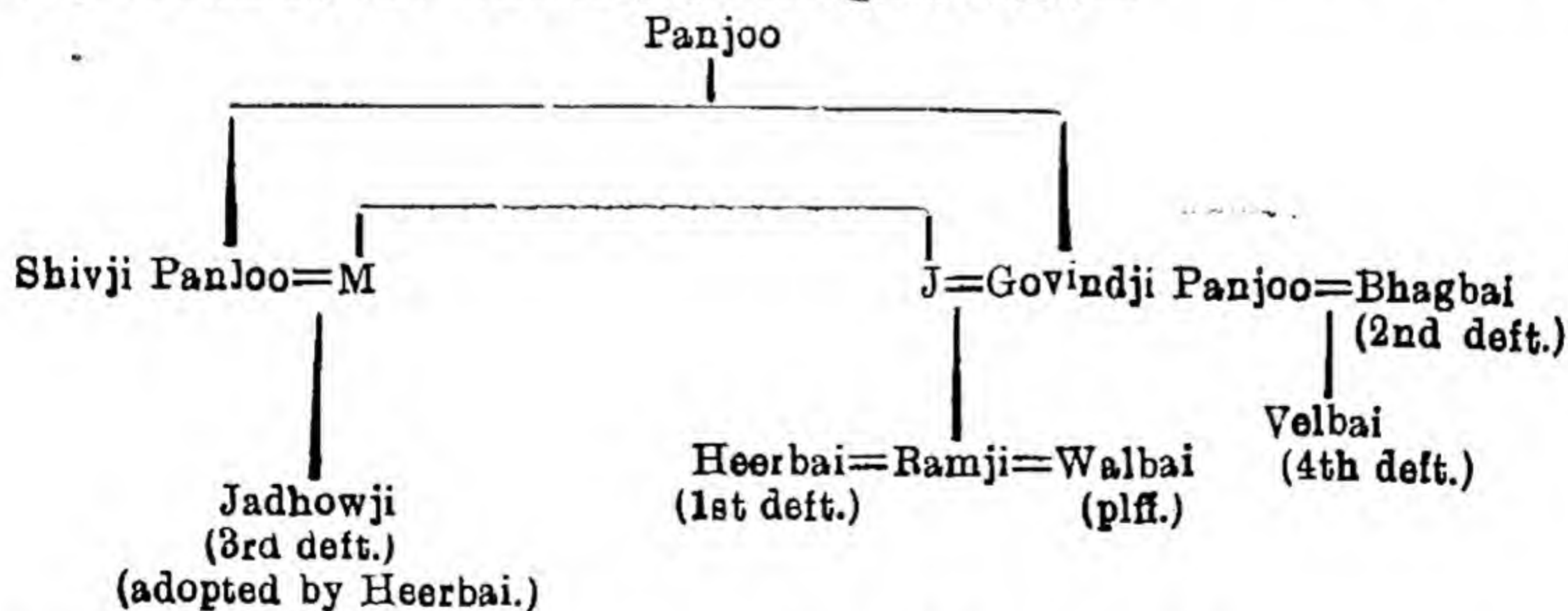
The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son.

The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotras.

*Ramchandra v. Gopal* (1), followed.

[492] Administration suit.

One Ramji Govindji died in February 1908, leaving him surviving two widows, Heerbai and Walbai and a step-mother Bhagbai. This suit was originally filed by Walbai the junior widow against Heerbai and Bhagbai, but at a later date Jadhovji, who was alleged to have been adopted by Heerbai since the filing of the suit, and Velbai, the daughter of Bhagbai, were added as 3rd and 4th defendants respectively. Jadhovji in addition to being the son of Ramji's father's brother was also the son of Ramji's mother's sister, the double relationship arising from the fact that two brothers married two sisters. The relationship of the parties is more fully shown by the following genealogical tree:—



A receiver was appointed on the application of the plaintiff.

Various issues were raised between the parties as to the property in certain ornaments and as to the effect of a consent decree in a former

\* Original Suit No. 244 of 1908.  
(1) (1908) 82 Bom. 619.



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suit filed by Bhagbai against Ramji for maintenance ; but the most important point at issue and the chief point to which the legal arguments were directed, was the validity of the above-mentioned adoption.

*Strangman*, Advocate-General, with *Inverarity*, *Raikes* and *Lowndes* for the plaintiff :—

The adoption is invalid. See Stokes on Hindu Law at pages 61 and 571. The point was decided once and for all in *Bhagwan Singh v. Bhagwan Singh* (1). And further discussion is in fact now purely academic. See Sarkar's Hindu Law at page 150.

*Padsha* with *Setalwad* for the 1st defendant :—

It is a mistake to lay down that the possibility of lawful marriage with the natural mother is the test. See Mandlik's [493] Hindu Law at page 479. The proper construction of the text of Sakala is to read it as directing the adoption in the first place of a Sapinda or a Sagotra, and in the second place, *failing* a Sapinda or Sagotra, of any stranger except a sister's son, etc. In the present case, Jadhawji was adopted in accordance with the directions of the first part of the text. The second part has no application at all.

*Davar* with *Jinnah* appeared for the 2nd and 4th defendants.

*Bhandarkar* with *Desai* for the 3rd defendants supported the adoption.

*Strangman* in reply :—

The text does not warrant such a construction. There are no full stops. The exceptions named in the last line refer to the whole text. See *Ramohandra v. Gopal* (2).

MACLEOD, J.—One Ramji Govindji died in February 1908 leaving two widows Heerbai and Walbai, his step-mother Bhagbai, and her daughter Velbai him surviving. In March 1908 Walbai the junior widow, filed this suit for the administration of the estate of Ramji, making Heerbai and Bhagbai defendants. After the suit was filed, Heerbai purported to adopt one Jadhawji the son of Ramji's father's brother and mother's sister. Jadhawji and subsequently Velbai were added as party defendants to this suit. Bhagbai and Velbai thereafter filed suit 602 of 1899 against Ramji claiming maintenance and other relief. By a consent decree of the appellate Court in that suit, a house in Essaji Street was settled on Bhagbai for life in lieu of maintenance and Ramji was directed to set aside a proper sum for the marriage expenses of Velbai. No provision was made for the maintenance of Velbai should her mother die before she was married. Bhagbai was made a party to this suit merely because as the plaintiff alleged she had a life interest in a portion of Ramji's estate ; but besides joining with the plaintiff in contesting the validity of the adoption of Jadhawji, she has seized the opportunity of making several claims against [494] Ramji's estate on behalf of herself and Velbai, which must be disposed of before I deal with the validity of the adoption and the further questions in dispute between the plaintiff and defendants 1 and 3. In the first place Bhagbai asked the Court to construe the consent decree in suit 602 of 1899 for the purpose of ascertaining what interest she took in the house in Essaji Street. I do not think it is open to argument that she took anything more than a life interest in that house, which, on her death, will revert to Ramji's heirs. Then it was contended that Velbai's maintenance should be provided for ; on the other hand the plaintiff and defendants 1 and 3 argue that as Velbai prayed for maintenance in

(1) (1898) 21 All. 412.

(2) (1908) 33 Bom. 619 at p. 682.



suit 602 of 1899 and no provision was made for it in the consent decree her claim must be considered as refused. It seems more probable that the question of Velbai's maintenance was overlooked when the consent decree was passed. However it was no doubt intended that Bhagbai should maintain Velbai and if Bhagbai dies before Velbai is married, she will have to be maintained some how out of the family property. There is no necessity now to decide how her maintenance should be provided for under circumstances which may never come into existence. The question as to what is a proper sum to be set aside for the marriage expenses of Velbai and whether the sum of Rs. 3,247 is not sufficient for this purpose, must be decided by the Commissioner.

I now come to the claims of Bhagbai against the estate of Ramji for certain ornaments belonging to herself and Velbai, which, she says, she deposited with Ramji a few months before his death.

[After discussing the evidence his Lordship proceeded as follows:—]

I am satisfied that Bhagbai has not proved by direct evidence the deposit of ornaments with Ramji and that she has not proved that any of the ornaments taken possession of by the Receiver except the broken gold necklace belong to her or Velbai.

It remains for me to come to a finding on the 6th issue whether the adoption of the third defendant is invalid on the grounds that he is son of Ramji's mother's sister.

[495] It was held by the Privy Council in *Bhagwan Singh v. Bhagwan Singh* (1) that the text of Sakala cited by the authors of the Dattaka Mimansa and Dattaka Chandrika on the question who can be adopted is authoritative in all parts of India. That text is as follows, according to the literal translation given to the Court during the argument:—

"A son of a Sapinda or also next a Sagotra

A sonless twice born should adopt

In default of son of Sagotra should adopt Agotra

A daughter's son, sister's son and mother's sister's son excepting."

But defendants 1 and 3 argue that the verse should be divided into two parts, that the first permits the adoption of all *Sapindas* and those of the same *Gotra* as the adoptive father without any restriction, and that the second confines the prohibition against the sister's sons, daughter's sons and mother's sister's sons to persons who are neither *Sapindas* nor *Sagotras*, that therefore as the third defendant is the father's brother's son of Ramji, the fact that he is also the mother's sister's son is immaterial.

I should not have been inclined myself to adopt this construction. The double upright strokes appearing at the end of the alternate lines of the text in Ghose's work on Hindu Law page 651 relied on by the 1st defendant as representing full stops, do not appear in the original.

The prohibition seems to me therefore to be general, but in any event I am precluded from holding otherwise by a decision of this Court in *Ramchandra Krishna v. Gopal Dhondo* (2) where Chaulal J. at page 632 construes the text as follows:—

"In the order of selection for adoption the first choice is directed in favour of a Sapinda, failing him a Sagotra, and in default of these a stranger, excepting always the specific instances mentioned, viz., a daughter's son, a sister's son, and the mother's sister's son."

I find therefore that the adoption of third defendant is invalid. There must be a reference to the Commissioner to ascertain:—

(1) (1898) 21 All. 412.

(2) (1908) 32 Bom. 619.

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34 B. 491=4  
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34 B. 491=4  
I. C. 277=11  
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- (1) What was the property left by Ramji Govindji?  
(2) What were his debts?  
[496] (3) Whether the sum of Rs. 3,247 is sufficient for the betrothal and marriage expenses of Velbai, and if not, what further sum should be allowed?  
(4) Which of the ornaments taken possession of by the Receiver belong to Heerbai, Walbai and Ramji's estate respectively?  
Attorneys for plaintiff : Messrs. *Captain and Vaidya*.  
Attorneys for defendants 1 and 3 : Messrs. *Bhaishankar Kanga and Girdharlal*.  
Attorneys for defendants 2 and 4 : Messrs. *Thakurdas & Co.*

34 B. 496 (=4 I. C. 275=11 Bom. L. R. 1167).

ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

SIR CURRIMBOY EBRAHIM AND OTHERS, *Plaintiffs, v.*  
THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY  
AND OTHERS, *Defendants.\**

[23rd September, 1903.]

*City of Bombay Municipal Act (Bom. Act III of 1888), section 251-A, clause (a)—Building—"Directly over or directly under"—Construction.*

The words "directly over or directly under" in section 251-A, clause (a), of the City of Bombay Municipal Act (Bom. Act III of 1888) should be understood in the restricted sense of immediately over or immediately under, so that in effect under this section a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes.

Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense.

THIS matter came before the Court as a special case stated under section 527 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs were lessees of a plot of land in Wodehouse Road, Bombay, and, being desirous of building thereon, gave notice of their intention to the defendants in pursuance of the provisions [497] of section 337 (1) of the City of Bombay Municipal Act (Bom. Act III of 1888). The plans, however, were not approved by the Executive Engineer on the ground, *inter alia*, that they contravened the provisions of section 251-A (a) of the said Act, in that they contemplated the construction of certain water-closets in such a position as to be directly over or directly under a part of the building other than another privy or water-closet or bathing-place, bath-room or terrace.

To meet this objection fresh plans were prepared and submitted, according to which the water-closets were still vertically in a line with residential parts of the building, but a bath-room, or part of a bath-room, now intervened to prevent them being immediately over or immediately under such parts.

These plans, however, were also disapproved on the same grounds as before, the defendants maintaining that the words "directly over or directly under" in the clause in question meant "in a direct line with, vertically above or below." The plaintiffs on the other hand contended that the

\* Original Suit No. 709 of 1909.



words meant "not only in a direct line with, vertically above or below, but also in contact with or directly adjacent to."

As the parties were unable to come to a satisfactory conclusion on the point, they agreed to state a case for the opinion of the High Court, and accordingly after setting out their respective contentions, submitted the following questions:—

(a) What is the proper construction of section 251-A (a) of the City of Bombay Municipal Act (Bom. Act III of 1888) ?

(b) Are the plaintiffs entitled, having regard to the provisions of the said section, to erect water-closets in their said building in accordance with the plan in the 5th paragraph hereof referred to ?

*Jardine with Shortt* for the plaintiffs.

*Robertson with Strangman*, Advocate-General, for the defendants.

BACHELOR, J.—This is a case stated for the opinion of the Court under Order XXXVI of the Civil Procedure Code, 1908. The plaintiffs are the lessees of a piece of land situate at Wode-house Bridge Road, and the defendants are the Municipal [498] Commissioner for the City of Bombay and the Municipal Corporation of the City.

The plaintiffs, being minded to build residential chambers on their land, notified the defendants of their intention and submitted for approval the requisite plans and specifications. Objection was taken by the Municipality that the construction of some of the water-closets violated the provisions of clause (a) of section 251-A of the City of Bombay Municipal Act, 1888, as amended by Act V of 1905. That clause runs as follows:—

No person shall build a privy or water-closet in such a position or manner as to be directly over or directly under any room or part of a building other than another privy or water-closet or a bathing-place, bath-room or terrace.

In order to meet this objection the plaintiffs made certain alterations in their plans, which, they submitted, were now outside the prohibition contained in the clause, but the defendants maintained their original objection. The question before us is whether that objection is good in law, and the answer turns on the meaning to be given to the word "directly" in the clause. The plaintiffs contend that the words "directly over or directly under" mean not only vertically over or under, but also immediately over or under, so that in effect a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes. The defendants, on the other hand, put a wider construction on the clause and submit that the words "directly over or directly under" mean "in a direct line vertically at any height above or any depth below."

The form of the special case, as it is drawn, does not quite correctly follow the requirements of the Order, but any technical difficulty which might have arisen from this circumstance has been removed by the parties who, through their respective counsel, have assured us that neither side has any desire to appeal from our finding, and that the difference between them will be finally settled by the expression of our opinion as to the meaning of the clause. That being so, we proceed to state the reasons for the opinion to which the arguments on either side have led us.

[499] In the first place we must notice Mr. Robertson's argument that whatever may be the true construction of the clause, the proposed water-closets are within the prohibition, inasmuch as the structural alterations proposed do not remove the defendant's objection, but are merely an attempt to evade the provisions of the clause. In explanation of this

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I. C. 275=11  
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84 B. 496=4  
I. C. 275=11  
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point it should be stated that the ground floor of the building is to be a restaurant and that, according to the original plans, the bath-room and the water-closet were to be side by side on the first floor immediately over the restaurant. When objection was taken by the Municipality, under the clause cited, the plaintiffs so altered the position of the water-closet as to bring it immediately over the bath-room, which is immediately over the restaurant. The floors of the bath-room and of the water-closet are built of impervious material so that there are now two impervious floors between the water-closet and the restaurant. Mr. Robertson, however, contends that the water-closet ought even now to be regarded as being immediately over the restaurant and not the less so because as he puts it, a small corner of the bath-room intervenes between the water-closet and the restaurant. But we think that this contention must be disallowed. There may, no doubt, be cases where a structural alteration is so slight in effect as to amount to nothing more than a colourable pretence of doing something which the Act requires to be done substantially; but we do not think that this is such a case. As a matter of plain fact, what is now immediately below the water-closet is the bath-room and not the restaurant; and the truth of this description still remains despite the fact that the water-closet is over, not the whole bath-room, but only a four feet high recess in the bath-room. It follows, therefore, that the position of the water-closet does not contravene the provisions of section 251-A (a) if the plaintiffs' view as to the meaning of this clause is to prevail. In our opinion it ought to prevail.

It is plain that by the phrase "directly over" the draftsman of the Act intended to convey one or other of only two possible alternatives, and seeing that a familiar word lay apt for the purpose of expressing either alternative, it may be regretted that both these words were avoided and the equivocal word "directly" [500] was employed. Had the meaning intended been as the plaintiffs suggest, one would have expected "immediately"; had the meaning been as the defendants suggest, one would have expected "vertically." But the choice has fallen upon "directly" and we must construe it as best we can. It seems to us that full force is given to the word if we read it as the equivalent of "immediately" which is in accordance with popular modern usage, whereas the more extensive connotation required for the defendant's case would have invited a more precise word and some amplification of the phrase. It is not suggested that the word bears any technical sense in the context in which it occurs, and, therefore, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense, "*uti loquitur vulgus*," as was said by Dr. Lushington in *The Fusilier* (1). Now whatever may be the interpretation favoured by etymological propriety, we think that current popular usage is against the defendants. If two visitors to a hotel bargained that their rooms should be the one directly over the other, they would hardly be satisfied with rooms which, though in the same vertical line, were three or four storeys apart. In time also as well as in space, it is clear that "directly," *uti loquitur vulgus*, has parted with its original signification: we say that we are coming "directly" without reference to the line of our approach and meaning no more than at once or forthwith. It is true, the original precision is retained in scientific or mathematical usage, but with that we are not concerned: the point is that in popular speech this etymological accuracy has been so far lost that we do not

(1) (1864) 34 L. J. P. M. & A. 25, 27.



think it can be read into "directly" where the word can receive ample interpretation otherwise. Further support for this view may be found by considering the language of the clause without the word "directly"; for, that should suggest the particular *lacuna* which the insertion of the word was intended to supply. If the clause had read "no person shall build a water-closet in such a position or manner as to be over or under any room or part of a building other than another water-closet or a bathing-place," then a bathing-place at the [501] western extremity of the first floor might conceivably have justified a water-closet at the eastern extremity of the second floor; for the water-closet would have been, in a sense, over the bathing-place. It appears to us that the addition of the word "directly" is sufficiently accounted for by an intention to prevent such a construction and that the context does not warrant us in ascribing to the draftsman any wider intention.

As to the argument which was sought to be based on substantial considerations affecting the public health, we think that it is exposed to a two-fold answer: first, that, if effect were to be given to the defendant's contention, the Act would apparently be restrictive beyond all reasonable need, and, secondly and principally, that the Commissioner must be presumed to have entertained no such apprehension in this case, for, had he done so, he would have exercised his wide powers of prohibition under section 246-A of the Act instead of limiting himself to a technical and manifestly doubtful objection under section 251-A (a).

For these reasons we return the following answers to the two questions put in the case.

(a) The words "directly over or directly under" in clause (a) of section 251-A should be understood in the restricted sense contended for by the plaintiffs, and (b) in the affirmative.

There will be a decree accordingly.

Attorneys for plaintiffs: Messrs. *Thakurdas & Co.*

Attorneys for defendants: Messrs. *Crawford, Brown & Co.*

34 B. 502 (=12 Bom. L. R. 378=6 I. C. 527.)

[802] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

PIRAJI BIN LAXMAN MALI (*original Plaintiff*), Appellant, v. GANAPATI BIN RAMJI MALI (*original Defendant*), Respondent. \*

[1st March, 1910.]

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.*

There is nothing in the provisions of section 12 or in any other section of the Dekkhan Agriculturists' Relief Act 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908.

A compromise means the settlement of a disputed claim.

Where a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court to cancel all that has been done and to revive the suit.

\* First Appeal No. 48 of 1909.

1909  
SEP. 23.  
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ORIGINAL  
CIVIL.

34 B. 496=4  
I. C. 278=11  
Bom. L. R.  
1167.



1910

MAR. 1.

APPELLATE  
CIVIL.

84 B. 502=12

Bom. L. R.

378=6 I. C.

527.

*Basangowda v. Churchigirigowda* (1), followed.

[Dist. 33 Bom. 190; 37 Bom. 514; Ref. 50 I. C. 503=4 P. L. J. 282=1919 Pat. 242; 79 I. C. 553; Ref. 67 I. C. 253=46 Bom. 550 (Compromise by pleader without authority) Cf. 1923 M. W. N. 784=45 M. L. J. 453 (P. C.)]

APPEAL from the decision of Ruttonji Mancherji, First Class Subordinate Judge at Poona.

Suit for accounts and redemption.

The property in dispute was mortgaged by plaintiff's father to defendant for Rs. 3,500 on the 15th August 1893. It was again mortgaged on the 31st January 1896 for Rs. 2,500; and for Rs. 1,500 on the 25th March 1897. The plaintiff mortgaged it to defendant for Rs. 1,200 on the 17th April 1901. The total amount advanced was Rs. 8,700.

The defendant was in possession of the property.

The plaintiff filed this suit on the 17th January 1908 for account and redemption of the mortgages.

After the issues were settled, the parties applied for and obtained an adjournment of the hearing; and on the adjourned hearing they presented to the Court a compromise of the suit. [503] Under the terms of the compromise the amount due at the foot of the mortgage was fixed at Rs. 9,500 for principal and interest; the sum was made payable in yearly instalments of Rs. 500 each; and the question of further interest and costs was left to be determined by the Court.

The Court passed a decree in terms of the compromise. It awarded further interest at the rate of three per cent. per annum; and made the plaintiff bear the defendant's costs.

The plaintiff appealed to the High Court.

*L. A. Shah*, for the appellant. The lower Court erred in passing a decree on a so-called compromise. Under the Dekkhan Agriculturists' Relief Act section 12, the Court is bound to take accounts unless the claim is admitted; and even in that case the Court must record its reasons in writing showing that it is satisfied that the admission is true and made by the debtor with a full knowledge of his rights under the Act; the lower Court has not followed the latter course and hence it was bound to take the accounts under section 12 of the Act.

Further, the judgment of the lower Court clearly shows that after the commencement of this suit and before the issues were raised, the respondent was asked to produce his accounts and to show what he claimed under the mortgage in dispute. The appellant's pleader examined the same and admitted that in so far as the accounts were concerned the amount given by the respondent was correct; yet he disputed the amount of the consideration and therefore a distinct issue on that point was raised. Then comes in the compromise wherein the whole consideration is admitted. Thus there is the admission of the claim.

There is no express provision in the Act about compromises. Again I submit that the compromise is not binding on the appellant as it was entered into by his pleader without any authority from him.

[CHANDAVARKAR, J., referred to *Basangowda v. Churchigirigowda* (1).]

[504] Lastly, the lower Court was wrong in awarding future interest when it itself says that the respondent has already received past interest almost equal in amount to the principal.

*V. G. Ajinkya*, for the respondent was not called upon.

(1) (1910) see page 403 ante.



CHANDAVARKAR, J.:—The suit was brought by the appellant to redeem certain mortgages. The plaintiff alleged that the amounts of the mortgages were for past debts except the last mortgage, and that that was for interest due on the previous amounts. The plaintiff claimed relief in the suit as an agriculturist under the Dekkhan Agriculturists' Relief Act. The respondent pleaded that all the mortgages were for cash advances. The suit was fixed for disposal on the 20th of November, 1908. On that date the parties, appearing by their pleaders, asked for and obtained an adjournment upon the ground that they were going to effect a compromise. On the day fixed they appeared again and put in a compromise, embodying certain terms, except as to interest and costs, and the Court was asked to pass a decree in terms of the compromise, and also to give its own directions on the question of interest and costs. Accordingly, the Subordinate Judge, who heard the suit, passed a decree in accordance with the compromise, and also gave certain directions on the question of interest and costs.

The decree has been appealed from. It is contended, in the first place, that such a compromise as the parties entered into could not be recognized by the court having regard to the provisions of the Dekkhan Agriculturists' Relief Act, and section 12 is relied upon. No doubt, under the latter part of that section, if the amount of the claim is admitted, and the Court, for reasons to be recorded by it in writing, believes that the admission is true and was made by the debtor with full knowledge of his legal rights as against the creditor, the Court is not bound to take an account as directed by the previous provisions of the section. But the portion of the section, which is relied upon by the appellant, applies where the debtor, appearing before the Court to answer the creditor's claim, admits it. That is different from a compromise. There is nothing in the language of section 12 or in any other section of the Act, which expressly deprives [105] the parties to a suit of the power of entering into a compromise and of having that compromise recorded under section 375 of the old Civil Procedure Code, which is the same as Order 23, Rule 3, of the Code now in force. Here it cannot be said that it was a case of mere admission by the defendant of the claim. What the Court was asked to do was not indeed to pass a decree on any admission of the defendant, but to make one in terms of the compromise which, after trial commenced, had been deliberately entered into by the parties. A compromise means the settlement of a disputed claim. This view is supported by the decision of this Court in *Gangadhar Sakharam v. Mahadu Santaji*,<sup>(1)</sup> where it was said:—"If a creditor and debtor cannot define their mutual relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided, and thus the settlement of accounts would be no settlement unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot without an express declaration be supposed to have formed a part of the policy of the legislature in this particular instance." And then the Court went on to observe that "the Code of Civil Procedure and the Dekkhan Agriculturists' Relief Act being within the territorial range of the latter, Statutes in *pari materia* must be construed together so as to give effect, so far as possible, to the provisions of each."

That decision has remained undisturbed and unquestioned as law. There have been several amendments of the Act since that decision was reported, and yet the legislature has left it untouched.

(1) (1888) 8 Bom. 20.

1910  
MAR. 1.

APPELLATE  
CIVIL.

34 B. 502=12  
Bom. L. R.  
378=6 I. C.  
527.



1910

MAR. 1.

APPELLATE  
CIVIL.34 B. 502=12  
Bom. L. R.  
378=6 I. C.  
527.

It was next argued, however, that this compromise had not been consented to by the appellant; that what was put in was merely a *purshis* of his pleader and the pleader had no authority, express or implied, to give such a consent. But, as was held by this Court in a recent case, *Basangowla v. Churchigirigowda* (1), where a party complains that a compromise effected in his name by his pleader was unauthorized, he must move the Court to cancel all that has been done and to revive the suit. Here no [506] steps for that purpose, as required by law, have been taken, and we are asked to set aside the compromise on a ground raised for the first time before us while we are concerned with only an appeal. The lower Court was not asked to determine whether it had been misled in the way that it is said to have been in consequence of the alleged want of authority in the appellant's pleader to effect the compromise.

On the question of interest, it is entirely a matter of discretion and we do not think there is any reason in law or equity to interfere with the Court's award. The decree is confirmed with costs, without prejudice to the right, if any, of the appellant to have the compromise set aside on the ground of fraud.

*Decree confirmed.*

34 B. 506 (=6 I. C. 905=12 Bom. L. R. 471.)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.*

NARAYAN SHRIDHAR DATE (*Original Defendant*), Appellant, v.  
PANDURANG BAPUJI DATE (*Original Plaintiff*),  
*Respondent.\**

[4th April, 1910.]

*Hindu Wills Act (XXI of 1870), sections 2 and 5—Indian Succession Act (X of 1865), section 187—Administrator-General's Act (II of 1874), section 96—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.*

A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870).

The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of section 187 of the Indian Succession Act (X of 1865).

SECOND appeal from the decision of S. S. Wagle, First Class Subordinate Judge of Thana, with Appellate Powers, confirming [507] the decree of D. D. Cooper, Second Class Subordinate Judge of Panvel.

One Radhabai, a Hindu widow, resided at Panvel in the Thana District for several years and was possessed of some moveable and immovable property at that place. On the 1st September 1897, she made a will in favour of Narayan Shridhar Date in whose house she resided at Panvel. Subsequently she set out on a pilgrimage to holy places and on her way back to Panvel she put up with her brother Pandurang Bapuji Date at Bombay. While living with her brother at Bombay, Radhabai became ill and died on the 25th September 1903 after having made a will, dated the

\* Second Appeal No. 558 of 1909.  
(1) (1910) see page 408 ante.



23rd September 1903. Under the will she bequeathed her property to her brother the said Pandurang Bapuji Date. As the property comprised in the will was less than Rs. 1,000 in value, the legatee applied to the Administrator-General of Bombay for a certificate of administration under section 36 of the Administrator-General's Act (II of 1874). The Administrator-General held the necessary inquiry and granted a certificate to Pandurang Bapuji Date, the legatee, on the 16th December 1903. Subsequently the said Narayan Shridhar Date relying upon a certified copy of the will made in his favour by the deceased Radhabai on the 1st September 1897 applied to the Administrator-General to withdraw the certificate granted to Pandurang Bapuji Date, and the Administrator-General on the 25th April 1905 refused to withdraw the grant.

On the strength of the certificate granted by the Administrator-General, Pandurang Bapuji Date filed a suit against the said Narayan Shridhar Date for the recovery of Radhabai's assets in his possession.

The defendant contended *inter alia* that the plaintiff had not obtained probate of Radhabai's will, that the plaintiff derived no title under the said will and that he, the defendant, was the sole legatee under Radhabai's will, dated the 1st September 1897.

The Subordinate Judge found that under the certificate granted by the Administrator-General the plaintiff was entitled to recover the whole of Radhabai's property in the defendant's possession and he passed the decree accordingly.

[508] The defendant having appealed, the District Judge remanded the case for the purpose of recording evidence in support of the will relied on by the plaintiff. The Subordinate Judge, thereupon, sent for the will from the office of the Administrator-General and having recorded evidence of the attesting witnesses found that the plaintiff had proved the due execution of the will and passed the same decree as before.

On appeal by the defendant the Appellate Court found that the will was duly proved and that the plaintiff was entitled to sue without obtaining probate. The decree of the First Court was, therefore, confirmed.

The defendant preferred a second appeal.

*M. V. Bhat* for the appellant (defendant):—Radhabai made the will in Bombay, therefore, it is governed by the Hindu Wills Act. Under section 2 of that Act, section 187 of the Indian Succession Act is incorporated in it. Section 187 of the Indian Succession Act is imperative. Under that section it was necessary for the plaintiff to obtain probate to establish his right under the will. The certificate granted by the Administrator-General is of no avail. The plaintiff's suit must therefore fail. The lower Court has relied upon the decision in *Shaik Moosa v. Shaik Essa* (1). But the parties to that suit were Mohomedans who are not governed by the Hindu Wills Act.

*G. B. Rele* for the respondent (plaintiff):—The property comprised in the will being less than Rs. 1,000 in value we were entitled to obtain a certificate of administration under section 36 of the Administrator-General's Act. Section 5 of the Hindu Wills Act exempts the Administrator-General from the operation of that Act. Further the certificate granted by the Administrator-General has universal application. It was, therefore, not necessary for us to obtain probate. The certificate of the Administrator-General gives us title to the property comprised in the will.

*Bhat* in reply.

1910  
APRIL 4.

APPELLATE  
CIVIL.

34 B. 508=6  
I. C. 905=12  
Bom. L. R.  
471.

(1) (1884) 8 Bom. 241.



1910  
APRIL 4.  
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APPELLATE  
CIVIL.

34 B. 506=6  
I. C. 905=12  
Bom. L. R.  
471.

[509] SCOTT, C. J.:—The only question that we have to decide in this case is whether the certificate of the Administrator-General granted to the plaintiff entitles him to sue for possession of the plaint property without taking out probate of the will under which he claimed as legatee—a will which was made in Bombay and is therefore subject to the provisions of the Hindu Wills Act.

If the certificate of the Administrator-General did not entitle him to sue without taking out probate he would be bound by section 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act to take out probate before he could establish his right as a legatee.

The certificate of the Administrator-General was granted under section 36 of the Administrator-General's Act which states that in cases where the Administrator-General is satisfied that the assets do not exceed one thousand rupees in value, he may, if he thinks fit, if "requested to do so by writing, under the hand of the executor or the widow or other person entitled to administer the effects of the deceased, grant to any person claiming otherwise than as a creditor, to be entitled to a share of such assets, certificates under his hand, entitling the claimant to receive the property therein mentioned, belonging to the estate of the deceased, for value not exceeding in the whole one thousand rupees."

That provision, we think, implies that the certificate when granted will as a matter of law entitle the claimant to receive the property. That that provision of the Administrator-General's Act is not affected by the incorporation in the Hindu Wills Act of the section 187 of the Succession Act, is clear from section 5 of the Hindu Wills Act which provides that "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively."

The plaintiff therefore was entitled to maintain this suit. We confirm the decree of the lower Court and dismiss the appeal with costs.

*Decree confirmed.*

34 B. 510 (=7 I. C. 445=12 Bom. L. R. 487).

[510] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

VITHAPPA BIN KASHA HEGDE AND OTHERS (Original Plaintiffs),

Appellants, v. SAVIRI KOM GANAPBHATTA AND ANOTHER

(Original Defendants), Respondents.\*

[10th April, 1910.]

*Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common.*

In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely.

When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them.

In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject.

\* Second Appeal No. 803 of 1909.



SECOND appeal from the decision of T. Walker, District Judge of Kanara, reversing the decree of K. G. Kittur, Subordinate Judge of Honavar.

1910  
APRIL 10.

APPELLATE  
CIVIL.

34 B. 510=7  
I. C. 445=12.  
Bom. L. R.  
487.

Suit to recover Rs. 65 as balance of rent.

One Vishnu who owned the land in suit died leaving him surviving two daughters, Kuppi and Savitri. Kuppi was married to Rama Hegde and she died in or about the year 1899 leaving her surviving her husband Rama. In the year 1907 Rama Hegde brought the present suit against Kappabhatta Vishnubhatta, the tenant of the land, as defendant 1 and against Savitri, as defendant 2 to recover a share in the rent which devolved on him as heir of his wife Kuppi, deceased.

Defendant 1 denied the plaintiff's right to recover the rent.

Defendant 2 contended *inter alia* that plaintiff's wife Kuppi was not entitled to a share in the estate of her father, she having been well off and possessed of moveable and immoveable property; while the defendant belonged to a poor family and she was entitled to inherit in preference to the plaintiff's wife.

[511] While the suit was pending the plaintiff Rama Hegde died and his nephews were brought on the record as his legal representatives.

The Subordinate Judge found that both Kuppi and Savitri were the heirs to their father. He, therefore, allowed the claim.

On appeal by defendant 2 the District Judge reversed the decree and dismissed the suit on the ground that Kuppi's right of heirship passed to her sister Savitri by survivorship.

The plaintiffs preferred a second appeal.

S. S. Patkar for the appellants (plaintiffs):—The lower Court was wrong in holding that Savitri took by survivorship the interest of Kuppi. Under Hindu Law in the Bombay Presidency the daughter succeeds to an absolute and several estate in her father's immoveable property; *Harihath v. Damodarbhath* (1). It is laid down in *Bulakidas v. Keshavlal* (2) that in the Bombay Presidency the daughters take not only absolute but several estates. The rule, however, is different in Bengal and Madras. The remarks of Mr. Melvill, J., are very apposite: "This is the view which appears to have generally been taken by the Shastris and to have commended itself to the learned authors of West and Buhler's Digest and it is certainly a far more convenient rule than that of regarding as joint tenants two or more daughters who have married into different families."

The ruling in *Rindabai v. Anacharya* (3) relates to sisters and approves of the decision in *Haribhat v. Damodarbhath* (4). West and Buhler in their Digest of Hindu Law at page 106 lay down that daughters take in the Bombay Presidency separate interests excluding the right of survivorship contrary to the rule applied in Bengal and Madras. There is, however, a Privy Council ruling in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma* (5) which might be relied on by the other side. The remarks at page 165 favour the opposite contention, but that was a case from Madras where daughters take only a life estate and the law there is quite different as laid down in *Bulakidas v. Keshavlal* (6). But the said Privy Council case is [512] explained in *Bai Rukhmini v. Keshavlal Ranchod* (7). In *Jogeswar Narain Deo v. Ram*

(1) (1878) 3 Bom. 171.

(2) (1881) 6 Bom. 85.

(3) (1890) 15 Bom. 206.

(4) (1878) 3 Bom. 171.

(5) (1902) 29 I. A. 156.

(6) (1881) 6 Bom. 85.

(7) (1907) 9 Bom. L. R. 1293.



1910  
APRIL 10.  
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APPELLATE  
CIVIL.  
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34 B. 510=7  
I. C. 448=12  
Bom. L. R.  
487.

*Chandra Dutt* (1) the Privy Council have laid down that the principle of joint tenancy is unknown to Hindu Law except in the case of a coparcenary between members of an undivided family. See also *Karuppai Nachiar v. Sankaranarayana Chetty* (2). In the *Vyavahar Mayukha*, Chapter IV, Section 8, para. 10 (Stokes' Hindu Law Books, page 86) it is laid down following the text of Manu that "If there be more daughters than one then they are to divide (the estate) and take (each a share)." This shows that the daughters take an absolute and several estate. Though this case is governed by the Mitakshara, it is laid down in *Bhagwan Vithoba v. Warubai* (3) that it is a well established rule of the Bombay High Court that where the Mitakshara is silent and obscure, the Court must, generally speaking, invoke the aid of the *Vyavahar Mayukha* to interpret it and harmonize both the works so far as that is reasonably possible.

*N. A. Shiveshavarkar* for respondent 1 (defendant 2):—The cases cited were governed by the *Mayukha* and not by the Mitakshara. The present case is governed by the Mitakshara and it must be decided according to the interpretation of the Mitakshara as laid down by the Privy Council in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma* (4). At page 165 their Lordships say that widows succeed jointly, so also daughters. We rely also on *Aumirtolall Bose v. Rajoneekant Mitter* (5). The present case is governed by the Mitakshara and it must be decided according to the interpretation put upon the Mitakshara by the Privy Council. Further this case comes from Kanara which, at the beginning of the last century formed part of the Madras Presidency. Therefore cases under the *Mayukha* would not apply.

*Patkar* in reply:—The law in Madras is quite different. There the daughters take only a life-interest like the widows and are therefore placed by the Privy Council on the same [513] footing. But as laid down in *Bulakhidas v. Keshavlal* (6) the law in the Bombay Presidency is quite different. It is laid down in a case from Dharwar governed by the Mitakshara that a daughter takes an absolute estate in the property inherited from her father *Gulappa Doningappa v. Tayawa Kempanna* (7). The *Mayukha* is quite clear and according to *Bhagwan Vithoba v. Warubai* (3) where the Mitakshara is silent or obscure, the Court should invoke the aid of the *Mayukha*.

SCOTT, C. J.:—The question in this appeal is whether the plaintiff or the second defendant was the person entitled as landlord to receive rent from the first defendant for property of which the latter was a *mulgeni* tenant.

The last male owner of the property had two daughters, Kuppi and Savitri. Kuppi was married to Ram Hegde. The heirs of Kuppi's husband, Ram Hegde, are plaintiffs in this case. Savitri is the second defendant.

It is contended that on Kuppi's death Savitri acquired her interests in the property by survivorship. This contention is based upon certain Madras decisions of which the latest is to be found in *Rajah Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma* (4), from which it appears that according to the Mitakshara, as interpreted by the

(1) (1898) 23 Cal. 670.

(2) (1908) 27 Mad. 800.

(3) (1908) 82 Bom. 300.

(4) (1902) 29 I. A. 158.

(5) (1874) 2 I. A. 118.

(6) (1881) 6 Bom. 85.

(7) (1907) 9 Bom. L. R. 884.



Madras High Court, daughters inheriting from their father take jointly and do not take absolute interest in separate shares.

In the Bombay Presidency, however, it has long been held that a daughter taking property from her father inherits it as *stridhan* and it follows that two daughters taking from their father take their shares separately and absolutely.

The result is that where property so inherited has not been physically divided it is held by them as tenants-in-common and not as joint tenants and between them there can be no survivorship.

[514] It has been urged on behalf of the respondent that we ought to follow the rulings applicable to the Madras Presidency, because this case comes from Kanara which, at the beginning of the last century, formed part of the Madras Presidency.

The rule, however, which has been always followed in cases affecting the inheritance of property under Hindu Law is to adhere to the decisions of the Court to which the district from which the case arose is subject; and it has not been contended that in the district of North Kanara any different rule has been laid down by the Bombay High Court from that which applies to the rest of the Presidency in the case of property inherited by daughters from their father.

We, therefore, think that the District Judge has come to an erroneous conclusion in holding that the second defendant succeeded by survivorship to the interest of her sister in the property in suit.

We reverse the decree of the District Court and restore that of the Subordinate Judge.

The defendant No. 2 must pay the costs of this appeal and of the lower appellate Court.

*Decree reversed.*

34 B. 515 (=4 I. C. 837=11 Bom. L. R. 1354.)

[515] ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*

AHMED SULEMAN JUMANI AND ANOTHER (*Plaintiffs*)  
v. BHAGWANDAS VISSAM & Co. (*Defendants*).\*

[14th September, 1909.]

*Suit for partnership accounts—Limitation Act (IX of 1908), Art. 106—Specific assets realised within period of limitation.*

If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation.

*Merwanji Hormusji v. Rustomji Burjorji* (1) distinguished.

ON 7th November 1903, the plaintiffs entered into an agreement with the defendants to carry on a Commission Agency and brokerage business in partnership till 7th November 1904. The partnership was actually dissolved on or about 8th October 1904. This suit was filed by the plaintiffs on 7th November 1907 for the taking of partnership accounts and the payment of their share of the assets. The defendants in their written statement raised the defence (*inter alia*) that the suit was barred by limitation.

\* Original Suit No. 882 of 1907.

(1) (1882) 6 Bom. 628.

1910  
APRIL 10.  
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APPELLATE  
CIVIL.  
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34 B. 515=  
7 I. C. 445=  
12 Bom. L.R.  
487.



1909

SEP. 14.

ORIGINAL  
CIVIL.34 B. 515 = 4  
I. C. 837 = 11  
Bom. L. R.  
1354.*Desai with Jinnah* for the plaintiffs :—

If the date mentioned in the agreement be taken as the date of dissolution, the suit is not barred. Further, clause 9 of the agreement provided that the partnership accounts were to be made up on the expiration of 13 months, namely on 9th December 1904; so that time should be deemed to run from that date. In any case, even if it is held that this suit is barred, the plaintiff should be allowed to recover such outstandings as were realised by the defendants after dissolution and within the period of limitation.

See *Knox v. Gye* (1), *Dayal v. Khatau* (2), *Merwanji v. Rustomji* (3).

[516] *Wadia with Pirbhai* for the defendants.

BEAMAN, J. :—I think one of the preliminary objections taken by the defendants proves fatal to the plaintiff's present claim. Mr. Desai, who has argued the case for the plaintiffs, admits that he is not in a position to call any further evidence upon the question of fact when the partnership was dissolved. The court must, therefore, come to its conclusion on that point upon the papers which Mr. Wadia for the defendants has put in. The Court has the agreement, an advertisement, and a letter (Exhibits 1, 2 and 3). According to the agreement it would appear that the intention of the parties, when the partnership was formed in 1903, was that it should last till 7th November 1904 with a month over in which to collect outstandings and settle all accounts. The advertisement to which the first plaintiff is himself a party and the letter of April 1907, written on behalf of the second plaintiff, prove conclusively that as a matter of fact, the partnership was dissolved at the latest by the 19th October 1904. That being so, I see no escape from the conclusion that this suit, which was brought for a partnership account and share in partnership profits on the 7th of November 1907 is clearly time-barred. Article 106 of the second Schedule of the Limitation Act enacts that where a suit is, as this suit is, for taking partnership accounts or share in partnership profits, the date from which limitation begins to run is the dissolution of the partnership. The plaintiffs apparently laid considerable stress upon the agreement contained in clause 9 of Exhibit 1; which they appear to think extended, as between the parties themselves, the duration of the partnership by one month beyond the date, whatever that date may have been upon which it was actually and in fact dissolved. But I am unable to accede to any such argument. If partners make an agreement of that sort between themselves, it appears to me that the only effect which could be given to it is that, assuming the partnership lasted up to the contemplated date, neither party could press the other for accounts until the added grace period had expired. But, what that has to do with the law of limitation, or how it can operate to extend the period allowed by the Limitation Act, I must own I entirely fail to understand. In this view of the case, [517] it appears to me too clear to admit of serious argument that the plaintiffs' claim is time-barred. But they have strenuously contended that although so much of their claim, as relates to the taking a general partnership account, may, upon that view of the law, be time-barred, they are at least entitled to ask for a share of any outstandings recovered by the defendants after the 7th of November 1904 and within the period of limitation applying to a suit for moneys had and received. In support of that contention I have been referred to *Knox v. Gye* (1), *Dayal Jiraj v.*

(1) (1872) L. R. 5 H. L. 656.

(2) (1876) 12 B. H. C. 97.

(3) (1882) 6 Bom. 628.



*Khatao Ladha* (1) and *Merwanji v. Rustomji* (2). But after giving those cases careful consideration I am unable to see that they do sustain the plaintiffs' contention.

In *Dayal v. Khatao* (1), which was decided by Mr. Justice Green, the suit was not for a general partnership account at all. The learned Judge there referred, with approval, to the opinions of three of the learned law Lords who decided *Knox v. Gye* (3). And Latham, J., in giving judgment in *Merwanji v. Rustomji* (2) rests upon the decision of Green, J., quoting his excerpts from the decision of their Lordships in *Knox v. Gye* (3). But in *Merwanji v. Rustomji* (2), it appears to me that the facts are again easily distinguishable from the facts in this case. There, it is true, the suit was by an ex-partner against a former partner in a firm, which had been dissolved, to share in a definite sum of money which the defendant appears to have admitted to be a partnership asset; and no doubt there are observations, both in the judgment of Latham, J., and in the judgments of their Lordships of appeal in *Knox v. Gye* (3), which may appear on the first reading to lend some colour to the plaintiffs' contention that where a suit for general partnership accounts is barred, the plaintiffs may yet be allowed to proceed as for moneys had and received in respect of any outstanding partnership assets which have come into the defendants' hands within the period of limitation. I am very doubtful myself whether taking the decision in *Knox v. Gye* (3) as a whole and keeping it strictly to its own facts, it can be [518] legitimately used to support the reasoning and conclusion which have subsequently been based upon it. As a matter of fact the Lords of Appeal in that case found that the suit by an executor of a deceased partner against a surviving partner was time-barred. Much of their Lordships' reasoning and arguments no doubt turn upon the fact that the surviving partner had received a sum of £2,500 as a partnership asset more than six years after the partnership had been dissolved and, standing alone, no doubt within the period of limitation. But it appears to me that excepting some observations by Lord Hatherley, the gist of the decision, at any rate of the majority, was that that fact alone would not remove the bar of limitation which had been interposed by the lapse of six years since the partnership was dissolved. Nor, speaking with all respect for any observations or opinions of other learned Judges who may seem to favour a contrary view, am I able to understand how, if a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit can be allowed to proceed speculatively against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation. In such a suit, it seems to me, questions would inevitably arise which could not be resolved without opening up the whole partnership account. It appears to me that allowing the plaintiffs to pursue such a course, might result in real hardship and great injustice to the defendants. I have said that this case is clearly distinguishable on its own facts from the authorities I have just been discussing. There is not a word in the plaint asking for any relief of the kind which the plaintiffs now think the Court should grant them. The plaintiffs never so much as allege that any assets have been recovered after November 1904. All their specific prayers are prayers proper to a suit of the kind they really meant to bring, prayers, that is to say, for a general partnership

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(1) (1875) 12 B. H. C. 97.

(2) (1882) 6 Bom. 628.

(3) (1871) L. R. 5 H. L. 656.



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account, to be given their share of any partnership profits which such an account might disclose and that the defendants should bear the costs of resisting them in this suit. Since that is so and I am quite clear that the suit is time-barred, I feel unable to accede to the plaintiffs' alternative contention that they should now be allowed to convert this defective plaint into a plaint merely for the [519] recovery of moneys had and received on their account by the defendants subsequently to November 7th, 1904.

This being my view, I must dismiss the plaintiffs' suit with all costs upon them, including costs reserved, if any.

*Suit dismissed.*

Attorneys for the plaintiffs: Messrs *Tayabji, Dayabhai & Co.*

Attorneys for the defendants: Messrs. *Thakordas & Co.*

34 B. 519 (=12 Bom. L. R. 1058=8 I. C. 810.)

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*Before Sir Basil Scott, Kt. Chief Justice, and Mr. Justice Batchelor.*

JOSHI NARBADASHANKAR HURJIVAN, *Appellant and Defendant,*  
v. MATHURADAS GOKULDAS AND ANOTHER, *Respondents and*  
*Plaintiffs.\**

[31st January 1910.]

*Contract—Wagering—Intention of the parties—Payment of differences—Contract Act (IX of 1872), s. 57.*

There is no authority for the proposition that, because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

THIS was a suit for damages for breach of contract. The plaintiffs alleged that by certain contracts entered into on 26th and 27th October 1908, the defendant agreed to purchase from the plaintiffs 800 tons of Rangoon rice, delivery to be taken of 400 tons between 22nd February and 7th March 1909, and of the remaining 400 tons between 23rd March and 5th April 1909. On the due dates delivery orders were forwarded to the defendant, but the latter refused to take delivery. As a result the plaintiffs sold the rice by auction and an aggregate loss of Rs. 12,605-6-9 was sustained. The plaintiffs now claimed this sum as damages.

[620] The defendant in his written statement admitted the contracts, but alleged that they were by way of wagering on the fluctuation of the market prices, and that payment of differences only was contemplated by the parties, there being no intention to give or take delivery. He further contended that even if the contracts were genuine, the plaintiffs had committed a breach by not sending the delivery orders in time according to the practice and usage of the market.

The chief issue raised was whether the contracts were by way of wagering or not.

The following was the judgment of Mr. Justice Beaman in the Court below :—

\*Original Suit No. 356 of 1909,  
Appeal No. 28 of 1909.



This is a suit to recover on certain forward contracts for the purchase of rice, the due dates of which were the Fagun and Chaitar Vaidas of 1965 corresponding with February-March, and March-April 1909. The plaintiff's contention is that the defendant refused to take delivery as the market had gone against him; consequently the plaintiff sold the goods at his risk and on his account; and now claims the difference between the contract and the market rate. A preliminary difficulty was settled by plaintiff consenting to accept certain rates as the measure of damages. What was realised at the sales and whether or not the sales were *bona fide* and properly conducted becomes of no further consequence.

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The defence is two fold: (1) General, that the contracts were wagering contracts. (2) That in respect of the contracts for the Fagun Vaida the plaintiff was in fault for not giving the defendant the delivery orders in time. Under the rules of the Rice Merchants Association the plaintiff was bound to do this before 4 P.M. on a certain day, whereas in fact he did not do so till about fifteen minutes later. The latter defence is inconsistent with the former. For it implies that the contracts were genuine. That defence could not be available to the defendant, if his principal defence is true that under other rules of the said Association the contracts were plainly wagering contracts, and were known and intended to be so, on both sides. However, I do not say that the defendant is not entitled to make an [521] alternative case of this kind. I merely point out that doing so, weakens his position in his main defence. For amongst other criteria of what is and what is not a wagering contract the conduct of the parties is not the least important. I intimated to the defendant that I did not think there was anything in his second line of defence. This was after hearing the evidence upon it. Considering his general defence and all the circumstances of the case, I think, no Court would favour a contention of this kind which is purely technical. And being as it is in doubt, to put it most favourably to the defendant, the Court would not be too anxious to scrutinize the lapse of a minute or two, while it would be ready to doubt the accuracy of the defendant's clock (even assuming his evidence to be more trustworthy on this point than it is) and lean in favour of the evidence for the plaintiff which is at least as good and proves that the tender of delivery orders was well within the prescribed time. If the defendant had been an honest dealer, if the contracts were genuine (it does not follow that they were not because the defendant was a dishonest dealer) I do not think that he, the defendant, would have raised a technical defence of this kind at all, hinging as it does on a variation in time of a few minutes only, the lapse of which could not really have injured him in any way. Some such considerations I intimated, as I have said, to defendant's learned counsel who, in deference to the Court's view, did not further press this point. I may add that on the evidence as it stands I should have had no hesitation in finding that the delivery orders were tendered in time, and, therefore, as a matter of fact, this defence failed.

The general defence splits into two parts.

First, it is contended that as these contracts were made under the rules of the Rice Merchants Association, and as some of those rules at any rate have all the appearance of having been framed to permit and encourage wagering contracts, any contract admittedly made under them must be deemed to be affected with this taint, as possibly referable in certain circumstances to the rules which appear to recognize mere wagers,



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[522] Second, it is contended that whether or no any and all contracts made under these rules are wagering contracts, these contracts certainly were and to the knowledge and within the intention of both parties.

The case of *Chapsey v. Gill and Co.* (1), which was decided by a Bench of this High Court, certainly appears to lend some colour to the first contention. With all humility I confess that I am unable to follow the reasoning of the learned Judges in that case. It was decided under the rules of the Cotton Association. One of those rules provided that on the happening of certain events contracts were to be settled in a particular way. In the case before it those events had happened and consequently the questions in issue between the parties fell to be decided under that particular rule. The learned Judges thought that the rule contemplated wagering, and so refused to give effect to it. Doubtless that decision is capable of some such extension as the defendant now wishes to give it. But I do not feel that this is necessarily so, or that in dealing with other contracts made under a different set of rules I am bound to accept as binding what is after all only an inferential extension of a more or less conjectured principle. If the defendant's contention on this point is sound, then every contract made under the rules of the Rice Merchants Association would be a wagering contract, because, in certain circumstances, any one of them might be settled under one or other of those rules which have, to say no more, a suspicious appearance of having been framed to permit of wagering. But it cannot be doubted that an immense volume of genuine trade is carried on under those rules, and such a decision, as I am now asked to give, would prove disastrous to the whole rice business of this city.

What is a wagering contract is a question which is constantly coming before the Courts. It may therefore be worth while to resume the leading authorities very briefly, and extract from them, if possible, a principle capable of universal practical application.

[523] The foundation of our decisions was laid in the two English cases: *In re Gieve* (2) and *Universal Stock Exchange Ltd., v. Strachan* (3). In this Court we have *Tod v. Lakhmidas* (4), in which Farran, J., laid down a rule, since much commented on, that a contract is a wagering contract only where it was the intention of both parties under no circumstances either to take or give delivery to or from each other.

Then followed *Motilal v. Govindram* (5), in which Batchelor, J., doubted whether the rule laid down by Farran, J., was not perhaps too broadly expressed, and added observations upon the manner in which Courts were to deal with questions of this kind. This was followed again by Davar, J., in substantially the same terms, in *Hurmukhrai v. Narotamdass* (6). *Universal Stock Exchange v. Stevens* (7) appears to be an exception to the rule which now finds general favour, for there possibilities implied in the form of the contract appear to have been allowed to override a strict determination of the real intention of the parties, and therefore of the real nature of the transaction. The reason of decision in *Forget v. Ostigny* (8) is simple. The appellant there was held to be the respondent's agent; although the respondent might have gained or lost, as the shares

(1) (1905) 7 Bom. L. R. 805.

(2) [1899] 1 Q. B. 794.

(3) [1896] A. C. 166.

(4) (1892) 16 Bom. 441 at p. 445.

(5) (1905) 30 Bom. 88.

(6) (1907) 9 Bom. L. R. 125.

(7) (1892) 66 L. T. 612.

(8) [1895] A. C. 818.



he was dealing in rose or fell, the appellant would not. He was to be remunerated by a fixed commission, and, therefore, in the opinion of their Lordships of the Appeal Court, there was no wager between the parties to that suit. It might be doubted whether assuming that the respondent had been gambling with third parties, and the appellant knew it, the appellant could have succeeded under the terms of Bombay Act III of 1865.

Speaking broadly, however, the authorities appear to me to create no difficulty. I think that the dictum of Farran, J., subjected to rigorous analysis, will be found to be perfectly correct. I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gieve* (1) was, to be a wagering contract, the Court must [524] be satisfied that the intention of the parties was in no circumstances either to give or take delivery.

But this intention is not to be confounded with capacity. A party may be able to fulfil a contract and yet have no intention whatever of doing so. I am not to be understood as in any way dissenting from the judgments of Batchelor, J., and Davar, J. Rather I may say that in my opinion both these judgments contain an admirable exposition of the processes by which a Court has to arrive at the true intention of the parties, while both of those learned Judges appear to me to say, in no uncertain tones, that it is the intention of the parties and that alone that is to be ascertained and made the decisive factor. But I think that although these judgments are unexceptionable as far as they go, they leave a point, or possibly more than one point, in some uncertainty.

Where both parties are wagering and that can be clearly ascertained, no difficulty is likely to be met. About the best way of ascertaining whether both parties were wagering, notwithstanding the form in which they have embodied their contracts, there can again be little or no difficulty. But there is a class of cases and a common class of cases, which does not seem to have attracted the attention of the learned Judges who have so far dealt in this Court with the general question.

I mean cases in which one party A may be doing a large *bona fide* business, while the other party B may be a pure gambler, and doing no legitimate business at all. The form of the contract may be perfectly proper. A may be ready and able to fulfil his part of the contract. Yet I conceive that if B is really gambling and if A knows that he is gambling, whatever is to be said of the character of the rest of A's business, in his contracts with B he would be gambling as much as B. Surely he would fall within the provisions of Bombay Act III of 1865.

And these are precisely the cases which give rise to the most serious difficulty. It is no answer to B's contention that the contract was a wager, for A to say I had the goods and could have fulfilled my contract, or, I had the money and could have taken delivery of the goods from you. That is not really the question at all. For coming back to Farran, J's rule, we shall [525] have to decide whether, in all the circumstances of the particular case, A intended to give or take delivery of the goods covered by that particular contract. And the broad universal principle will then require re-statement in a slightly enlarged form. If A usually an honest dealer knew that B was a pure gambler, then any contract which he made with B with that knowledge would be a contract in furtherance of wagering and would fall within the scope of Bombay Act III of 1865, while it would likewise follow, that waiving that consideration, A could not strictly be said to have "intended" to give or take delivery to or from B.

(1) [1899] 1 Q. B. 794.

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Brought into the region of every day practice, this principle would, I expect, cover a great many transactions which are entered into not only in rice but other great staples in this city. I suspect that there are many large dealers doing genuine business, who are not averse from giving clients an occasional gamble. And thus in each case it becomes a pure question of fact.

What was the nature of the particular contract impugned? No more than this can be extracted from the cases. Reduced to their simplest terms they all emphasize one thing and one thing only. The Court must look beneath the surface and find out, if it can, what was in reality the true nature of the contract.

If, for example, we find A, a dealer in rice on a large scale, entering into forward contracts with B, a bootmaker who has no trade in rice at all, nor any means of dealing with rice in large quantities; if we find that such contracts have been made over and over again, embracing goods worth laos of rupees; but invariably settled by the payment of differences on due date, then I apprehend that notwithstanding the surface propriety of the formal contracts, notwithstanding A's appeals to his great legitimate business, and his assertions that for his part he was always in a position to fulfil his contracts, the Court would hold that as between him and B, the whole series were pure wagers.

And that is in effect the case on which the defendant relies here. Does he substantiate it? It seems almost superfluous to observe that A would start with every presumption in his favour. A *bona fide* dealer on a large scale could only be affected with the [526] particular knowledge which would except certain contracts with a certain individual from the ordinary category of the bulk of his contracts, by showing that he had had a series of dealings with that person of such a character that he must have known all about the man himself, and the kind of contract he was in the habit of making. In this case the defendant cannot hope to establish his case in that way because there was no long course of previous dealings, nor were the parties known to each other. Possibly the plaintiff might have known, as one man in the bazaar knows of another, that the defendant was partner in an iron business. But it would not necessarily follow from that that he might not have resolved to launch out into rice dealing with honest trade intentions. Therefore the defendant has fallen back rather on the line of attacking the plaintiff's business and endeavouring to show that it was chiefly a gambling business. Now the plaintiff was doing a very substantial business in various commodities. He had a strong financial backing. True he dealt largely in rice too and seems to have had but poor godown accommodation for the quantities of rice he bought and sold. The duration of his business was short, the firm is now dissolved, and appears to have existed for only three or four years. The maximum of rice shown to have come during any one year into the plaintiff's actual possession is out of all proportion to the extent of his dealings in rice. And from all this the inference is drawn that the plaintiff was himself not a *bona fide* dealer but merely a gambler in differences. Over and above this the defendant strongly relies upon a statement made by the broker who negotiated these contracts. He swears that he told the plaintiff that the defendant only meant to pay or receive differences. If that were true there would be an end of the case. The plaintiff swears that he was not told anything of the kind and the broker himself goes on to say that he regarded these as perfectly genuine contracts. He



stoutly repudiates the imputation that he negotiates any wagering contracts. Naturally he would.

I do not, however, think I ought to rely on that unsupported statement by the broker. Setting that on one side the Court has to be guided by such facts as are made clear by the evidence. [527] First, I am unable to find in any part of it sufficient support for the defendant's allegation that the plaintiff's whole business was sham and wagering. On the contrary it appears to have been a good solid business with plenty of money to back it. If that were so, and part of it at least consisted in buying and selling rice forward, the onus would lie very heavily indeed on the defendant to show that these particular contracts with him were made to the plaintiff's knowledge for no other purpose than wagering on differences. What is his own conduct? He begins by meeting the plaintiff's claim with an assertion that he was only an intermediary to the plaintiff's knowledge. He has abandoned that contention. But the fact that he began by making it, loses none of its significance. If we read all his early correspondence, carried on through Mr. Bhat, we shall see at once that it is utterly inconsistent with his present case. The foundation of all of it is that the contracts were perfectly genuine. He tries to explain that away now by saying that this is part of the usual practice, designed to throw dust in the Court's eyes should either party subsequently wish to sue. First, I do not believe that for a moment. Next, if I did, I should be strongly disposed to allow the attempt to succeed. It is asking a good deal of a Court of equity to come before it with a plea of this kind, and then bolster it up by confessing that everything was done during the earlier stages of the dispute to put a fraud upon the Court. People who indulge in that sort of knavery are not entitled to much consideration, and have themselves to thank if the results turn out contrary to their expectations. Then as to the argument that whether the plaintiff was a *bona fide* dealer or not he must have known that the defendant was not, what evidence is there to support it? The defendant has told his story. He relies strongly on being an iron merchant, and virtually asks whether any man in his senses would believe that a partner in an iron business would launch out suddenly into rice business. He points to the fact that he had no godowns for rice, that he never took delivery or could have taken delivery, and insists that the plaintiff knew all this perfectly well, and therefore when he made these contracts also knew that they were wagering contracts; and that the intention of both parties to them was to settle by payment of differences.

[528] Now I have said that there was no long previous course of dealings between the plaintiff and the defendant in rice, which might have affected the plaintiff with knowledge of the defendant's real intentions in entering into such contracts. Had there been, the case might have been very different. Evidence has been laid before the Court of how these forward contracts are made in the bazaar. It is only when the contract is on the point of completion that the parties' names are disclosed to each other. Then if one of them distrusts the other, the contract is broken off. Here the plaintiff says he asked who the defendant was and was told that he was a sound man. There is really little risk in making forward contracts of the kind; no risk over and above the fluctuations of the market. It does not appear to me that plaintiff did anything unusual in accepting the broker's recommendations and making the contracts. Further, there is a good deal of evidence to show that the defendant has

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been speculating in rice for a year or two. In one instance at least he appears to have adopted precisely the same course against one of his vendees who refused to take delivery, as the plaintiff did in this case against him. That is to say, he sold the actual goods at the risk and on the responsibility of the man who had refused to take delivery. All this looks like real business. Of course the defendant explains it away now by saying that every one of those contracts was merely for differences, and that selling the goods really made no material change in the nature of the dealing between him and his vendee. He says that he did not get the price the goods realized, that this in fact, like his early letters to the plaintiff, was all part of the common practice designed to put a cloak of reality about these unsubstantial transactions. But at any rate, supposing the plaintiff had any knowledge at all of the defendant, this is the kind of knowledge he would have had. He would have known that the defendant, like hundreds of others, was a speculator in rice and had been so for some time. He would have known that the defendant had gone through the usual regular business proceedings when one of his vendees refused to take delivery. Why was he to infer from all this vague bazaar knowledge that the defendant was a pure gambler? It is to be observed that the witnesses called for the plaintiff [529] swear that in many instances the defendant did in fact take and give delivery just as any other *bona fide* dealer in rice would have done. The defendant seeks to meet this by arguing that in no case did he really take or give more than delivery orders. Now, this may be a device in use among gamblers to evade the law. But, on the face of it, it is a regular business method and as effective as taking the goods away and putting them in your own godown. The truth is that if people want to gamble in this covert way and, in order to make the gamble appear a real transaction, wrap it up in all the formalities of a real transaction, it becomes virtually impossible for a Court to say that it is not what it appears to be. A Court may go on "probing into the surrounding circumstances" for ever, and be little or none the wiser. Certainly were there a long course of previous transactions between the parties, every one of which had been settled by paying differences, and had the parties been well known to each other (as in the case I began by supposing, where one of them is, say, a boot-maker) then there would be a good solid ground for inferring the real nature of their speculations, and the true intention of both of them. But where they are hardly known to each other at all, where both are in the open market, and both have been speculating for about the same time in rice, how is one, who has perfectly honest intentions, to know that the other has not? I confess that I do not see any test which could be applied in the sure confidence that it would disclose the truth.

For, unfortunately, whether transactions of the kind now in dispute are genuine or wagering, it appears to me that parties can with moderate care so conceal the real nature of the transaction that it would become impossible for the Court to say positively what that was. Assume that these were genuine transactions. The procedure would have been exactly what it admittedly was. Assume that there were wagering and for all I can see the procedure again would have been admittedly what it was, at any rate up to the point of tendering the delivery orders. And there is absolutely nothing by way of a history of previous relations, or deducible from the trade status of either party, which will yield any satisfactory test.



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While I permit myself to say so much, as having a bearing on all cases of the kind, I do not feel any doubt in my mind upon [530] the actual case. I have no doubt at all that the defendant was a gambler, and that he never meant to do more than pay and receive differences. Unfortunately that is also an incident (qualifying if necessary for theoretical purposes the "intention to do no more than pay or receive differences", by adding "ordinarily") of a good deal of legitimate trade. Hundreds of contracts for cover in the markets of Bombay and Manchester respectively are, I suspect, made without any very definite intention of taking actual delivery, and are settled by paying differences. Yet unless this were done business in such commodities as cotton could hardly go on. But there is of course a real distinction, though rather an elusive one, between real and unreal transactions of this kind. And I need not go further into that. It is enough to repeat that I have no doubt that in these rice speculations, the defendant meant to gamble and nothing else. But I am equally sure that in a large part at any rate of his rice business the plaintiff was doing honest trade. He has admitted that about half the total of his rice deals were settled by paying differences. But that is not necessarily inconsistent, as far as I can see, with genuine business. As to the rest there was actual buying and selling, real solid business. And I am clear that there is nothing whatever in the transactions now laid before the Court, or in the evidence given to colour them one way or the other, which would justify this Court in holding that they were wagering contracts within the intention of both parties or within the intention of one, and to the knowledge of the other. That I apprehend to be the right way of stating the principle upon which every decision of this kind must turn. Both parties may intend to wager; or one party may intend to wager, and the other party may know that that is his sole intention and knowing it enter into the contract. Where the facts found warrant the Court in adopting either of those statements of fact, then the contract is a wager under the law of this Presidency. But where only one party intends to wager, and the other neither intends himself to wager, nor knows that it is the sole intention of the former, then the contract is not a wagering contract from the point of view of the latter, and he has a right of action on it.

I do not think that any case in which the issue is raised could be clearer than this case is against the defendant. For that [531] reason I have not gone more minutely into the evidence. When the points to be determined on the evidence are obscure, I usually analyse it exhaustively. I have not thought it necessary to do so in this case because it speaks for itself, and, in view of the brief statement of principles I have attempted, can leave no doubt at all which way the decision of the Court must be.

I find for the plaintiff. The measure of damages has been agreed upon by the parties. When the sum has been ascertained by applying it, the decree will be for that amount with all costs upon the defendant.

The defendant appealed.

*Inverarity*, with *Lowndes* and *Jinnah*, for the appellant:—

Any contract made under the rules of the Rice Merchants Association must be deemed to be affected with the taint of wagering. Rules 17 and 27 are much wider than the rule discussed in *Chapsey v. Gill & Co.* (1), and yet contracts under that rule were held to be void. The statement by the learned Judge in the Court below that a decision that contracts



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under the Rice Merchants Association rules were void would have a disastrous effect on an immense volume of genuine trade carried on under these rules, is not supported by evidence. Nor is it in any event a legal consideration. The contracts in this case were certainly by way of wagering, inasmuch as it was known to the plaintiffs that the defendant was a gambler, and would only pay differences. The evidence showed that he was an iron merchant and had no godowns for rice; and the plaintiffs' clerk knew this. The plaintiffs' moonim did not deny that previous contracts between the parties had been settled by payment of differences. Further there is evidence to show that the plaintiffs were themselves speculators. Certain transactions appeared in their books, in which delivery was optional,—a fact which brings them within *In re Gieve* (1).

It is the true character of the contract that must be looked at and not its outward appearance. See *Universal Stock Exchange, Ltd., v. Strachan* (2).

[532] Counsel also cited *Kong Yee Lone & Co., v. Lowjee Nanjee* (3), *Tod v. Lakhmidas* (4), *Motilal v. Govindram* (5), and *Hurmukhrai v. Narotamdas* (6).

*Strangman* (Advocate-General) with *Robertson* for the respondents:—

The defence is dishonest. The correspondence shows that the contracts were genuine. Rule 17 does not say all that the appellant contends.

With regard to *Chapsey v. Gill & Co.*, (7) an extension of the decision in that case would be inconsistent with section 57 of the Contract Act.

*Inverarity* replied.

SCOTT, C. J.:—Two points have been urged by the appellant in this appeal: (1) that according to the rules of the Bombay Rice Merchants Association subject to which the contracts sued on were made both parties were to pay or receive differences and that therefore the contracts were void as wagers; (2) that having regard to all the circumstances of the case it should have been found as a fact that neither party intended that delivery should be taken.

In support of the 1st point reliance is placed upon Rule 17 of the Rice Association Rules. That rule obliges the buyer to accept a delivery order if tendered up to 4 p. m. on the 6th day before the Vaida and provides that on the seller's failure to make such delivery, the contract shall be settled by payment of the difference between the contract rate and the due date rate fixed by the Association.

Whether if the seller failed to give the delivery order in time the conditions imposed by the rules would make the contract a wager is one which we are not called upon to decide for it is found as a fact in the lower Court and not now disputed that all the delivery orders were tendered by the plaintiffs in time. The facts are therefore entirely dissimilar to those in *Chapsey v. Gill & Co.*, (7) upon which the argument of the appellant is based.

[533] There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event the contract is void as a wager

(1) (1899) 1 Q. B. 794.

(2) [1896] A. C. 166.

(3) (1901) 29 Cal. 461.

(4) (1893) 16 Bom. 445

(5) (1905) 30 Bom. 83.

(6) (1901) 9 Bom. L. R. 125.

(7) (1905) 7 Bom. L. R. 805.



if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

As regards the 2nd point, it is a pure question of fact which has been adequately dealt with by the learned Judge. We see no reason to differ from the conclusion at which he has arrived. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

Attorneys for the appellants: Messrs, *Hiralal & Co.*

Attorneys for the respondents: Messrs. *J. R. Patel & Co.*

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34 B. 519=12  
Bom. L. R.  
1058=8 I. C.  
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34 B. 533 (=4 I. C. 591=11 Bom. L. R. 1302).

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

IN THE MATTER OF THE INDIAN COMPANIES ACT VI OF 1882  
AND

IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING  
COMPANY, LIMITED,

AND

IN THE MATTER OF RATILAL KARSONDAS.

[25th September, 1909.]

*Winding up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), sections 128, 129, 130 and 131—Scheme of arrangement—Practice.*

The definition of "debt" in section 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor.

[534] If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up.

If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement. . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors.

ON 2nd September 1909 a petition for the winding up of the Bombay Cotton Manufacturing Company was filed by one Ratilal Karsondas, a creditor of the Company to the extent of Rs. 6,500 lent on fixed deposit account and repayable in April 1910. A provisional liquidator was appointed on 4th September. Further, petitions were filed by two other creditors on the 7th and 8th September respectively; and on 9th September by an order of Macleod, J., all three petitions were consolidated.

The various allegations made by the petitioners as to the insolvent condition of the Company and the mis-management by the Directors were strenuously denied by two of the Directors on behalf of the Company, who further contended that the petitioners were not in the position of



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I. C. 891=11  
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creditors entitled to present such a petition, in that their debts were not immediately payable.

Before the matter came on for hearing certain other creditors proposed a scheme of arrangement with the view of preventing liquidation and the consequent loss of credit. The terms of this scheme were subsequently modified and agreed upon at a meeting of creditors held on 23rd September. The petitioners, however, submitted that such an arrangement could not be sanctioned by the Court until a formal order for winding up had been made.

*Setalwad* appeared for the 1st petitioner, Ratilal Karsondas.

*Jinnah* appeared for the 2nd and 3rd petitioners.

*Padshah* appeared for other creditors.

*Strangman*, Advocate General, appeared for the Company.

[535] MACLEOD, J.:—Three petitions have been filed for winding up the Bombay Cotton Manufacturing Company. The first is by Ratilal Karsondas, a creditor for Rs. 6,500 in respect of three deposit receipts, the second by Raja Bahadur Shivilal Motilal, who is a creditor to the extent of three lakhs, one lakh of which is secured by a charge on certain liquid assets of the Company, and the third is by Raju Babaji, who alleges that he has a claim of about Rs. 50,000 in respect of monies due to him for the erection of a weaving shed for the Mill.

The chief allegation on which the prayer for winding up the Company in all these three petitions is based is, that the Company is unable to pay its debts. There are other allegations made regarding the management of the Company to the effect that the affairs of the Company have been grossly mis-managed by the Directors.

The Company oppose these petitions and a large number of creditors have also appeared who are desirous that their interests should be secured by some means or other, either by a winding up order being made, or by some directions of the Court being given. A number of share-holders have also appeared and they are anxious that their interests should be protected.

The grounds on which the Company oppose the petitions fall under two heads. In the first place they take certain technical points. It is contended that the petitioners are not creditors who are entitled to petition under section 131 of the Indian Companies Act. The ground for this contention seems to be, that a creditor must be a person to whom a debt is now due and who can demand immediate payment from the Company before he can petition. That contention seems to be based on the definition of "debt" in section 130. But the definition of "debt" is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor. Otherwise this contention would lead to this absurdity, as I have already observed on an interlocutory application in these [536] petitions, that depositors who have lent their monies to the Company would have to stand by and see the assets of the Company dissipated without their being able to seek the protection of the Court. The petitioners Ratilal and Shivilal are clearly creditors entitled to petition under section 131. It may be that the position of Raju Babaji is somewhat different, as the amount of his claim if any has yet to be ascertained. But it seems unnecessary to decide whether he is in a position to file a petition, as there are two petitions, which are good, before the Court.



The next contention is that the petitioners have not proved any ground on which the Court can make a winding up order: that the only ground defined under section 128 on which the petitioners can rely is ground (d) "whenever the Company is unable to pay its debts." That is defined in section 129 sub-section (c) (the only part of that section which is relevant to these petitions) as follows:—"Whenever it is proved to the satisfaction of the Court that the Company is unable to pay its debts." The Company argue now that as "debt" is defined in section 130 as debts actually due, therefore the petitioners must prove that the Company is unable to pay debts which are due to-day, and that even if the Court is satisfied that the debts which will fall due to-morrow and any time thereafter cannot be paid, the Court cannot make a winding up order on this ground. Even if that contention, which appears to lead to an absurdity, is correct, it is immaterial, because clause (c) to section 128 makes it possible for the Court to order the winding up whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the company should be wound up. And if the Court is satisfied that the Company is unable to pay the debts falling due hereafter that would be a reason of a like nature to (d). It is suggested that reasons under clause (c) must be restricted to reasons of a like nature to those mentioned in the previous clauses (a) to (d) but in the case of *In re Shah Steam Navigation Company of India* (1), Mr. Justice Davar held himself entitled to follow the English practice, and to construe the [537] section in the same way as the English Courts have construed the corresponding section in the English Act, although the words "for any other reason of a like nature" are omitted in that section. However, I am clearly of opinion that if the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up. The last balance sheet, which has been put before the Court, contains the last audited accounts up to the 30th June 1908. Those accounts were not audited until six months later, and, therefore, I have not got full details of the present position of the Company. But it is admitted that the Company is now a creditor of the Tricumdas Mills to the extent of nearly thirteen lakhs, and a very large amount of that must have been lent to the Tricumdas Mills since the 30th June 1908. The amounts for which acceptances have been given were on that date nearly Rs. 24,00,000 and they must have increased since that date. Now the loan to the Tricumdas Mills was an act not contemplated and not empowered by the Memorandum of Association, and although the share-holders appear in 1898 to have empowered the Directors to lend the funds of the Company to other Companies there can be no doubt that the resolution of the share-holders was *ultra vires*, and that for eleven years, not only the funds of the Company, but the money which was borrowed from the public for the working of the Company, have gone into the pockets of the Agents of the Tricumdas Mills. That amount of thirteen lakhs must now be taken as a very doubtful asset. The Company in trying to establish their solvency have estimated it at 3 lakhs, but I should consider that an over-valuation. However that may be, the remaining assets, which they entered in their affidavits with their estimated value, will not on close scrutiny bear the value which has been put upon them by the Company. They have valued the machinery, as it

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(1) (1908) 32 Bom. 415.



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appears on the assets side of the balance sheet, at cost price without deducting the depreciation to the extent of nearly five lakhs which appears on the side of liabilities. Other assets are such that they are not available for the payment of the Company's debts. They are merely available [538] for the working of the Mills; so that if the Company endeavoured with these assets to satisfy the debts of the creditors it would find it impossible to continue working the Mill. Now, it is no doubt the practice for Mill Companies in Bombay in order to work their Mills to borrow money for working capital, but such borrowings should not exceed what is actually required for working purposes and should not exceed to any great extent under careful management the liquid assets, such as cotton, coal, stores, etc. The Company's credit depends on this rule being observed. But it is clear that the borrowing of this Company has been quite out of proportion to what was required for the working of the Mill; and also to the paid up capital. With the small amount of Rs. 7½ lakhs paid up capital the debts of the Company have amounted to something over Rs. 25 lakhs. For the present the Company's credit has gone.

If these petitions were dismissed, it is quite clear that the Company would not be able to pay its liabilities as they became due. The only result would be that the first person who obtained a decree against the Company (and I have only recently passed a decree for Rs. 50,000 against it) would proceed in execution of his decree. It appears certain that if I dismissed these petitions there would be other petitions filed immediately afterwards.

I am quite convinced on the affidavits before me that the Company is not in a position to pay its debts, and, therefore, it is desirable that a winding up order should be made. At the same time, there is no doubt that if an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement, so that the interests of the creditors might be protected as well as the interests of the share-holders. Already it appears from the affidavits that suggestions have been made from some sources, which, if they prove effective, would keep the Company going. But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three fourths majority of the creditors is able to bind the [539] minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. Therefore I shall not sanction any proceedings in the winding up order which might in any way prejudice the chances of a settlement, and the bringing forward of any scheme for carrying on the business of the Company which may be acceptable to the creditors.

The order, then, will be: First of all that the Company be wound up. I propose, then, as I did in the case of the Trioumdas and Lakhmidas Mills to proceed to appoint a Liquidator, although I suggest that he should be provisional for a short time. What I would suggest is that until the 16th October Mr. Sethna be appointed official Liquidator in the same position as he is Liquidator of the Lakhmidas Mill. It is necessary that there should be a Liquidator for the purposes of arranging a compromise and scheme of settlement, but there will be no necessity for the Liquidator to continue after the scheme has been sanctioned by the Court, except for the purpose of giving effect to the scheme.



The official Liquidator will therefore be appointed provisionally.

I have no objection now in the interest of the share-holders to direct that nothing should be done under the order for winding up by the Liquidator beyond carrying on the working of the Mill until further application is made by the Liquidator.

Liquidator to have powers (b), (d) and (f) in section 144.

Under section 138 until further order proceedings to be stayed except as to the carrying on of the business of the Company by the Liquidator.

It is advisable that any proposals for settlement should be crystallized as soon as possible, so that the meeting of the creditors and contributories can be summoned.

I allow the contributories inspection of the directors' minute books and accounts relating to the loans made by and to the Company.

[540] Costs of the petitioner Ratilal Karsondas and the costs of the Company out of the assets: and one set of costs between the other petitioners and creditors appearing. As the other petitioners had notice of the first petition their costs must be included in the one set of costs allowed to the creditors.

Attorneys for 1st petitioner : Messrs. *Daphtary, Ferreira and Divan.*

Attorneys for the other petitioners : Messrs. *Bhaishankar, Kanga and Girdharlal.*

Attorneys for the Company : Messrs. *Payne and Co.*

Attorneys for other creditors : Messrs. *Dikshit, Dhunjisha and Sunderdas.*

34 B. 540 (=7 I. C. 455=12 Bom. L. R. 531).

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GULAM HUSSEIN ALIAS KIKABHAI TYABALLI (original Plaintiff), Appellant, v. MAHAMADALLI IBRAHIMJI AND OTHERS (original Defendants), Respondents.\*

[10th February, 1910.]

*Civil Procedure Code (Act XIV of 1882), sections 48 and 50—Transfer of Property Act (IV of 1882), section 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.*

In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realised by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

[541] The first Court found that the claim for a personal decree against the mortgagor was time-barred.

On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree.

\* Second Appeal No. 498 of 1906.



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84 B. 540=7  
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On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed.

*Held*, further that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

SECOND appeal from the decision of W. Baker, District Judge of Surat, confirming the decree of Chimanlal Lallubhai, First Class Subordinate Judge.

On the 18th April 1887 one Ibrahim Jiva passed a mortgage-bond to the plaintiff. Subsequently the mortgagor having died the plaintiff, on the 18th April 1899, brought a suit against the mortgagor's widow as defendant 1 and his children as defendants 2—4 to recover Rs. 1,999 due under the mortgage. The plaintiff claimed to recover the said amount by sale of the mortgaged property and the balance, if any, from the remaining non-hypothecated property of defendant 1 and of the deceased mortgagor. The decree was, however, passed against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a further decree against the other property of the mortgagor. The Subordinate Judge found that the claim was time-barred and that the plaintiff was not entitled to the further decree prayed for.

The plaintiff appealed to the District Court urging *inter alia* that the sum of Rs. 200 was paid by the mortgagor to the plaintiff subsequent to the mortgage, therefore, the claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as [542] alleged by him. The District Judge found that the plaintiff was not entitled to adduce evidence to prove the payment of interest and that he was not entitled to a further decree under section 90 of the Transfer of Property Act. The appeal was therefore dismissed with costs. In his judgment the District Judge observed as follows:—

Section 50 of the Civil Procedure Code provides that if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaintiff must show the ground upon which exemption from such law is claimed.

It is argued that the plaint in the original suit satisfies the requirements of section 50.

The plaint, para 5, says that Rs. 7-9-0 were paid as rent. No date is given. It also says 200 were received but as it is not stated on what account it was received, the learned Sub-Judge holds that it was not a payment under the mortgage at all, but on some other account.

What the plaintiff seeks now to prove is that the payment of 200 as interest was made within 6 years of the suit. The fact is stated to be mentioned in the original plaint. But the plaint merely states that 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains 2 distinct allegations which are not found in the original plaint, first that 200 was paid within six years of the suit and secondly that it was paid as interest. Plaintiff seeks to adduce evidence to prove these allegations. I do not think he can be allowed to do so; it is stated that no fresh allegations are made and that he is not going beyond his original plaint. It is argued that the fact of his mentioning this sum of 200 in the plaint taken with his request for a remedy against the mortgagor personally should lead the Court to presume that this amount was paid within the period of limitation. I do not see how the Court can make such a



presumption when the plaintiff himself does not trouble to explain in his plaint how the payment of this sum saves limitation. Even now no date is given of the payment and beyond saying that it was within 6 years plaintiff does not give any information as to when it was paid. Nor is there anything in the application regarding the payment being shown in the debtor's handwriting.

In these circumstances it seems to me that the present allegations are entirely different from those in the original plaint, when the personal relief sought was not based on the facts now alleged. In his deposition in the original suit plaintiff did not give the details. It does not appear to me that the rulings cited contemplate the proceedings under section 90 of the Transfer of Property Act being based on an entirely new case and I would therefore hold that plaintiff has no right to set up these new allegations and cannot be allowed to adduce evidence to prove them.

[543] The plaintiff preferred a second appeal.

N. K. Mehta for the appellant (plaintiff):—Our point is that both the lower Courts erred in not allowing us to adduce evidence to show that our personal remedy against the defendant under section 90 of the Transfer of Property Act was not time-barred. If section 88 of the Act be read in conjunction with section 90 it becomes clear that there are two distinct decrees to be passed—one a substantial decree under section 88 and another under section 90—on the application of the decree-holder in case the net proceeds of any sale under section 89 are insufficient to pay the amount due on the mortgage. The question is whether the personal remedy was within time. We contend that it was not necessary for us to ask for a personal remedy in the plaint or to show that the remedy, if asked for, was still subsisting, as the time for showing that it was not time-barred arose when it was found that the net proceeds of the sale under section 89 were insufficient. If the net proceeds of the sale had been sufficient to pay off the mortgage-debt, an application under section 90 would not have been at all necessary: *Musaheb Zaman Khan v. Inayat-ul-lan* (1) and *Kama Dattu v. Sukharam Lingu* (2) support our contention.

L. A. Shah for respondents 1, 2 and 4 (defendants 1, 2 and 4):—The plaintiff asked for a personal remedy in respect of the balance and mentioned the fact of having received Rs. 200 without giving the date of the receipt or the purpose for which that amount was received.

We rely on section 50 of the Civil Procedure Code. The plaint merely stated that Rs. 200 were received but it did not show that receipt kept the personal remedy subsisting. The lower Courts were therefore justified in not allowing the plaintiff to adduce fresh evidence to show that the personal remedy was not time-barred: *Damodar Sakarchand v. Vyanku Gangaram* (3).

See, Form of Plaint in a suit on mortgage, No. 109, Sch. IV, Civil Procedure Code of 1882.

N. K. Mehta in reply.

[544] SCOTT, C. J.:—The plaintiff originally sued on the 18th April 1899 to recover Rs. 999 due under a mortgage-deed dated the 18th April 1887. He claimed to recover the amount in question by sale of the mortgaged property and any balance from the remaining non-hypothecated property of the first defendant and of the deceased mortgagor.

A decree was passed in his favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property was insufficient to satisfy the decree by Rs. 837 and the plaintiff applied

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(1) (1892) 14 All. 513.

(2) (1909) 11 Bom. L. R. 1127.

(3) (1906) 31 Bom. 244.



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34 B. 540=7  
I. O. 485=12  
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under section 90 of the Transfer of Property Act for a further decree against the other property of the mortgagor.

The Sub-Judge found that the claim was time-barred.

An appeal was then preferred to the District Court on the ground that a sum of Rs. 200 was paid by the mortgagors on account of interest on the mortgage-debt and that therefore the plaintiff's present claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as alleged by him.

The Acting District Judge framed the following issues:—

(1) Whether the plaintiff is entitled to adduce evidence to prove the payment of interest?

(2) Whether he is entitled to a further decree under section 90 of the Transfer of Property Act?

He decided both the issues against the plaintiff. He says "what the plaintiff seeks now to prove is that the payment of Rs. 200 as interest was made within six years of the suit. This fact is stated to be mentioned in the original plaint. But the plaint merely states that Rs. 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains two distinct allegations which are not found in the original plaint, first that Rs. 200 was paid within six years of the suit and secondly that it was paid as interest."

We are of opinion that the District Judge came to the right conclusion upon the facts stated by him.

[545] Section 43 of the Code of Civil Procedure of 1882 provides that "A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the Court) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted." If therefore he wished to make out a case that he was entitled to a decree against the mortgagor personally or against his unhypothecated property in the event of the sale-proceeds of the mortgaged property being insufficient to pay the mortgage-debt, he was bound to put forward in his plaint the allegations which if established would entitle him to that relief. The mortgage being a mortgage of 18th April 1887 and the suit being a suit of 1899, it is clear that the plaintiff's right to a personal decree would be barred unless he could allege some ground for exemption from the law of limitation.

Section 50 of the Code of 1882 provides that "If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaintiff must show the ground upon which exemption from such law is claimed." The plaintiff did not show any ground for exemption from the law of limitation and therefore if the plaintiff is bound by what is stated in his plaint he cannot obtain the relief which he now seeks. In the case of *Damodar v. Vyanku* (1) the Court said, "It is clear from the words of section 90 of the Transfer of Property Act that a direction of personal payment by the mortgagor should be in a supplemental decree to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for decree under section 90." This assumes that the plaint indicated that debt sued on was legally recoverable at the date of suit.



This view is supported by the form of plaint for a mortgage suit, No. 109, in the Schedule to the Code of 1882, which shows that there should be a prayer in the original plaint for payment to the plaintiff of the amount of the deficiency if the sale-proceeds should not be sufficient for the payment of the full amount.

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[546] The conclusion, therefore, to which we have come is that the plaintiff cannot be allowed at this stage of the suit to bring forward for the first time allegations which it is necessary to prove in order to show that he is entitled to a further decree against the defendant personally.

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Our attention has been called to the decision in *Ram Dattu v. Sakharam Lingu* (1). That was a case in which the plaintiff in his plaint had claimed a personal decree although he had not at the original hearing led evidence to prove a subsisting personal obligation. It does not appear that any question of limitation arose which should have been confessed and avoided in the plaint.

We affirm the decision of the lower Court and dismiss the appeal with costs.

*Decree affirmed.*

34 B. 546 (=7 I. C. 457=12 Bom. L. R. 539).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

GOKULSING BHIKARAM PARDESHI (original Plaintiff), Appellant,  
v. KISANSINGH Guru LAXMANGIRI AND OTHERS (original Defendants),  
Respondents.\*

[28th February, 1910.]

*Civil Procedure Code (Act XIV of 1882), sections 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under section 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.*

O sued M on a money-bond M having died during the pendency of the suit, his widow R and his brother N were brought by O on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be [547] executed both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale: and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title.

*Held*, that as the property was sold by the Court at O's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the

\* Second Appeal No. 245 of 1909.

(1) (1909) 11 Bom. L. R. 1127.



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explanation to section 617 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 211 did not apply:—

*Held*, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 211, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit.

The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

[*Ref.* 20 O. L. J. 481=19 C. W. N. 517=27 I. C. 321; 72 I. C. 256=25 Bom. L. R. 147; 80 I. C. 100; 83 I. C. 550.]

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by B. B. Kunte, Joint Subordinate Judge at Nasik.

[548] Suit to recover possession of property purchased in execution of a decree.

The decree was passed on a money-bond passed by one Mahadevgir in favour of Chimnaji in 1852. During the pendency of the suit Mahadevgir having died, his widow Rahu and his brother Narayangir were brought on the record as his legal representatives. The decree passed was against the property of Mahadevgir.

After the decree was passed but before it could be executed both Rahu and Narayangir died. The decree-holder Chimnaji thereupon brought on the record the names of Kiangir and Nana (defendants) as the legal representatives of Mahadevgir; and sought for execution of the decree by attachment and sale of the property in dispute. It was contended by the defendants in those proceedings that they were not the legal representatives of Mahadevgir and had no property of his into their possession. The Court notwithstanding attached the property; and at the sale it was purchased by the plaintiff on the 12th August 1896. The certificate of sale was issued to him on the 24th June 1905.

The plaintiff brought this suit on the 15th August 1907 to recover possession of the property from the defendants.

It was contended in defence that the property in dispute was the joint family property of Mahadevgir and defendants; and that on the death of the former it devolved upon them by survivorship.

The Subordinate Judge held that the property was the joint family property and that it devolved upon the defendants by survivorship on Mahadevgir's death. He held further that the plaintiff's claim was barred by limitation.

On appeal this decree was confirmed by the lower appellate Court, on grounds which were stated as follows:—

It would appear that the decree-holder Chimnaji showed no regard for truth or law in placing on the record party defendants and judgment-debtors to represent the estate of Mahadevgir for the purposes of the suit and execution of the decree.



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inasmuch as though he knew as a matter of fact that Mahadevgir was undivided with Naravangir at the time of his death he joins both Naravangir a brother and Rahu, his widow as party defendants, and latter [54] heir death defendants 1 and 2 who are brothers to each other and cousin's sons to Mahadevgir, and defendant 3, who was neither an agnate nor cognate relation to the deceased, as judgment debtors. Though they urged in the course of execution that they were not the heirs or legal representatives of the deceased judgment debtors, the execution was proceeded with and the right, title and interest of Mahadevgir in the plaint land was sold with all the three defendants as parties on the record. No objection to the attachment of the property seems to have been raised by them in execution and the circumstance of the sale having been made absolute in favour of the plaintiff with the present defendant's as Mahadevgir's legal representatives, has given rise to the contention on behalf of the plaintiff that they are bound by the sale and made it necessary for me to frame the first issue in the case.

This issue should have been raised in the original Court, but as it is one purely of law and as none of the parties would or could attempt to call evidence, I have framed it here and proceeded to determine it myself. In this connection I may remark at once that the contention of the appellant's pleader that the nature of the debt should have been inquired into has no force. The plaint did not allege that the debt was binding on Naravangir or that Mahadevgir had contracted it as manager and it was not competent to the appellant to make a new case in this Court.

Though the present defendants could and should have objected to the plaint property being sold in execution as Mahadevgir's property, their omission to do so does not estop them from raising the contention on this suit, notwithstanding the provisions of section 244 of the Code of Civil Procedure, and the reason is that the plaintiff as purchaser at a Court-sale is not a representative of the decree-holder (I L R. 25 Bom. 681) and the provisions of the section which require that questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, etc., should be determined in course of execution and which forbid a separate suit for the same do not come into play.

No doubt in a suit between parties to execution or their representatives the question not raised in the course of execution could not be urged, but as a purchaser at a sale in execution is not a party to the suit (I L R. 15 Bom. 297) and as he is a representative of none of the parties, there is no bar of section 244 or of section 18, Civil Procedure Code, to the defendants taking exception to the title of the plaintiff in this suit.

Mahadevgir's interest, which came into existence with him died with him, because he was undivided co-parcener in a Hindu family and because the decree was a mere money decree and no specific charge was created by him during his life-time and because the attachment had not been laid while he was alive.

The plaintiff appealed to the High Court.

[550] R. R. Desai, for the appellant (plaintiff). K. H. Kelkar, for the respondents.

The following cases were cited:—*Prosunno Kumar Sanyal v. Kali Das Sanyal* (1); *Madhusudan Das v. Gobinda Pria Chowdhurani* (2); *Ram Chandra Mukerjee v. Ranjit Singh* (3); *Tara Lal Singh v. Sarobar Singh* (4); *Collector of Jaunpur v. Bithal Das* (5); *Krishnan v. Arunachalam* (6); *Kashinath Moreshwar v. Baji Pandurang* (7); *Trimbak Ramrao v. Govinda* (8); *Murigeysa v. Hayat Sheeb* (9).

CHANDAVARKAR, J.:—The facts found by the lower appellate Court, on which the question of law arising upon this second appeal turns, are shortly these.

Chimnaji valad Ramji brought a suit on a bond against Mahadevgir Guru. The latter having died during the pendency of the suit, his widow Rahu and his brother Narayangir were brought by Chimnaji on the record

(1) (1892) 19 Cal. 683.

(2) (1899) 27 Cal. 34.

(3) (1899) 27 Cal. 242, 257.

(4) (1899) 27 Cal. 407.

(5) (1902) 24 All. 391.

(6) (1899) 16 Mad. 447.

(7) (1909) 11 Bom. L. R. 699.

(8) (1894) 19 Bom. 228.

(9) 1898) 23 Bom. 237, 241, 242.



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as the deceased's legal representatives. The suit ended in a decree, awarding the claim out of the property of the deceased. Before execution, both Rahu and Narayangir died. The decree-holder (Chimnaji) then brought on the record the present respondents as legal representatives of the deceased judgment-debtor, Mahadevgir, and applied for execution of the decree by attachment and sale of the property now in dispute. The respondents denied that they were the legal representatives of the deceased, and that they had any property of his which could be liable for the decree. All these objections were, however, negatived by the Court executing the decree and the property in dispute was attached and sold. The present appellant, having purchased it at the Court-sale, sued to recover possession from the respondents.

Both the Courts below have disallowed the claim on the ground that the property in dispute was the joint property of [551] the deceased Mahadevgir and the respondents, held by them as co-parceners in a joint Hindu family, and that on Mahadevgir's death the respondents having acquired an exclusive title to it by survivorship, the appellant obtained no title at the Court-sale which he could legally assert as against the respondents.

In the lower Court it was contended for the appellant that the respondents were debarred by the provisions of section 244 of the Code of Civil Procedure from asserting their title. That Court disallowed the contention, relying on the decision of this Court in *Maganlal v. Doshi Mulji* (1).

Act XIV of 1882, which applies to this case, laid down certain procedure as to the execution of a decree for money obtained against a person brought on the record as the legal representative of a deceased judgment-debtor. If such person denied his representative character, the Court executing the decree could either itself decide the question of representation or refer the parties to a separate suit: (section 244, last paragraph). Under section 252, the decree-holder could attach and sell the property of the legal representative in satisfaction of the decree under certain circumstances, viz., when there was no property of the deceased in the possession of the legal representative and the latter had failed to satisfy the Court that he had duly applied such of the deceased's property as had come into his possession.

In the present case, according to the finding of the lower appellate Court, the decree-holder Chimnaji brought the property to sale, although he knew that the respondents were not the deceased Mahadevgir's legal representatives. The property was sold by the Court at the decree-holder's instance as that of the deceased. So far it cannot be denied, and indeed the respondents' pleader before us had to concede, that the question was one relating to the execution of the decree arising between the decree-holder and the respondents as judgment-debtors under section 252. It was, therefore, a question, in relation to them, falling within section 244 of the Code of Civil Procedure by reason of the explanation to section 647 of the [552] Code, that applications for the execution of decrees are proceedings in suits. The respondents were bound to object to the attachment and the sale under that section, so far as the decree-holder's action was concerned. But they did not object. It is now contended that, whatever might have been the result if the decree-holder had been a party to the present suit, the dispute now is between the auction-purchaser, who is a stranger to the previous suit and the execution proceedings therein, and the respondents, and that, therefore, section 244 does

(1) (1901) 25 Bom. 681.



not apply. The answer to that contention is that, though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. That is upon the ground that he is precluded by section 244 from raising the question as a defence in any proceedings other than those under that section. That is the law laid down by the Privy Council in *Prosunno Kumar Sanyal v. Kalidas Sanyal* (1). In their judgment the ruling of the Madras High Court in *Kuriyali v. Mayan* (2) is referred to by their Lordships with approval. In that Madras case it was held that the question whether the property mentioned in the decree was available for execution was one arising between the decree-holder and the judgment-debtor's legal representative. So in the present case that is substantially the question. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

[553] This view is not inconsistent with but is supported by the judgment of this Court in *Maganlal v. Doshi Mulji* (3), which is relied upon by the lower appellate Court as warranting its conclusion. In that case the question was simply between the judgment-debtor and the auction-purchaser; and therefore it was held that the question could be tried in a separate suit and that section 244 was no bar. But the judgment in that case explains the Privy Council decision in *Prosunno Kumar Sanyal v. Kalidas Sanyal* (1), as applying where the question is virtually between the parties to a suit and the auction-purchaser is affected by its determination.

For these reasons the decrees of the Courts below must be reversed and the claim of the appellant allowed with costs throughout on the respondents.

Appeal allowed.

34 B. 553 (=7 I. C. 459=12 Bom. L. R. 545.)

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

JAGANNATH RAGHUNATH (original Plaintiff), Appellant, v.  
NARAYAN L. SHETHE (original Defendant), Respondent.\*

[29th March, 1910.]

*Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvadhya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of a marriage—Presumption as to form.*

\* First Appeal No. 91 of 1906.

(1) (1892) 19 Cal. 683.

(2) (1901) 25 Bom. 681.

(2) (1888) 7 Mad. 255.

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The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail.

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

[Ref. 88 Mad. 1144; 40 Cal. 407; 77 I. C. 450=50 Cal. 370 (Presumption as to form of marriage).]

APPEAL from the decision of Gulabdas Laldas, First Class Subordinate Judge at Thana.

[554] Suit for declaration.

The property in dispute belonged originally to one Laxmibai, who had obtained it after marriage by way of gift from her husband in 1894. Laxmibai died in 1896, leaving a son Elshetti and a daughter Narsubai.

Narsubai was married to one Narsinga; but she did not live with him. She lived with Laxman (defendant No. 2) and had a son born of her by him. Narsubai died in 1903; and a few months after her son also died.

In 1904, Narsinga sold the property in dispute to Jaggannath (plaintiff).

The plaintiff filed this suit to establish his title to the property and to recover possession of the same.

Elshetti having died, his son Narayan was sued as defendant No. 1 and Laxman as defendant No. 2.

It was contended for the defence that on Laxmibai's death the property devolved equally on her son Elshetti and her daughter Narsubai; that Narsubai's moiety descended on her death to her son; and from him to defendant No. 2.

The Subordinate Judge held that the deed of sale by Narsing to plaintiff was proved; but he found that Narsing did not acquire any title to the property, which on Narsubai's death devolved upon her son. He, therefore, dismissed the suit.

The plaintiff appealed.

The appeal was heard by Chandavarkar and Knight, JJ., on the 30th September 1907. Their Lordships referred certain issues to the lower Court for trial; and in doing so delivered the following interlocutory judgment.

CHANDAVARKAR, J.:—The important point in this case is what is the law by which the community called Kamathis—to which the parties belong—are governed.

In the Court below the pleadings appear to have been framed upon the basis that according to the plaintiff the law governing the parties was that of the Mitakshara. According to the defendants it was the law of the Mayukha. But at the trial it [555] appears that reliance was placed by the defendants apparently upon the law of the Andhra School in Southern India, because the Kamathis had originally migrated from that part of the country where the *Smriti Chandrika* is the prevailing authority on Hindu Law. But whether this case was specifically made by the defendants is not quite clear from either the evidence or the judgment. And it appears from the judgment of the Subordinate Judge that he has relied upon the law of the *Smriti Chandrika* as being applicable to the parties. But no issue was raised to try that particular case and accordingly the evidence led as to it is so meagre that we cannot come to any satisfactory decision upon it as



it stands. It is conceded here as it was in the Court below that the Kamathis who have settled in Bombay and other parts of this Presidency originally came about 70 years ago from some part of Deccan Hyderabad. That being common ground between the parties the question is:—What is the Hindu Law by which they were governed in the place from whence they have migrated? And whether since their settlement here and in other parts of the Presidency they have adhered to it or adopted the law of the Mitakshara or Mayukha School prevailing in this Presidency.

According to the decisions of the Privy Council, when any community or family of Hindus migrate from one place to another, they must be held to have adhered to the law of their original place if they have not changed their original manners, habits and customs and religious observances. We think therefore that distinct issues must be raised to try these important points and that additional evidence should be taken. The issues will be as follows:—

(1) Whether the Kamathis settled in this Presidency have abandoned the manners and customs and usages of the place of their origin?

(2) Whether they have adopted the law of the Mitakshara and the Mayukha since their settlement in this Presidency?

The Subordinate Judge should record the evidence that might be adduced by the parties and return it to this Court within 3 months with his findings thereon.

[556] The Subordinate Judge will be at liberty to allow any of the witnesses to be examined on commission. We have thought it necessary to allow this additional evidence because it affects a large class of the people in this Presidency and our decision will become a precedent as to the law of succession governing them. The lower Court recorded its findings in the negative on the issues.

The appeal was again heard and the following issues were again remanded to the lower Court for finding:—

1. From what part of the Nizam's territories did the deceased Shetiba Venkati or his ancestors migrate to Bombay?

2. By what school of Hindu Law are the Hindus in general and the Kamathis in particular of the class of which the family of the deceased belong, governed?

And it is further ordered that in finding on these issues the lower Court do determine the language which is spoken in their homes by the members of the family of the deceased and the community to which they belong amongst other considerations.

The following findings were recorded: (1) from a place called Bodhan in the Indur District of the Nizam's territories; (2) no evidence; (3) Telagu.

The appeal came on for final hearing before Chandavarkar and Heaton, JJ.

G. S. Rao and K. A. Padhye, for the appellant:—The parties to this case are Kamathis, who are governed by the Mayukha. The lower Court has erred in applying to them the law contained in the Smriti Chandrika.

The Kamathis originally resided in the Deccan Hyderabad, which is divided into two parts, known as Maratha Wadi and Telangan Wadi. The Kamathis belong to the former, where the Hindu Law prevalent in Bombay is followed. See H. H. The Nizam's Gazetteer of Hyderabad, p. 31. See also 14 Ain-i-Dekhan, pp. 3, 11; Ain-a-Dekhan, Civil, p. 3.

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84 B. 558=7  
I. C. 459=12  
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*W. B. Pradhan*, for respondents Nos. 1 and 2:—The Kamathis came from the Southern India; they are of the old Dravidian stock and speak Telugu language (see the Bombay Gazetteer, [557] Vol. XXI, p. 108, foot-note; Thana, Vol. XIII, Pt. I, p. 119; Mackintosh (1836), Transactions of the Bombay Geographical Society, Pt. I, p. 202; Dharwar, Vol. XXII, pp. 136, 137; Poona, Vol. XVIII, Pt. II, p. 1, and Pt. I, pp. 395—397. They are, therefore, governed by the Smriti Chandrika, which prevails in the country from which they have migrated.

Under the law contained in the Smriti Chandrika, the Anvadhya Stridhan (which is the kind of Stridhan in dispute in this case) descends to the children, male and female, alike. See also *Muttu Vaduganadha Tevar v. Dora Singha Tevar* (1), *Sengamalathammal v. Valayanda Mudali* (2), *Venkatarama Krishna Rau v. Lhujanga Rau* (3). If, however, the Mitakshara is held applicable to the parties, then the view adopted in *Lal Sheo Pertab Bahadur v. Allahabad Bank Ltd.*, (4), ought to be followed here; and if the Mayukha is held to apply, then the marriage of Narsubai having been in an unapproved form and the parties Shudras, her property goes not to her husband but to the heirs of her mother. See *Janglubai Shivappa v. Jetha Appaji Marwali* (5).

Even treating Narsubai as the kept mistress of the defendant No. 2, the successor to her property would be not her husband but those who have fallen with her. See *In the goods of Kamineymoney Bewah* (6), *Sivasangu v. Minal* (7), *Sarna Moyee Bewa v. Secretary of State for India in Council* (8). Narsubai's son by defendant No. 2 should, as her illegitimate son, succeed to her property. See also *Pandaiya Telaver v. Puli Telaver* (9), *Mayna Bai v. Uttaram* (10), *Myna Boyee v. Ostaram* (11), *Venku v. Mahalinga* (12), *Arunagiri Mudali v. Ranganayaki Ammal* (13) and *Jogendro Bhuputi v. Nittyanud* (14).

CHANDAVARKAR, J.:—Upon the evidence adduced in this case we are of opinion that the parties, who are Kamathis, settled in [558] Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where these agree, where they differ, the Mayukha law must prevail.

The property in dispute belonged originally to one Laxmibai. She had obtained it after marriage by way of gift from her husband on the 11th of January 1894. Therefore it became her *stridhan* of the kind designated in Hindu Law as *anvadhya* or gift subsequent to marriage. Laxmibai died in 1896, leaving a son by name Elshetti and a daughter named Narsubai. As was held by this Court in *Dayaldas Laldas v. Savitribai* (15), the *anvadhya stridhan* of a woman descends on her death to her sons and daughters jointly, not to the daughters alone. Accordingly, the property in dispute was inherited by Narsubai and her brother Elshetti in equal shares. Narsubai died in 1903, and the question is, who inherited her moiety of the property? It is proved from the evidence in the case that, although Narsubai was married to one Narsinga, yet she lived in adultery with respondent No. 2 and gave birth to a son. When she died,

(1) (1881) 3 Mad. 290.

(2) (1867) 3 M. H. C. 812, 813, 816.

(3) (1896) 19 Mad. 107.

(4) (1908) L. R. 30 I. A. 209 at p. 218.

(5) (1908) 10 Bom. L. R. 522.

(6) (1894) 21 Cal. 697, 701.

(7) (1889) 12 Mad. 277.

(8) (1897) 25 Cal. 254.

(9) (1867) 1 Mad. H. C. 472.

(10) (1864) 2 Mad. H. C. 196.

(11) (1861) 8 M. I. A. 400.

(12) (1888) 11 Mad. 893, 897.

(13) (1897) 21 Mad. 40.

(14) (1886) 11 Cal. 702, 714.

(15) (1909) see ante p. 385.



she left her surviving her husband and the son. The husband sold the property in dispute to the plaintiff on the 10th of June 1904. Respondent No. 2's case in the Court below was that Narsubai became his lawful wife by marriage after she had obtained a divorce from Narsinga. The Subordinate Judge has held the divorce not proved, and we agree with him. The evidence to prove it is of an unsatisfactory character and establishes no more than that Narsubai lived with respondent No. 2 and had a son by him.

Now the question is, whether her moiety descended on her death to the son born of her in adultery or to her husband Narsinga?

It is contended before us that the son inherited, because the law as to *stridhan* is that a woman's son is heir to it before her husband. But that law applies to a married woman, that is, one whose marriage was celebrated according to one of the recognised forms. When the text-writers say that the *stridhan* of a married woman, who has died "without issue," goes to her husband, if she was married in one of the approved forms, the words [559] "woman," "issue" and "husband" were intended to be used as correlative, or, as Vijnaneshwara in another part of the *Mitakshara* terms it, in the *prati yugika* sense, to show that the issue contemplated was issue of the woman by her husband and none else. Therefore, where a woman was married according to the approved form, the term "dies without any issue" means issue of that marriage. There is no authority whatever in the Hindu Law for the proposition, which is contended for by Mr. Pradhan, that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that son supersedes the husband as heir to the *stridhan*.

It is next contended by Mr. Pradhan that we must presume under the circumstances of this case that the marriage of Narsubai with Narsinga was according to the unapproved form. That, however, is not the law. See *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (1), *Gojabai v. Shree-mant Shahojirao Maloji Raje Bhosle* (2). Even among Shudras, the law will presume the marriage to have been according to the approved form, if the parties belong to a respectable family. The Kamathis are an intelligent and respectable section of the Hindu community. We must, therefore, act upon the presumption that the marriage of Narsubai was according to one of the approved forms. Under these circumstances, the plaintiff obtained a valid title from the sale of the property to him by Narsubai's husband, and, therefore, he is entitled to half a share in the property in dispute.

We reverse the decree and allow the plaintiff's claim to the extent of a moiety of the property.

Costs throughout in proportion.

We also direct an inquiry as to mesne profits of a moiety of the property from the institution of the suit until—

- (i) The delivery of possession to the decree-holder, or
- (ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
- (iii) The expiration of three years from the date of the decree, whichever event first occurs.

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1. C. 458=12  
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(1) (1866) 11 M. I. A. 189.

(2) (1892) 17 Bom. 414.



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34 B. 560=7  
I. C. 661=12  
Bom. L. R.  
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34 B. 560 (=7 I. C. 661=12 Bom. L. R. 577.)

[560] APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

YELLAPPA BIN RAMAPPA KURI (*original Defendant No. 2*),  
Appellant, v. MARLINGAPPA BIN CHAVADAPPA AND ANOTHER  
(*original Plaintiffs*), Respondents.\*  
[23rd June, 1910.]

*Shetsanadi* † lands—Rules framed under Act XI of 1852 (Bombay) ‡—Government continuing the *shetsanadi* lands to the family of the *shetsanadi* who is discharged by Government without any fault on his part—Continuance on condition of paying full survey assessment on the lands—Subsequent resumption of the lands by Government.

On the death in 1865 of the then *shetsanadi*, one B, Government appointed one Y as the new *shetsanadi*; but under the rules framed under Bombay Act XI of 1852, Government continued the *shetsanadi* lands to the family of B on condition of their paying full survey assessment on the lands. The remuneration of Y was made payable out of the extra assessment recovered in 1905. Government resumed the lands and handed them over to Y for his services.

Held, that both the order passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment.

[561] Held, also, that the proceedings of 1905 were on the supposition that what was done in 1865 on B's death had the effect of continuing the lands in dispute as one reserved for *shetsanadi* service; but that was not its effect, and the proceedings in question were *ultra vires*.

APPEAL from the decision of T. D. Fry, District Judge of Dharwar.

One Bashya was the registered *shetsanadi* and as such certain lands were continued to him by Government free from assessment as remuneration for his services.

On his death in 1865, Government appointed one Yellappa as the new *shetsanadi*; but under the rules framed under Bombay Act XI of 1852, Government continued the lands to the family of Bashya on condition of paying to Government full survey assessment on the lands. The remuneration of the new *shetsanadi*, Yellappa, was arranged to be paid out of the extra assessment thus levied.

Yellava, the mother and heir of Bashya, was in enjoyment of the lands. She sold them to the plaintiffs in 1876.

\* First Appeal No. 1 of 1908.

† The *shetsanadi* is one holding a sanad or grant of lands for military service, applied especially to a local militia acting also as police and garrisons of forts; also an assignment or grant of revenue of land for certain services; the assignment, as well as the office, may be hereditary.—*Wilson's Glossary of Anglo-Indian Terms*.

‡ 1. The Honourable the Governor in Council affirms the principle that the lands of a *shetsanadi* are liable to be resumed and given to another if the holder misconducts himself. In reserving this right, however, the Governor in Council rules that it shall be exercised only in cases of extreme misconduct.

3. In ordinary cases of misconduct the dismissed *shetsanadi* will be allowed to remain in possession of the land, but the lands will be subjected to full assessment and to a further payment, if necessary, to make up the remuneration of the person employed to perform service.

5. Whenever a *shetsanadi* is discharged without fault because the service is no longer required, the land will remain in his possession subject to the survey assessment and no further demand can be made.



In 1883, on the application of Yellappa, Government started an enquiry into the question whether they could resume the lands and place them in Yellappa's possession. It was decided that they could not. In 1905, Government again started a similar enquiry, resumed the lands and placed them in Yellappa's possession.

The plaintiff filed this suit against the Secretary of State for India in Council (defendant No. 1) and Yellappa (defendant No. 2), to obtain a declaration of title and to recover possession of the lands.

The defendants contended *inter alia* that the orders complained of by the plaintiffs were legally passed under the rules framed under Bombay Act XI of 1852.

The District Judge decreed the plaintiffs' claim holding that they were not liable to eviction under the rules. The grounds of his judgment were expressed as follows :—

The heirs of the deceased had to pay full assessment to Government and had no further obligation of any sort. It need hardly be added that they were in no way concerned with the manner in which Government might deal with the [562] assessment levied. They ceased to be *shetsanadis* and no longer enjoyed the exemption which had been allowed them while they were still *shetsanadis*. From the date of the Collector's order they became ordinary occupants as defined in section 3 (16) of the Land Revenue Code and it will hardly be suggested that, holding as they did in that capacity, their alienage would legally be subjected to the treatment meted out to him in this case.

Clearly the Collector was following this last rule when he passed the order which I have quoted. As I read that rule it gave the *shetsanadi* an "occupancy" on full assessment in lieu of his more favoured tenure. If the services of Bashya had been dispensed with during his lifetime, he would have become an ordinary occupant with nothing whatever to distinguish him from the ordinary rayat whose rights are hereditary and transferable. If on his death the Collector has taken away the land itself, he would have been treating the family with the severity allowed only in case of extreme misconduct.

When it is remembered that these rules provided for the remuneration of the person performing the service, it seems clear that Government did not and could not look for further liability in that land. They "resumed" the land in the sense in which that term is generally understood when applied to inam land. In other words they make it *khalsa* and with this imposition of full assessment the favoured tenure of the *shetsanadi* became the "occupancy" of the ordinary cultivator.

The Collector following as in duty bound the directions of Government levied full assessment on the land of a *shetsanadi* the continuance of whose office was no longer necessary, and on condition of payment of full assessment granted the occupancy to the *shetsanadi* heirs. There the relations between Government and the occupants ceased and I can imagine no circumstances which could legally justify the removal of these occupants or those claiming under them with a view to the transfer of their rights to the person holding the office of the *shetsanadi*.

I am not dealing here with what might be equitable. I look on the matter from the strictly legal point of view and my conclusion is that Government had no better right to vest the plaintiff than they would have to eject the neighbouring tenant on the ground that his land should preferably be with the Kulkarni as part of his remuneration.

I hold that no particle of liability other than payment of assessment adhered to the land when it was continued to Bashya's heirs (even if any liability ever existed) and that these heirs had as much right to alienate their holding as is recognized in the case of all occupants under the Land Revenue Code and consider the case as I may I cannot perceive any alternative to this finding.

The defendant No. 2 appealed to the High Court.

G. S. Rao, for the appellant.

D. A. Khare, for the respondent.

[563] CHANDAVARKAR, J.:—It has not been contended before us, nor does it appear to have been contended in the Court below by either of the

1910  
JUNE 28.

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A 'PELLATE  
CIVIL.

84 B. 530 =  
I. J. 631 = 12  
Bom. L. R.  
577.



1910  
JUNE '28.

APPELLATE  
CIVIL.

34 B. 560=7  
I. C. 661=12  
Bom. L. R.  
577.

defendants, that the orders passed, and the action taken by the Collector in consequence of those orders in 1865, were illegal. One of the rules then in force and having the force of law under Act XI of 1852 provided that in case of the discharge of a *shetsanadi* "without fault" but because his service was no longer required, his *shetsanadi* land should be allowed to remain in his possession, subject to the survey assessment, and that no further demand could be made. And this is substantially what the Collector did in respect of the land in dispute on the death of Bashya in 1865. The *shetsanadi* service required of Bashya's branch of the family was dispensed with upon the ground that there was no necessity for it; full survey assessment was imposed upon the land; and Bashya's heir was allowed to remain in possession, subject to the survey assessment. After that, no further demand could be made from the person let into possession on that condition. Both the order passed and the action taken under the rule had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it so long as he paid the survey assessment.

But it is urged for the appellant, who was the 2nd defendant in the Court below, that in 1865 the Collector also entered the land in the appellant's name in the revenue records as a *shetsanadi* holding and that he also ordered a portion of the amount of the assessment payable by Bashya to be paid to the appellant for his services as a *shetsanadi*. The appellant's pleader has not been able to show why the land was entered in his client's name in the revenue records as a *shetsanadi vatan* contrary to the implication of the rule just mentioned. The action taken under that rule conferred a certain right upon Bashya's heir; and the mere entry could not affect that right or preserve that as a *vatan* which, in virtue of the action of the authorities under or on the analogy of the rule, had ceased to partake of that character. The land was not made over to the appellant; nor were its profits as such charged with the remuneration for his services as a *shetsanadi*. He had held the office of *shetsanadi* independently of this land in Bashya's lifetime; and on the latter's death all that was done was that his remuneration for that service was increased and the enhanced amount was made payable, not from the land in dispute, but out of the assessment, payable to Government by its occupant. That was an arrangement between the appellant and Government, which could not prejudice the rights of Bashya's heir in the absence of any law affecting that right.

The proceedings adopted by the Collector in 1883 and in 1905, on which the appellant relies in support of his case, were on the supposition that what was done in 1865 on Bashya's death had the effect of continuing the land in dispute as one reserved for *shetsanadi* service. That was not its effect and the proceedings in question were, in our opinion, *ultra vires* of the Collector.

This is the conclusion arrived at by the learned District Judge in his lucid judgment, and we entirely agree with him.

His decree under appeal must be confirmed with costs.

*Decree confirmed.*



34 B. 566 (=8 I. C. 648=12 Bom. L. R. 988).

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

JOHN GEORGE DOBSON, Plaintiff, v. THE KRISHNA  
MILLS, LTD., Defendants.\*

[11th March, 1910.]

*Letters Patent, clauses 12 and 14—Cause of action arising partly within jurisdiction  
—Further cause of action arising wholly outside jurisdiction—Joinder—Time of  
application.*

An application under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under clause 12; nor is there anything in clause 14 to show that this application must be made before the plaint is filed. There is nothing to prevent the plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented.

[565] PROCEEDINGS in Chambers.

The plaintiff, having obtained leave to sue under clause 12 of the Letters Patent, took out a summons calling on the defendants to show cause why he should not be allowed under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction.

*Inverarity* appeared for the defendants to show cause.

*Shortt* appeared for the plaintiff in support of the summons.

MACLEOD, J.:—The plaintiff in this suit is a merchant carrying on business at Manchester in England. The defendants are a Registered Company carrying on business at Beawar outside the jurisdiction of this High Court. In 1907 the plaintiff commenced to contract with the defendants to sell their yarns which the defendants were to pay for in Bombay against documents, and shipments of yarn were made in pursuance of such contracts. In respect of one contract after a portion of the yarn contracted for had been taken delivery of by the defendants, they gave notice to the plaintiff that they would not take delivery of the remainder owing to inferiority of quality. The plaintiff accordingly did not ship the balance and claims as damages the difference between the contract price and the market price at the date of the notice. I shall call this claim A. In respect of yarn shipped under another contract the defendants refused to take delivery. The plaintiff claims the value of this shipment with interest and charges. I shall call this claim B. In October 1907 the defendants consigned to the plaintiff in England 11 bales of yarn for sale and the plaintiff advanced £100 against this shipment. The account sales showed a balance of £15 due to the plaintiff which the defendants have refused to pay and the plaintiff seeks to recover this sum from the defendants. I shall call this claim C. It is obvious that in the case of claims A and B the cause of action arose only in part within the local limits of the Ordinary Original Jurisdiction of this Court and that in the case of claim C the cause of action arose wholly outside the said limits. But in para 13 of the plaint it is merely stated that the cause of action in respect of the said claims and in particular in respect of claim B arose partly in [566] Bombay within the jurisdiction of the Court, without any mention being made that the cause of action in respect of claim C arose wholly out of the jurisdiction.

\* Original Suit No. 64 of 1910.

1910  
MAR. 11.

ORIGINAL  
CIVIL.

34 B. 566=8  
I. C. 648=12  
Bom. L. R.  
988.



1910  
MAR. 11.

ORIGINAL  
CIVIL.

34 B. 564=8  
I. C. 648=12  
Bom. L. R.  
988.

Accordingly when the plaint was presented on the 25th January 1910 to the Judge in Chambers, leave was granted under clause 12 of the Letters Patent.

The plaintiff then proceeded to take out this summons calling upon the defendant to show cause why he should not be permitted to join together in one suit the several causes of action set out or appearing in the plaint and proceed to trial at the same time upon all such causes of action in the suit as framed. The application is made under clause 14 of the Letters Patent which is as follows :—

And we do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immoveable property, the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined in one suit, and to make such order for trial for the same as to the High Court shall seem fit.

The defendants have raised two objections :

(1) That an application under clause 14 cannot be made in a case in which leave has to be obtained under clause 12 in respect of the other causes of action.

(2) That in any event the application should be made before the plaint is filed.

Now the Court has original jurisdiction in respect of a cause of action arising partly within the local limits provided the leave of the Court has first been obtained. Therefore in this case as soon as leave had been obtained the Court had original jurisdiction in respect of claims A and B. It then became lawful for the Court to call on the defendants to show cause why the cause of action in respect of claim C should not be joined in the suit and there is nothing in clause 14 to show that this must be done before the plaint is filed. If no application was made under clause 14 that part of the plaint which related to claim C would be struck out as soon as the case came on for hearing, but as far as I can see there is nothing to [567] prevent the plaintiff making the application at any time before the hearing. However, apart from other circumstances, the measure of his success would probably depend on the application being made at the earliest opportunity, and it would certainly be advisable for a plaintiff to make an application under clause 14 at the time the plaint is presented. On the merits I see no reason why the cause of action in respect of claim C should not be tried in this suit. Evidence will have to be taken regarding the contracts for purchases of yarn by the defendants from the plaintiff, and neither party will be embarrassed by the inclusion of evidence regarding the contract for the sale of yarn by the defendants to the plaintiff.

*Summons absolute.*

Attorneys for the plaintiff :—Messrs. *Smetham, Byrns & Co.*

Attorneys for the defendants :—Messrs. *Bicknell, Merwanji & Romer.*



34 B. 567 (=7 I. C. 663=12 Bom. L. R. 582).

## APPELLATE CIVIL.

*Before Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

VITHAL NARAYAN KARANDIKAR AND OTHERS (*original Plaintiffs*),  
*Appellants*, v. MARUTI NARAYAN KALE, HEIR AND  
 LEGAL REPRESENTATIVE OF SUNDRABAI, DECEASED,  
 AND OTHERS (*original Defendants*), *Respondents*.\*

[12th April, 1910.]

*Family property—Division under an award—House of residence—Prohibition of sale by  
 a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale  
 —Prohibition not effective.*

An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The [568] sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them,

*Held* that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales *in invitum* the judgment-debtor.

SECOND appeal from the decision of V. V. Vagh, Joint First Class Subordinate Judge of Poona with appellate powers, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The facts of the case were as follows :—

Three co-sharers Dattatraya, Narayan and Balvant effected partition of family property under an award of arbitrators dated the 30th November 1880. One of the conditions of the award was as follows :—

In case of a sale by any of the brothers of his portion of the house of residence he should sell it to his brother for the aforesaid price (Rs. 1,800). He should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (brothers) are not willing to buy it. In case of making a mortgage of the same the brothers must have precedence up to the amount of Rs. 1,700 and the term of notice in regard to sale shall hold good in case of mortgage.

Afterwards one Sundrabai obtained a decree against Dattatraya, one of the co-sharers, and in execution got his share in the said house attached. Thereupon the present plaintiffs, that is, the sons of Narayan, another co-sharer, intervened by a petition and sought to have the attachment raised but their petition was dismissed for want of prosecution. The attached share of Dattatraya was then sold in the execution-proceedings and it was purchased at auction by one Vishnu Shankar Gore.

After the Court-sale the plaintiffs, that is, the sons of Narayan, brought the present suit on the 26th July 1904 against Sundrabai, the judgment-creditor of Dattatraya, as defendant 1, Parvatibai, widow of Dattatraya the judgment-debtor, as defendant 2, and Vishnu Shankar Gore, the auction-purchaser, as defendant 3. The plaintiffs prayed among other things for a declaration that Dattatraya's share in the house of residence was not liable to be sold in execution of the decree against him, that, if at all, the right to receive Rs. 1,800 as the value of the [568] share was liable to be sold under the terms of the award and that the execution-sale was null and void.



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APRIL 12.

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APPELLATE  
CIVIL.

34 B. 567=7  
I. C. 663=12 for.

Bom. L. R.  
582.

Defendant 1 was absent though duly served.

Defendant 2 contended that the suit to enforce one of the terms of the award could lie.

Defendant 3 answered *inter alia* that he had purchased the property at auction-sale for valuable consideration and that the provision in the award was not capable of the construction which the plaintiffs contended

The Subordinate Judge found that the provision in the award was not binding on defendant 3 the auction-purchaser, that the term in the award regarding the co-sharer's right of pre-emption was not capable of bearing the interpretation sought to be put upon it by the plaintiffs and that defendants 1 and 3 who were strangers to the award were not bound by it. He, therefore, dismissed the suit.

On appeal by the plaintiffs the Appellate Court relying on the decision in *Shaikh Ferasut Ali v. Ashootosh Roy Singh* (1) confirmed the decree.

The plaintiffs preferred a second appeal.

*S. V. Bhandarkar* for the appellants (plaintiffs):—Our first contention is that what was attachable under the terms of the award was the value of the share in the house, namely, Rs. 1,800 and not the portion of the house itself. Next we contend that the right of pre-emption runs with the property. It is not purely a personal right. It is incident to or arises out of the ownership of immoveable property: *Karim Baksh Khan v. Phula Bibi* (2).

*M. V. Bhat* for respondent 3 (defendant 3):—The right of pre-emption as given and enjoyed by law and custom is generally sought to be exercised in connection with transactions between individuals. The privilege does not attach to sales held at the instance of the Court in execution of a decree: *Shaikh Ferasut Ali v. Ashootosh Roy Singh* (1). The language of the proviso in the [570] award clearly shows that the right of pre-emption was intended to apply to private sales and not to sales *in invitum* the judgment-debtor.

SCOTT, C. J.:—In this case the plaintiffs sue as heirs of Narayan Govind Karandikar to have it declared that a purchase at a Court-sale by the third defendant is not binding upon them. They based their claim upon the fact that by an award under which certain family property was divided between their father and his two co-sharers of whom one is the judgment-debtor, it was provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for the aforesaid price of Rs. 1,800 and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (the co-sharers) were not willing to buy it.

It was held by the first Court that the correct reading and interpretation of the words "if any one should have occasion to sell his share of the house of residence" was that the term of pre-emption was contemplated to attach to sales made privately and willingly and that therefore the attachment and sale *in invitum* the judgment-debtor was legal and proper.

In the lower Appellate Court the same conclusion was arrived at upon the authority of *Shaikh Ferasut Ali v. Ashootosh Roy Singh* (1) where the learned Judges say "the only other privilege which the brothers had left to them under the *ikrar* was the right to become purchasers by pre-emption of Mohabharut's share in the event of Mohabharut selling;

(1) (1871) 15 W. R. 455.

(2) (1886) 8 All. 102.



1910  
APRIL 12.  
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APPELLATE  
CIVIL  
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84 B. 567=7  
I. C. 663=12  
Bom. L. R.  
582.

but Mohabharut has not sold his share. It has been sold it is true, but by the action of the Court in execution of a decree passed against Mohabharut, which is quite a different thing. Moreover, if the plaintiffs Ashootosh and Joykishen wished to purchase their brother's share, they could easily have done so by bidding at the sale which took place in execution of the decree." These observations are directly applicable to the case before us.

[571] It is argued, however, on behalf of the appellants that upon the authority of *Karim Baksh Khan v. Phula Bibi* (1) the right of pre-emption is a right running with the land.

Whether the right of pre-emption in the present case is a right running with land or not we do not decide, but if it is, it is not a right which will render the purchase in execution invalid. At most it would give the owner of the right a title to exercise that right as against the purchaser if the purchaser intended to sell voluntarily at some future date.

We therefore dismiss the appeal with costs.

*Appeal dismissed.*

84 B. 571 (=7 I. C. 663=12 Bom. L. R. 586.)

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

BASLINGAPPA PARAPPA AND OTHERS (*Original Plaintiffs*),  
*Appellants, v. DHARMAPPA BASAPPA AND OTHERS (Original*  
*Defendants), Respondents.\**

[16th June, 1910.]

*Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.*

Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved.

On second appeal by the plaintiffs *held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.

*Sadagopachariar v. A. Rama Rao* (2) followed.

[Ref : 29 M. L. J. 91=29 I. C. 248 ; 18 Bom. L. R. 460=37 I. C. 363 ; 49 I. C. 533=36 M. L. J. 79=1919 M. W. N. 46=42 Mad. 271 (F. B.) ;]

[572] SECOND appeal from the decision of T. Walker, District Judge of Belgaum, confirming the decree of E. F. Rego, Subordinate Judge of Saundatti.

Suit for declaration and injunction.

The plaintiffs who were members of a community called Halgars or Devangs of the village of Deshnur sued the defendants alleging that they

\* Second Appeal No. 846 of 1907.

(1) (1886) 8 All. 102.

(2) (1902) 26 Mad. 376.



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JUNE 16.  
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APPELLATE  
CIVIL.

34 B. 871=7  
J. C. 663=12  
Bom. L. R.  
586.

had built a temple at Deshnur and dedicated it to the Goddess Banshan-kari, that they had constructed a car for procession to neighbouring temples, that in the year 1904 they had applied to the District Magistrate for the necessary permission and that the defendants having opposed the application, the Magistrate referred the plaintiffs to a Civil Court. The plaintiffs, therefore, prayed for a declaration of their right to march in procession with the car along the road which passed through two gates called the Mulla Agashi and Durga Agashi and for an injunction restraining the defendants from interfering with the plaintiffs' right.

The defendants, who were members of the Lingayat community, answered *inter alia* that the suit was not maintainable in a Civil Court, that the plaintiffs had no right to move in procession along the road mentioned in the plaint and that the plaintiffs had built the temple and constructed the car simply to annoy the defendants who had dwelling houses on both sides of the said road.

The Subordinate Judge found that the road in dispute was public, that the defendants had a right to object to the plaintiffs' passing in procession on the road and that the suit must fail as the plaintiffs had not proved any special damage to them. He, therefore, dismissed the suit.

On appeal by the plaintiffs the District Judge was of opinion that on the merits the plaintiffs were entitled to succeed but relying on the decisions in *Satku valad Kadir Sausare v. Ibrahim Aga valad Mirza Aga* (1) and *Kazi Sujaudin v. Madhavdas* (2), he confirmed the decree on the ground that without proving special damage the plaintiffs could not succeed.

[578] *Weldon* with N. A. *Shiveshvarkar* for the appellants (plaintiffs).  
*G. S. Mulgaumkar* for the respondents (defendants).

SCOTT, C. J.:—In this case the plaintiffs sue on behalf of themselves and of other members of a religious community at Deshnur to have a declaration of their right of marching in procession with a car along a particular public road to certain temples, and for an injunction restraining the defendants from interfering with the plaintiffs.

The suit arises out of an application made by members of the plaintiffs' community to the District Magistrate under the local Police Rules for permission to hold the procession and to march with the car along the road. The Magistrate not being convinced of their legal right so to use the public road referred them to a Civil Court for a declaration of that right.

The members of another religious community who occupy land abutting upon the road at a point where the width of the roadway is defined by two gates called Mulla Agashi and Durga Agashi, have put in a written statement denying the right of the plaintiffs to march along the road.

In the first Court it was found that the road was a public road, but it was held the plaintiffs' suit must fail as the road being public the plaintiffs could not sue unless special damage were shown and proved, and reference was made to *Satku valad Kadir Sausare v. Ibrahim Aga valad Mirza Aga* (1) and *Kazi Sujaudin v. Madhavdas* (2) in support of that decision. The suit was, therefore, dismissed and that decree was affirmed by the District Judge.

In appeal before us it was contended for the respondents that the plaintiffs wished to conduct along the road a car which was too large to pass through what was properly speaking the public road as defined by

(1) (1877) 2 Bom. 457.

(2) (1898) 18 Bom. 692.



the space between the two gates which we have already referred to. We, therefore, remanded the case for a finding as to whether the car of the plaintiffs could pass through the two gates. The lower Court found that it could pass. It was then contended by the respondents that the car which had been submitted for measurement to the lower Court on this [574] issue was not the car which the plaintiffs had originally wished to conduct in procession. We then referred that question to the lower Court and it was held that the car was the same car. The question, therefore, is whether the plaintiffs have a right to conduct in religious procession a car which is not too wide to pass along the public road.

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34 B. 571=7  
I. C. 663=12  
Bom. L. R.  
586.

There has been no obstruction of their right but the defendants in consequence of the course taken by the District Magistrate have denied the right claimed by the plaintiffs.

The suit is not for the removal of a public nuisance but for a declaration of the right of an individual community to use the public road. It is, therefore, a suit which raises the same question as that which was the subject of the decision in *Sadagopachariar v. A. Rama Rao* (1), in which the Court held that the correct view is that every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege. That case was appealed to the Privy Council and their Lordships of the Judicial Committee held that the decision of the lower Court was perfectly right that all members of the public have equal rights in public roads.

We, therefore, allow the appeal, reverse the decree of the lower Court and declare that the plaintiffs have a right to march in procession with their car along the public road referred to in the plaint and we pass an injunction restraining the defendants from interfering with the plaintiffs in the exercise of that right.

Although we have decided the question of civil right and granted an injunction in the terms prayed for, it must not be supposed that by so doing we intend in any way to fetter the discretion of the District Magistrate in passing such orders as he may be entitled to pass with reference to the procession under the Police Act Rules or any other relevant rules for the time being in force.

The respondents must pay the costs throughout.

*Decree reversed.*

34 B. 575 (=12 Bom. L. R. 686=7 I. C. 940).

[575] APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

TRIMBAK RAMKRISHNA RANADE (*original Plaintiff*), Appellant, v.  
HARI LAXMAN RANADE AND OTHERS (*original Defendants*),  
Respondents.\*

[1st July, 1910.]

*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.*

\* F. A. No. 215 of 1908.

(1) (1902) 226, Mad. 876.



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JULY 1.

APPELLATE  
CIVIL.

24 B. 576=12  
Bom. L. R.  
686=7 L. C.  
940.

A decree was adjusted outside the Court. No notice was given to the Court of the adjustment: and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872.

*Held*, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882.

There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 253 enacts a special law for a special purpose whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

*Per Chandavarkar, J.*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice: and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law.

*Per Heaton, J.*—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree.

[*Rej*: 16 C.W.N. 923=13 I.C. 63; 63 I.C. 553; 68 I.C. 934; 76 I.C. 811=50 Cal. 468; *Rel*. 78 I.C. 776=79 I.C. 89; *Ref* 65 I.C. 820=1922 M.W.N. 189; *Fol*. 21 I. C. 926=19 O.L.J. 126; *Ref*. 29 M.L.J. 219=30 I.C. 357 (Estoppel by conduct).]

[576] APPEAL from the decision of M. V. Kathawate, First Class Subordinate Judge of Ahmednagar.

Proceedings in execution.

The decree, of which the execution was sought, was passed in 1893 and was confirmed in appeal in 1895. It directed partition of property between the plaintiff and the defendants, who were members of a joint Hindu family. The plaintiff was, under the decree, awarded annually a 1/13th share of the income of the family property. It was also directed that the parties should pay in equal shares the debts due by the family to outsiders.

In 1899, the parties entered into an arrangement, whereby the plaintiff relinquished his share in the family property to the defendants, and the defendants undertook to pay plaintiff's share in the family debts and also to pay to the plaintiff Rs. 125 every year for his maintenance, and Rs. 100 to his daughter. After the arrangement, the plaintiff continued to receive payments from the defendants. The Court was not informed of the arrangement, nor was its sanction obtained under section 258 of the Civil Procedure Code, 1882.

The plaintiff applied to execute the decree. The defendants contended that the arrangement which was acted upon by the plaintiff barred the execution. The plaintiff replied that the deed evidencing the arrangement was taken from him under coercion and undue influence; but he led no evidence to prove his allegation.

The Subordinate Judge found that the plaintiff had acted under the arrangement and was receiving thereunder payments from the defendants, who had also to liquidate a portion of the plaintiff's share in the family



debts. He rejected the application for execution on the following grounds :—

"It seems to me that the plaintiff is estopped by his conduct from repudiating it. And he cannot now execute the decree. Section 252 prevents the executing Court from recognising payments or adjustments not certified to it and not sanctioned by it. It does not affect the law of estoppel as laid down by section 115 of the Evidence Act."

The plaintiff appealed to the High Court.

[577] *G. K. Dandekar* for the appellant:—A decree-holder has to certify adjustment of a decree to the Court; but if he fails to do so, it is equally open to the judgment-debtor to move the Court. If, notwithstanding this, the judgment-debtor continues making payments which are not certified to the Court, the decree-holder is not thereby estopped from executing the decree. Section 115 of the Indian Evidence Act does not apply here: it is, at the most, a rule of evidence and nothing more.

*S. K. Sane* and *S. K. Godbole* for the respondents:—The plaintiff has in the execution proceedings admitted to have received certain payments from the defendants. These payments should, in any event, be credited in defendants' favour. See *Gopal Das v. Ganga Ram* (1).

CHANDAVARKAR, J.:—The *darkhast*, in respect of which this appeal is preferred, was presented for the execution of a decree for partition dated the 4th of July 1893. By that decree the appellant was awarded annually a 1/13th share of the income of the property belonging to him and his co-parceners, and it was also declared that they should pay in equal shares the debts due from them, as members of a joint Hindu family, to outsiders.

By the present *darkhast* the appellant sought, in execution of the decree, for his share of the income due for 13 years immediately preceding the *darkhast*. He also asked the Court to determine his share of the debts and to deduct it from his share of the income awardable under the *darkhast*.

The application for execution was opposed by the respondents on the ground that the appellant had in November 1899 by a deed relinquished his annual share of the income awarded to him by the decree, in consideration of receiving from the respondent Vishnu, Rs. 125 a year as maintenance.

The appellant admitted execution of the deed but pleaded that he had executed it under coercion. He led no evidence, however, in the lower Court to substantiate that defence. The Subordinate Judge held coercion not proved.

[578] But it was contended before him by the appellant that, as the arrangement under the deed was pleaded as an adjustment and satisfaction of the decree outside the Court, and had not been certified to it as required by section 258 of the Code of Civil Procedure (Act XIV of 1882), the Court could not recognise it as valid but was bound to execute the decree.

The Subordinate Judge overruled the contention, holding that, as the appellant had, after executing the deed, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act.

This view of the Subordinate Judge gives the go-by to the plain language of the last paragraph of section 258 of Act XIV of 1882, which was in force at the time of this *darkhast*. It says that a Court which is

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(1) (1888) ALL W. N. 115.



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asked to execute a decree for money shall not recognise for the purposes of execution any adjustment of it, whole or partial, or any payment, made outside the Court and not certified to it as required in the preceding part of the section. When the law directs that such adjustment or payment "shall not be recognised" for the purposes of execution, it means that the adjustment or payment, as the case may be, should be treated as an invalid or void transaction, so far as the executing Court is concerned. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 of Act XIV of 1882 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. As held by the Privy Council in *Gokul Manjar v. Pudmanund Singh* (1), "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

The Subordinate Judge has disallowed the *darkhast* also on the ground that the appellant is not entitled to seek execution in respect of his share of the income before paying his share of [579] the debts due to creditors by both the appellant and the respondents as co-parceners in a joint Hindu family. But the decree does not make the payment by the appellant of his share of the debts a condition precedent to his right to receive his share of the income. The decree merely declares by way of an independent provision that the debts shall be paid equally by the co-parceners.

This is conceded by the respondents' pleader before us.

Upon these grounds the order in execution appealed from must be reversed and the *darkhast* remitted to the lower Court for fresh hearing and disposal.

In dealing with the *darkhast* it will be competent for the Subordinate Judge to consider whether, apart from the appellant's right to execute the decree in spite of his deed, his conduct in seeking execution has been fraudulent so as to render him liable to a criminal prosecution. Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the Criminal Law.

It will also be competent for the Subordinate Judge, in dealing with the *darkhast*, to consider whether under section 258 of Act XIV of 1882, the respondents' plea of an adjustment outside the Court, put in as a defence to the *darkhast*, can be treated as notice, to the Court, of the adjustment, satisfying the provisions of the section regarding certification, so as to warrant the Court in holding that the decree, having been wholly satisfied, according to law, is no longer capable of execution. On this point I express no opinion.

Costs of the *darkhast* hitherto incurred in the lower Court and here to abide the result.

HEATON, J.:—I think that this is a matter which is substantially disposed of on a preliminary point, and wrongly disposed of, and therefore it must be remanded to the lower Court to be disposed of on its merits.

(1) (1902) L. R. 29 I. A. 196 at p. 202.



[580] Curiously enough, I say curiously, because after hearing what this matter is about, it so strikes me; no one concerned appears to doubt that we are dealing with a thing which is an adjustment of a decree. It seems to me that the question arises at the very outset whether this is an adjustment of a decree at all; or whether it is a transfer of a right acquired under a decree, which is quite a different thing. If it is the latter no question under section 258 of the old Code of Civil Procedure arises at all.

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However, it has been assumed that the matter is an adjustment of a decree and that we are concerned with section 258. The lower Court has taken this view and has come to the conclusion that section 258 prevents the executing Court from recognising the adjustment in this case; but has decided, notwithstanding, that the plaintiff is estopped from seeking execution of the decree. On this point I concur with my learned colleague that there is not any estoppel.

Therefore, we are left to deal with the matter as an adjustment of the decree and to enquire what is the effect of section 258.

In my opinion section 258 of the Code of Civil Procedure of 1882 provided or intended to provide that the Court executing a decree should record as certified any payment or adjustment of the decree certified by the decree-holder or of which information and satisfactory proof were given by the judgment-debtor. That section laid down a special procedure for the case in which the judgment-debtor appeared as an applicant desiring that a payment or adjustment should be recorded as certified. The law also, in the Limitation Act, provides a period within which this special procedure may be followed.

In fact however that is not the only way in which a judgment-debtor informs the Court of a payment or adjustment. He seldom adopts the special procedure provided by section 258, but more often, as in this case, when the decree-holder has applied for execution and the judgment-debtor has received notice of the application, he pleads, in answer, a payment or adjustment. In the case before us, the judgment-debtor [581] asserts an adjustment of the decree and the decree-holder denies it; were the law to follow its usual course, the Court would enquire and decide whether that adjustment is proved and if it found the adjustment to be proved, would treat it so far as it went as an answer to the decree-holder's claim.

This would be in consonance with the whole spirit of our Code and with the express provisions of section 244.

It was however necessary, or at least desirable, to provide for the particular case in which a judgment-debtor should appear, not as an opponent contesting a claim in execution, but of his own initiative as an applicant seeking to establish a payment or adjustment of the decree. Section 258 deals only with this particular case and with payments &c. certified by the decree-holder.

It is however supposed that the Court is debarred from recognising in any way any payment or adjustment unless it is certified by the decree-holder or proved by the judgment-debtor in accordance with the special procedure provided by section 258. To so suppose is to run counter to the provisions of section 244 which provide that the Court executing the decree shall determine any question between the parties relating to the discharge or satisfaction of the decree, and if what is supposed to be the effect of the law be in truth its effect, it leads to a very singular result; for it means that a decree-holder may fraudulently apply to execute a



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decree twice over; and the Court is prohibited from enquiring whether there is or is not a fraud; and this in spite of the fact that the decree-holder seeks to debar the Court from enquiring into the fraud, by the device of refusing to do what the law says he must do.

If that be the effect of the law, then all I have to say is that the law intends the Court to be used, in this kind of matter, not as an instrument of justice but as an aid to fraud. And, as experience has shown, this is the very effect, where the law is understood to mean, what I am contending it does not and cannot mean.

It is to me abundantly clear that the legislature never intended such a result as an encouragement of fraud. Do the [582] words of the law compel it? I think not; though section 258 is doubtless worded in such a way as to invite misunderstanding. The final clause of section 258 runs thus: "Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any Court executing the decree."

The purpose of section 258 is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise: in this sense, that it at the outset assumes that what is not recorded as paid or adjusted, still remains unpaid or unadjusted. But it is still open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due, having been paid or adjusted; and it is still incumbent on the Court to go into the matter, if a contest on the point is raised. To state the result briefly, the final clause of section 258 raises a presumption, but does not limit the jurisdiction of the Court. This result appears to me to be inevitable if section 258 be read not by itself as an isolated enactment containing a complete statement of the law on the matter it deals with, but as a part of a whole and with reference to its place in the scheme of the Code and its relation to other parts of the scheme.

I am aware that the views, which I have just expressed, are not those which are commonly held. At the same time I am not sure that the argument stated in that form has ever been dealt with in any of the decisions which are contained in the Bombay Series of the Law Reports; and if that be so, seeing that the question does directly arise in this case, I think it may well be considered in the Court, which is to deal with this matter, and I should both be interested and pleased to see the case, if again it comes before the High Court, argued on the lines I have indicated. I have gone perhaps out of my way to express this opinion; but it is a matter which nearly affects the reputation of our Courts, and very closely affects the administration of justice; for [583] to read the law, as it often is read, is, it seems to me, to reverse the principles of justice, and to convert the instruments of justice into instruments of fraud.

*Order reversed.*



34 B. 583 (=7 I. C. 679=12 Bom. L. R. 615).

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

CECIL GRAY, THE SECRETARY AND A MEMBER OF THE WESTERN  
INDIA TURF CLUB (Original Plaintiff), Appellant, v. THE  
CANTONMENT COMMITTEE OF POONA (original Defendant),  
Respondent.\*

[28th June, 1910.]

*Civil Procedure Code (Act V of 1908), sections 2 (17), 80—Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889)—Section 80 applies to actions ex delicto and not to actions ex contractu.*

A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a "public officer" within the meaning of section 2 clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given.

The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions ex contractu.

*Rajmal v. Hammant* (1) considered.

APPEAL from the decision of C. Roper, District Judge of Poona.

Cecil Gray was the Secretary and a member of an unincorporated association styled the Western India Turf Club. He sued on behalf of himself and all other members of the Club.

Under a lease dated the 16th February 1907, made between the Secretary of State for India and the Club, the latter occupied certain lands and buildings in the Poona Cantonment on a rental of Rs. 1,200 per annum.

[584] The defendants, the Cantonment Committee of Poona, were a body corporate constituted under the Indian Cantonments Act (XIII of 1889), having the control and management of the Poona Cantonment Fund. The Poona Cantonment Magistrate was the executive officer of the Committee.

The Governor in Council of Bombay imposed, under section 17, subsection 1 of the Cantonments Act, 1889, a general rate of 4 per cent. per annum of the annual value of houses, buildings and lands within the Cantonment of Poona. The rate was made payable to the Cantonment Magistrate and formed a part of the Cantonment Fund.

The annual value of the Club's lands and buildings was for the purposes of the rate fixed at Rs. 5,033 for the years 1907 and 1908, and the rate amounted to Rs. 201-8-4. The Club did pay the sum of Rs. 100-12-2 as rate for the half-year ending the 31st March 1909. But on the 8th October 1909 the Cantonment Magistrate by a notice to the Club claimed to assess it at the sum of Rs. 9,840 per annum being 4 per cent. on an annual gross income of Rs. 2,46,000.

On the 28th November 1908, the Club paid under protest the sum of Rs. 4,819-3-10, the additional rate for the half-year ending the 31st March 1909, and informed the Cantonment Magistrate that the Club intended to appeal against his assessment to the Cantonment Committee. The appeal was made with the result that the assessment at Rs. 4,819-3-10 was brought down to Rs. 4,671. The Club further paid under protest

\* First appeal No. 9 of 1910.

(1) (1895) 20 Bom. 697.

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another sum of Rs. 4,772-1-3 for the assessment for the half-year ending the 30th September 1909.

The Club, through the plaintiff, filed a suit for an injunction restraining the defendants from recovering from the Club the enhanced assessment, and for recovering the amount of assessment that was paid in excess.

The defendants contended *inter alia* that the suit was bad owing to want of notice provided for in section 80 of the Civil Procedure Code, 1908.

The District Judge tried as preliminary the issue whether the suit was bad for notice under section 80 of the Civil Procedure [585] Code, 1908, and found it in favour of the defendants on the following grounds:—

The preliminary issue thus raised has been argued and I find that notice was necessary. The provisions of the Cantonments Act, 1859, make it clear in my opinion that the members of the Cantonment Committee are in that capacity public officers, as that term is employed in section 80 of the Civil Procedure Code and defined in section 2 (17) (g) of the same Code. The learned Counsel for plaintiffs contends that a corporate body, such as the defendants, cannot come under the term "public officer" who must be an individual. Having regard to section 3 (9) of Act X of 1897 (General Clauses Act) and to section 2 (17) (g), Civil Procedure Code, also to sections 21 and 23 of the Cantonments Act, 1859, I think that every member of the Cantonment Committee is a public officer and so also the Committee as a body. The suit might and would properly have been brought against the Secretary of the Committee as its representative officer and in that event he would certainly come under the definition of a public officer. On the same reasoning the Cantonment Committee, which is the Cantonment authority according to the Act of 1859, is constituted of public officers in so far as they act on the said Committee. Plaintiffs' Counsel raises a second objection against the defendants' plea that notice under section 80 is necessary. It is this. The suit, he contends, is brought on a contract or at least on a quasi-contract, and is not based on tort. To such a suit section 80 is said not to apply. It may be conceded that there are authorities laying down that "ex contractu" suits are not covered by section 80, but I am of opinion that the suit is clearly based on a tort and not on a contract or even a quasi-contract. It is urged for plaintiffs that, when they paid the assessment under protest, a contractual relation arose between them and defendants. This argument is ingenious but it cannot conceal the patent fact that the suit is primarily based on an allegation that defendants in their official capacity wrongly levied certain assessments and to such a case I think section 80 has the clearest application. On these grounds I find that the suit is bad for want of notice under section 80 of the Civil Procedure Code and I accordingly dismiss it with all costs on plaintiffs. I omitted to state that I am to some extent confirmed in the above view of the meaning of the expression "public officer" by a case in this Court Civil Suit No. 63 of 1887, where an action was instituted by private persons against the Cantonment Magistrate in his capacity as Secretary of the Cantonment Committee in respect of a title to certain property in the Poona Cantonment. The plaintiff then served a preliminary notice under section 124 of the late Civil Procedure Code upon the Cantonment Magistrate and subsequently the Secretary of State was joined as a co-defendant. The cause of action in the present suit is at least somewhat similar and the fact that the suit is brought against the Committee and not against the Secretary alone cannot, I think, exempt the plaintiffs from the obligation to serve a preliminary notice.

The plaintiff appealed to the High Court.

[686] *Shortt*, instructed by *Craigie, Blunt and Caroe*, for the appellant:—The suit has been brought against the Cantonment Committee of Poona. The Cantonment Committee is nowhere specifically mentioned as a corporation in the Cantonments Act (XIII of 1859); but it is treated as a corporation, see *The Cantonment Committee, Poona, v. Barjerji Bamanji* (1).

A corporation is not included in the term "public officer" as defined by section 2, clause 17 of the Civil Procedure Code, 1908. The term "public officer" there means "a person falling under any of the



following descriptions"; and the descriptions that follow show that only individual officers are contemplated. A corporation cannot be included within it. The General Clauses Act (X of 1897) no doubt says (section 3, clause 39) that a person shall include "any company or association or body of individuals, whether incorporated or not"; but that description applies only if there is nothing "repugnant in the subject or context." There is the repugnancy in the Civil Procedure Code where the term "person" seems to denote some person who has some one or other in authority over him. The term has to be construed in conformity with the object of the statute in which it appears. See *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited* (1).

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Next section 80 of the Civil Procedure Code, 1908, applies only to actions in tort. It has no application to actions in contract. The claim in the present case arises *ex contractu* or *quasi ex contractu*; and it is only in the alternative that a relief in tort is prayed for. We paid the money to the defendants under protest and in order to avail ourselves of the right to appeal to the Committee. The object of the suit is to recover the money which the defendants had and received. See *Rajmal v. Hanmant* (2).

The Government Pleader for the defendants, was not called upon.

[587] CHANDAVARKAR, J.:—This Court has held in *The Cantonment Committee, Poona v. Barjorji Pamanji* (3), relied upon by Mr. Shortt in his able and careful argument in support of this appeal, that a Cantonment Committee, formed under rules framed under the Indian Cantonments Act (XIII of 1889), is a *quasi* body corporate. It is unnecessary to express any opinion on the correctness of that decision, because the question before us is whether, for the purposes of section 80 of the Code of Civil Procedure, a Cantonment Committee is a "public officer" as defined in section 2, clause (17) of the Code.

Under that section, the expression "public officer" means (*inter alia*) "a person," who is an "officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government." A Cantonment Committee is, according to the rules made under Act XIII of 1889, "a Cantonment authority," which is charged with the management of a fund called "the Cantonment Fund." That fund is vested in His Majesty by the provisions of section 13 of the Act, and its management by the Committee is made, by the same section, subject to the control of the Local Government.

The Committee is, therefore, an artificial person formed by the statute for the purposes of Cantonment administration.

But it is contended that the definition of "public officer" in the Code contemplates an individual, not a body composed of individuals, of the description mentioned in each of the clauses of section 2. A "public officer" means, in the first place, "a person," and the word "person," under the General Clauses Act (X of 1897), includes "any body or association of individuals, whether incorporated or not." Such a body, discharging, according to law, any of the functions, mentioned in the clauses of section 2 of the Code of Civil Procedure, falls, in our opinion, within the definition of "public officer."

(1) (1880) 5 App. Cas. 857.

(2) (1895) 20 Bom. 697.

(3) (1889) 14 Bom. 286.



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As pointed out in some of the cases decided on the construction of section 424 of the old Code of Civil Procedure (Act XIV of 1882), which is reproduced as section 80 in the present Code, the object of the section is to give a public officer, acting or pur- [588] porting to act in the execution of his public duty, an opportunity of making reparation for any damage which he may have caused in such execution without being sued in a Court. The right to notice, as a condition precedent to a suit, is given to the officer concerned in the interests of the public treasury, out of which the money must come for repairing the damage. This consideration applies to a Cantonment Committee, managing a Cantonment Fund vested in His Majesty, as much as to any public officer similarly situated.

We think, therefore, that a Cantonment Committee such as we have here is a "public officer" within the meaning of section 2 of the Code of Civil Procedure.

It is argued, however, that no notice under section 80 of the Code was necessary for the maintenance of this action against the Committee, because it arose not out of a tort but out of a contract; and *Rajmal Manikchand v. Hanmant Anyaba* (1) is relied upon.

The plaint and the pleadings clearly show that the cause of action complained of by the appellant is one sounding in tort. It is alleged that, under cover of authority given to it by the Cantonments Act and the rules framed under it, the respondent Committee as illegally imposed a rate upon the appellant. On the strength of that allegation, the appellant seeks the refund of a certain amount, which, he states, he deposited with the Committee "under protest" to meet its illegal demand. It is contended that the moment the appellant paid the money under protest, the Committee held it as money had and received for the appellant's use, and became bound to restore it, if the levy of the rate was illegal.

Chapter V of the Indian Contract Act, by which this argument is sought to be supported, deals with "certain obligations resembling those created by contract," not with those arising from a contract itself, which presupposes a legal relation brought about between parties by their free volition in the form of proposal and assent. The principle of *Rajmal Manikchand v. Hanmant Anyaba* [589] does not apply and was not intended to apply to the former kind of obligations. It would be straining the language of section 80 of the Code of Civil Procedure beyond legitimate limits and defeating its object, if we were to apply that principle to actions sounding substantially in tort, merely because by operation of law those actions, for certain purposes, are treated as actions *ex contractu*.

On these grounds the decree in appeal must be confirmed with costs.

*Decree confirmed.*



84 B. 589 (=7 I. C. 944=12 Bom. L. R. 694).

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

CHINTAMAN VYANKATRAO GHADGE (original Plaintiff), Appellant, v. RAMCHANDRA VYANKATRAO GHADGE AND OTHERS, (original Defendants), Respondents.\*  
[25th July, 1910.]

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*Limitation Act (XV of 1877), sections 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), section 11.*

A suit filed in *forma pauperis* was decided on the 10th February 1908. An application for leave to appeal in *forma pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *forma pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

*Held*, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly [590] within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period.

The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

APPEAL from the decision of V. V. Tilak, First Class Subordinate Judge at Satara.

Suit for declaration and possession of certain property.

The property in dispute belonged to one Vyankatrao, who died on the 4th June 1905. Some time before his death, he had made a will, dated the 26th May 1905, whereby he had bequeathed all his property in favour of Ramchandra (defendant No. 1) who was his *dasiputra* (a son by a mistress).

The plaintiff alleged that on the 31st May 1905, Vyankatrao had revoked the will and adopted him as his son.

The defendant No. 1 applied to the District Court for probate of the will. The plaintiff objected to the grant on the grounds that the will was revoked and he was adopted by Vyankatrao. The District Court granted probate holding that the will was genuine and that the adoption was doubtful.

The plaintiff next filed a suit in *forma pauperis* to have it declared that he was the adopted son of Vyankatrao and to recover possession of property belonging to Vyankatrao from defendant No. 1.

The defendant No. 1 pleaded *res judicata* on the ground that the plaintiff had failed to establish his claim in the probate proceedings. The defendants Nos. 2 and 3 claimed under defendant No. 1.

\* First Appeal No. 46 of 1909.



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The Subordinate Judge dismissed the plaintiff's claim on the 10th February 1908. He held that it was barred by *res judicata* on the following grounds:—

"Having regard to sections 55 and 83 of the Probate and Administration Act, 1881, I am of opinion that grant of probate in a contentious case is not in the nature of a summary proceeding which can be contested in a regular suit in a Civil Court. [591] Plaintiff's remedy seems to be to apply for a revocation or annulment of the grant under section 50 of the Act: I. L. R. 4 Cal. 860. A refusal to grant probate does not operate as a judgment *in rem* but the grant of a probate does: I. L. R. 21 Bom. 563."

On the 13th April 1908, the plaintiff presented to the High Court an application for leave to appeal in *forma pauperis* from the decree passed by the Subordinate Judge. The application was dismissed as having been presented beyond the time allowed by law.

The plaintiff, who was a minor, then applied for excuse of delay caused in presenting the aforesaid application. It was heard *ex parte* and granted by the Chief Justice on the 2nd of October 1908. But subsequently it was brought to his Lordship's notice that he had no jurisdiction to excuse the delay; the former order was thereupon cancelled on the 20th of November 1908.

An appeal against this last mentioned order was preferred under the Letters Patent. It was allowed by Chandavarkar and Heaton, JJ. on the 26th February 1909.

The original appeal was placed for final disposal.

B. N. Bhajekar for the appellant.

K. H. Kelkar for the respondent.

CHANDAVARKAR, J.:—This appeal was filed at first in the form of an application for leave to appeal in *forma pauperis* from the decree passed on the 10th of February 1908 by the Subordinate Judge, First Class, at Satara, in Civil Suit No. 354 of 1907. The application, presented on the 13th of April 1908, was beyond time, having been made more than 30 days after the period prescribed by the Limitation Act, and the appellant, a minor, by his guardian prayed that the delay might be excused. The application for the excusing of delay came on for *ex parte* hearing before a Division Court on the 2nd of October 1908 and it was allowed. But it having been brought to the Court's notice that it had no jurisdiction to excuse delay, it cancelled the order on that ground on the 20th of November 1908. An appeal against that order, presented under the Letters Patent, was allowed on the ground that, the applicant being a minor, section 7 of the Limitation Act of 1877 applied and the case was [592] governed by the principle of the Privy Council ruling in *Mussumat Phoolbas Koonwar v. Lalla Jogeshur Sahoy* (1). Leave to appeal in *forma pauperis* was granted.

Mr. Kelkar, appearing for the respondents, argues that an application for permission to appeal in *forma pauperis* must be treated as an appeal, and that, if it is so treated, section 5, and not section 7 of the Limitation Act, must apply here. Whether we treat the application as falling under section 5 or under section 7, the result is the same. If it falls under section 5 and is an appeal, as contended by Mr. Kelkar, then, under the second paragraph of that section, which applies to appeals, the Court has jurisdiction to excuse delay.

If, on the other hand, it is treated as an application and falls under section 7 of the Limitation Act, it is clearly within time and there is no

(1) (1875-76) L. R. 3 I. A. 7 at p. 25.



need of excusing delay, because the section provides that a minor can apply after he has attained the age of majority within a certain period prescribed.

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Dealing with the appeal on the merits, the suit was brought to recover possession on the ground that the plaintiff was the adopted son of one Vyankatrao. The defendant resisted the claim upon the ground that Vyankatrao had left the property to him by a will; that he had proved the will and obtained probate. Issues were raised involving the question of title and of *res judicata*.

The Subordinate Judge has disposed of the case only on the ground of *res judicata*. He has held the claim barred, because, in his opinion, the grant of probate concludes the parties as to title. That is clearly an error in law. The probate "is only conclusive as to the appointment of executors and the validity and the contents of the will: Williams on Executors, p. 452, (4th Edition): and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition": *Hormusji Navroji v. Bai Dhanbaiji, Jamsetji Dosabhai* (1). See also *Barot Parshotam* [593] *Kalu v. Bai Muli* (2). As the suit was wrongly disposed of on a preliminary point, we reverse the decree and remand the case for disposal on the merits according to law.

All costs including those of the Court-fees of this pauper appeal, in which Government are interested, must be costs in the cause.

*Decree reversed.*

34 B. 593 (=7 I. C. 935=12 Bom. L. R. 689=11 Cr. L. J. 544).

#### CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. RAMCHANDRA BHASKAR MANTRI.\*

[20th July, 1910.]

*City of Bombay Municipal Act (Bombay Act III of 1888), section 305†—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes.*

The owner of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing, etc., all ways, roads, etc. The applicant was one of those lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay issued

\* Criminal Application for Revision No. 175 of 1910.

† The City of Bombay Municipal Act (Bombay Act III of 1888), section 305, runs as follows:—

If any private street be not levelled, metalled or paved, sewered, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the Standing Committee, by written notice, require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct.

(1) (1887) 12 Bom. 164.

(2) (1898) 18 Bom. 749.



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a notice to the applicant, under section 305 of the City of Bombay Municipal [594] Act (Bombay Act III of 1888), calling upon him to level, metal, drain and light the public street in front of his building. The applicant failed to comply with the notice, for which he was prosecuted under section 471 of the City of Bombay Municipal Act, 1888. He contended that he was not the owner of the premises within the meaning of section 305 of the Act. The Magistrate overruled the contention and convicted him.

*Held*, that the mere owner of the land who had let it out under a building scheme for building purposes was not the owner of the property, because the property contemplated by section 305 necessarily embraced buildings, whether erected or to be erected; and the legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property.

The word "premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of immediately preceding sections of the Act. That group (sections 302—307) has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302—304 is that of buildings either erected or projected. That is the kind of property dealt with in what has gone before section 305; and therefore that is its "*præmissa*".

It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them.

APPLICATION for revision against the conviction and sentence passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The Municipal Commissioner of the City of Bombay issued, under section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888), a notice to the applicant calling upon him to level, metal, drain and light the private street on which his building abutted. The applicant has built the house upon building site which he rented from its owner one Narayan Moroji Zaoba under a lease for a period of thirty years. The applicant had to pay Rs. 14 as the annual rent for the site. At the end of the lease the applicant had to remove the building unless it was purchased by the lessor. The applicant had also agreed in the lease to pay and contribute a rateable or due proportion of the expense of making, repairing and cleaning all [595] ways, roads, pavements, sewers, drains, pipes, watercourses and other conveniences which might belong to or be used for the said premises.

The applicant constructed a building on the site; and let it out to tenants. He failed to comply with the notice; for which, the Municipal Commissioner instituted proceedings against him under section 471 of the City of Bombay Municipal Act, 1888.

The Magistrate was of opinion that the applicant, as the owner of the building, was included in the expression "owners of the several premises" used in section 305 of the Act, for the word "premises" in the section meant both "land and buildings". He, therefore, convicted the applicant of a failure to comply with the requisition served upon him and sentenced him to pay a fine of one rupee.

The applicant applied to the High Court under its criminal revisional jurisdiction.

*Setalvad*, instructed by *Sabnis and GREGAONKER*, for the applicant:—The Municipal Commissioner has power under section 305 of the City of Bombay Municipal Act, 1888, to require "the owners of the several premises" to do things mentioned in the section. The question then arises,



who are the owners, and what are the premises? The term "owner" is defined in section 3, clause (m) of the Act, as meaning "the person who receives the rent of the premises or who would be entitled to receive the rent thereof if the premises were let." The word "owner" would, therefore, include the lessor Zaoba, who let out the building site to the applicant and who is primarily entitled to receive rent.

If persons in the position of the applicant were intended by the legislature to be reached under the section, it would have used the expression "owners or occupiers" as it has done in sections 228, 249, 251, 275, &c. See also the Calcutta Municipal Act (Bengal Act III of 1899), section 645; the Public Health Act, 1875 (38 & 39 Vic. c. 55), section 150.

Even if it be conceded that the term "owners" includes both the lessor Zaoba and the lessee (the applicant), then the Commissioner is not authorized anywhere in the Act to single [596] out any one of them for the purposes of his requisition under section 305. He ought to requisition both of them.

The term "premises" is nowhere defined in the Act: and it is employed in different senses in the Act. See *The Municipality of Bombay v. Shapurji Dinsha* (1). Reading the sections that immediately precede section 305, it appears that the term premises means "land" and in section 305, used as it is in reference to street land, it must mean the abutting lands and nothing more.

*Jardine* (Acting Advocate-General), instructed by Messrs. *Crawford, Brown & Company*, for the Municipality:—It is not disputed that the applicant has constructed a building, which he has let out to tenants. He is the person who receives rent for the building, and is, therefore, its owner as defined in section 3, clause (m) of the City of Bombay Municipal Act, 1888. Even on general principles the person who receives the immediate rent is liable. It is he who is to be looked, for the benefit of enhanced rent goes to him. The lessor only gets a fixed rent for a long period of years. The applicant is not the occupier of the building for he has let it out. See *Lewis v. Arnold* (2).

CHANDAVARKAR, J.:—The question of law before us arising on this rule is as to the meaning of the words "owners of the several premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888).

The question arises under the following circumstances:—

One Zaoba parcelled out certain land belonging to him in plots for building purposes and gave each plot on lease for a fixed term (30 years). Each lessee erected on his plot a building at his own expense. The petitioner before us is one of those lessees. There is a private street adjoining the plots and it was with reference to it that the Municipal Commissioner of Bombay called upon the lessees, the petitioner included, to level, metal, drain and light the said street on the ground that they were "owners of the several premises fronting or adjoining" it within the meaning of section 305 of the Act. They having [597] refused to comply with the requisition, the Commissioner filed a complaint against them in the Presidency Magistrate's Court charging them under section 471 of the Act.

The lessees contended that they were not "owners of the several premises" and that it was their lessor, the owner of the land, who was legally liable to perform the work required by the Commissioner under

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(1) (1895) 20 Bom. 617.

(2) (1875) L. R. 10 Q. B. 245.



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section 305. The Chief Presidency Magistrate overruled that contention and convicted the lessees. Hence this rule.

The City of Bombay Municipal Act defines the word "owner" but is silent as to the meaning to be attached to the word "premises", though that word occurs frequently in the Act. And, as was pointed out by Ranade, J., in *Municipality of Bombay v. Shapurji Dinsha* (1); the word is used in different senses in different sections, in some meaning land, in some signifying buildings, and in others including both land and buildings. We must, therefore, see in what sense the word is used in section 305 of the Act.

The popular acceptance of the word "premises", according to Sweet's Law Dictionary and Wharton's Law Lexicon, is that it includes land. The same definition is given in Johnson's Dictionary. But, although it is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense, one exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them: *Her Highness Ruckmaboye v. Lulloobhoy Mottichund* (2), and *Trimbak Gangadhar Ranade v. Bhagawandas Mulchand and others* (3). The word "premises" has a technical meaning in law. Its strict legal meaning is "that which comes before", "the præmissa of the document or deed which includes that word". *Metropolitan Water Board v. Paine* (4). As pointed out in this last decision, in Sheppard's Touchstone that is the only meaning given to the word.

[598] Having regard to the canon of construction as to the legal meaning of a word and to the fact that the word we have to construe occurs in a statute, I think that the word "premises" occurring in section 305 must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of the immediately preceding sections of the Act. That group consisting of sections 302 to 307 is headed "Provisions concerning private streets." The whole group has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302 to 304 is that of buildings, either erected or projected. That is the kind of property dealt with in what has gone before section 305, and therefore that is its "præmissa".

If that view is correct—and I think it is—it follows that the mere owner of the land who has let it out under a building scheme for building purposes is not the owner of the property, because the property contemplated by the section necessarily embraces buildings, whether erected or to be erected; and the legislature regards him as the owner of the premises who has the right to receive rent in respect of that property. The lessor in the case before us receives rent under his contract only for that land; he is not entitled to rent in respect of the buildings. Once he has started his building scheme and let out his land in plots, he drops out of sight, and his lessees step in as the owners of the buildings. The land as land becomes merged in them. If no building is erected on any plot, still the plot becomes, as part of the building scheme, a building plot.

But it was contended that a more reasonable construction of the words "owners of the several premises" in section 305 was that it includ-

(1) (1895) 20 Bom. 617.

(2) (1851) 5 M. I. A. 284.

(3) (1898) 23 Bom. 348.

(4) (1907) 1 K. B. 385 at p. 297.



ed both the lessor as owner of the land parcelled out for buildings, and his lessees as owners of the buildings, because the word "premises" includes both land and buildings. Such a construction of the section ignores what I have called the dominant idea of building running through the group of sections, of which section 305 is a part.

For these reasons, the conviction, in my opinion, is right and this rule must be discharged.

[599] HEATON, J.:—I have no doubt in my own mind that the particular premises with which we are now dealing comprise the existing building and the plot on which that building stands. The lessee (in this case the applicant) is the person who receives the rent of those premises. The lessor takes the ground-rent which is something quite different from the rent of the premises. As the lessee takes the rent of the premises, he is the owner within the meaning of that word as used in section 305, as will appear from the definition of the word "owner" given in clause (m) of section 3 of the Bombay City Municipal Act III of 1888. As the lessee is the owner in this sense, I think that the notice mentioned in section 305 was correctly addressed to him, and that the Magistrate's order is right.

*Rule discharged.*

34 B. 599 (=12 Bom. L. R. 663=7 I. C. 933.)

CRIMINAL APPELLATE.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. AKBAR BADOO.\*

[11th July, 1910.]

*Criminal Procedure Code (Act V of 1898), sections 162, 288—Indian Evidence Act (I of 1872), sections 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-Chief—Practice and procedure.*

During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was [600] examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—

*Held*, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial.

(2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused.

\* Criminal Appeal No. 145 of 1910.

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The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial.

[Ref : 8 Pat. L. J. 588=15 I. C. 272; Diss : 72 I. C. 529=16 L. W. 239=18 M. L. J. 222=45 Mad. 766.]

APPEAL from conviction and sentence recorded by R. E. A. Elliott, Additional Sessions Judge of Ahmedabad.

The accused Akbar Badoo and Anwar Abashi were charged with the offences of house-breaking and theft. They were tried by the Additional Sessions Judge of Ahmedabad with the aid of Assessors.

The charge was that the accused broke open the house of the complainant during his absence, and committed theft of some gold and silver ornaments belonging to the complainant.

In the course of the Police investigation that followed, one Chhagan Asharam admitted that he had sold some gold for the accused Akbar. And after some time, Chhagan admitted, in the presence of the Panch, that the accused Akbar had given to him some ornaments to sell.

Akbar Anwar and Chhagan were then arrested, when Anwar admitted before the Police that Akbar had given him some ornaments to sell, which he had sold to one Ismail. Ismail was arrested next.

[601] All these persons were the next day sent to a Magistrate who recorded their confessions.

The charges against Akbar and Anwar were retained: and in the inquiry before the Committing Magistrate, Chhagan was examined as a witness.

The accused were committed to the Sessions Court to take their trial. In convicting them, the Sessions Judge gave the following reasons:—

All four ivory bangles were ornamented with gold and the gold has been stripped off them. Accused 1 sold the gold through Chhagan whose evidence in this Court that he sold the gold and Chudi on behalf of two brahmins Umiashankar and Nana-lal has been contradicted by the Sub-Inspector, the Panch witnesses, Muljibhai Zaverbhai (Exhibit 23) and Muljibhai Naranbhai (Exhibit 24) and by the question put by accused 1 to the Sub-Inspector in cross-examination.

These facts leave no room in the minds of the Court or Assessors that Chhagan Asharam has lied in this Court and that as stated in his confession and in the lower Court he got these articles from accused 1. Ismail (Exhibit 12) admits he got 8 Vintls 2 gen 2 machlis and 4 silver studs; Lalla produced one ivory bracelet (Exhibit G) and its pair (Exhibit M) was found in the house of Jina Jibhai who has absconded.

Now we have it admitted by accused 2 that he lent his plough-share which makes a very formidable jemmy to accused 1 and that soon after accused 1 gave him the things to sell which he sold to Ismail. There is no doubt that his statement is exculpatory, but taken with the evidence of Chhagan Asharam to the Police on the 19th, to the Honorary Third Class Magistrate on the 20th December 1909 and to the First Class Magistrate, Kaira, on the 18th January 1910 there can be no doubt accused 1 is guilty and accused 2 practically admits it.

The accused appealed to the High Court.

There was no appearance on behalf of the accused.

The Government Pleader appeared for the Crown.

HEATON, J.:—In this case two accused persons, Akbar Badoo and Anwar Abashi, were tried for house-breaking and theft by the Sessions Judge at Nadiad and both were convicted. Akbar has appealed and with his appeal we have to deal.



The Sessions Judge has admitted and considered, against the appellant, a good deal which is not evidence at all.

[602] Statements made by the witness Chhagan to the Police implicating the appellant have been admitted and used.

The same witness Chhagan's statement to the Panch and his statement as an accused person made before a Magistrate were admitted and used.

They were inadmissible for reasons I will explain later.

Then statements made by the co-accused Anwar to the Police were admitted and used. They were altogether inadmissible as evidence of the appellant's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the appellant. (See section 21 of the Evidence Act.)

Then there is the statement of a witness Ismail that the accused Anwar told him that he got certain things from the appellant. That statement was inadmissible against the appellant.

What remains of this part of the case after stripping it of irrelevant matter is this: Chhagan's statement to the Committing Magistrate is admissible in evidence (Criminal Procedure Code, section 288). In it Chhagan stated that certain articles were given him by appellant Akbar Badoo. Chhagan in the Sessions Court gave quite a different account of how he came by them and the Judge disbelieved that account and believed what was stated to the Committing Magistrate. But he used Chhagan's statement to the Police and his statement as an accused person and his statement to the Panch, by way of corroboration of what Chhagan had stated to the Committing Magistrate. In this she was entirely wrong. Only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act. Previous statements may be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. The Judge did right to see the statement of Chhagan recorded by the Police if it was reduced to writing (see section 162, Criminal Procedure Code). I also think he would have been right to look at the statement made by Chhagan as an accused person, because the appellant was [603] undefended and consequently there was no pleader on his behalf to whom these statements could be shown. But the object of referring to such statements should have been to see whether they contained anything which could be used for the purpose of cross-examining, on behalf of the accused, the witnesses examined for the prosecution. These statements, in this case, could not be used to corroborate what Chhagan said in the Sessions Court, for they were useless for that purpose. Therefore, they should not have been admitted.

The net result, had the Law of Evidence been properly regarded, would have been this: There was Chhagan's statement to the Committing Magistrate which implicated the appellant. The Sessions Judge who heard the statement made by Chhagan in his own Court exculpating the appellant did not believe it and he found nothing favourable to the accused in the materials which could be used on his behalf, for the purpose of cross-examination.

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In effect this is perhaps what the Sessions Judge really intended; but he actually adopted the illegal course of bringing irrelevant statements on to the record and using them against a prisoner under trial.

The Investigating Police Officer's deposition contains a great deal which no investigating police officer ought, in my opinion, to be allowed to depose to in examination-in-chief. I refer to the Police Officer's account of what various persons besides Chhagan said to him. It may be that what the witnesses said is admissible by way of corroboration within the terms of section 157 of the Indian Evidence Act, but to allow the Investigating Police Officer to be questioned about them in examination-in-chief, opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial. The evidence against him, in so far as it consists of the statements of witnesses, is intended to be primarily the [604] statements made to the trying Court, and secondarily, in a case tried by a Court of Session, the statements made to the Committing Magistrate.

Lastly, the Judge has used against the appellant the statement made by the co-accused in the Sessions Court. That statement is not a confession. Of course the Judge was bound to hear and record what the co-accused said but it ought to have had very little, if any, effect in determining, in the mind of the Judge, whether the appellant was or was not guilty. So little is it worth, in this case, that it was really superfluous to mention it amongst the circumstances which go to establish the appellant's guilt.

There has not been a proper trial of the appellant. He has been convicted largely on the strength of statements many of which ought never to have been heard or used, and, in my opinion, we are bound to reverse the conviction and acquit the appellant.

*Conviction reversed.*

34 B. 604 (=15 Bom. L. R. 841=6 I. C. 513).

ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*

JAINABAI AND ANOTHER, *Plaintiffs*, v. R. D. SETHNA AND OTHERS,  
*Defendants*.\*

[1st March, 1910.]

*Mahomedan law—Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders.*

In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.

[605] In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed.

\* Original Suit No. 792 of 1909.



His daughter then filed a suit for a declaration *inter alia* that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted.

*Held*, that the conveyance in 1902 was invalid.

Looked at from the stand-point of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party, and therefore subject to all the conditions of a valid gift, but *quære* whether private trusts were known to Mahomedan law.

*Banoo Begum v. Mir Abed Ali* (1) discussed and distinguished.

[Ref. 36 Bom. 214; 23 I. C. 651; 53 I. C. 764=30 C. L. J. 102].

ON 31st July 1902 Ebrahimbhaj Hashambhai, a Khoja Mahomedan, executed a deed by which he purported to convey a certain immovable property known as Dady Buildings, to himself and three other trustees to hold in trust to pay the net income to himself for life, and after his death annuities to his wife and daughter and certain sums to specified charities. After the death of his wife her annuity was to be set aside for the maintenance of four Khoja orphans, and after the death of his daughter a lump sum was to be given to her son. A final proviso reserved to the settlor the power at any time to revoke any or all the trusts therein mentioned. Owing to financial difficulty in June 1908 the settlor began to negotiate for a loan on the security of a mortgage of the property the subject of the above settlement. For that purpose he executed a deed of revocation, dated 18th July 1908, and nine days later, on 27th July 1908 he executed a mortgage of the property to Haji Ali Mahomed Haji Oasum as security for a loan of Rs. 3,00,000. Upon the death of Ebrahimbhaj Hashambhai in July 1909, one of his creditors brought an administration suit, and in that suit three receivers were appointed. On the 1st September 1909 Jainabai, the daughter of Ebrahimbhaj, and her son filed the present suit against the receivers, the trustees of the settlement of (1902) and the mortgagee. The Advocate General was joined as a party defendant by reason of the charitable bequests contained in the trust settlement. The plaintiffs prayed for a declaration that Ebrahimbhaj Hashambhai was not entitled to revoke the [606] trust settlement of 31st July 1902, that the deed of revocation and the subsequent mortgage were invalid, and that trust settlement was still valid and subsisting, and further prayed for the appointment of new trustees.

*Lowndes*, with *Strangman*, Advocate General, for the plaintiffs:—

It is admitted that the settlor was governed by Shia law. Under the Shia law a power to revoke is bad. See *Amir Ali* (3rd Edition), Volume I, p. 89: *Nasir Husain v. Sughra Begam* (2). Section 53 of the Transfer of Property Act does not apply to Mahomedans, and therefore does not affect the rule of Mahomedan law that a gift by a person who is not in insolvent circumstances at the time of the gift cannot be avoided by future creditors. That a life interest can be created and the subsequent interest dealt with is clear from *Banoo Begum v. Mir Abed Ali* (3). See also *Umes Chunder Sircar v. Mussummat Zahoor Fatima* (4). It may be taken from these cases that the Courts have modified the strict Mahomedan rule as to the invalidity of gifts '*in futuro*.' In any case, where the donor stands in *loco parentis* to the donee, as here, no transfer of possession is necessary. See *Wilson's Digest* (3rd Edition), p. 324. Finally this is a good trust under sections 5 and 6 of the Trusts Act. There was sufficient transfer of possession to complete the trust, in the opening, of a special account in the settlor's books.

(1) (1907) 32 Bom. 172.

(2) (1883) 5 All. 605.

(3) (1907) 32 Bom. 172.

(4) (1890) 17 I. A. 201.

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*Setalwad*, with *Raikes*, for the first, second and third defendants :—

The transfer was not sufficient. It is as necessary in the case of trusts as in the case of gifts. See *Moosabhai v. Yacoobhai* (1). Further the settlement was in reality a wakf, containing, as it did, dedications to charity. Taking the settlement, then, as a wakf, it is void because it does not fulfil the conditions required. See *Baillie's Digest*, p. 218.

*Shorri*, with *Koyaji*, for the fourth defendant :—

The best possession possible, actual or constructive, ought to have been given, but this was not done. No notice was [607] given to the tenants to attorn, and there was no transfer made in the books of the Municipality or Collector. See *Ismal v. Ramji* (2) and *Moosabhai v. Yacoobhai* (1). Further the donor was not here in *loco parentis* to the donees as has been argued; the trustees were the donees. With regard to the alleged modification of the strict rule as to the invalidity of gifts '*in futuro*' the cases cited do not show this. In both *Umeh Chunder Sircar v. Zahoor Fatima* (3) and *Banoo Begum v. Mir Abed Ali* (4) the settlement was for valuable consideration. There was no question of a voluntary gift. See also *Vahazullah v. Boyapati* (5). Thus, if regarded as a private gift, it must be void, as being conditional, '*in futuro*', reserving a power to revoke (see section 126 of *Transfer of Property Act*) and lastly as not completed by transfer of possession. But it may be regarded as a wakf, with provisions by way of family settlement: see *Wilson*, p. 346, and *Mulla*, Art. 144. If a wakf, it is again void because of the reservation of a power to revoke, and because the settlor has reserved part of the usufruct to himself. See *Haji Kalub Hossein v. Mussumat Mehrum Beebee* (6). The *Trusts Act* does not apply to wakf: see section 1 of the *Act*. If regarded as a testamentary or quasi-testamentary document, it is also void because it violates the Mahomedan law as to wills by which a testator cannot dispose of more than a third of his estate. Even if not void as a will, it has been twice revoked, (a) by deed of revocation, (b) by execution of the mortgage. Finally under 27 Eliz., c. 4, it is void as a voluntary settlement. In whatever light the document is regarded, the settlor as a free agent has reserved a power to revoke, and has actually revoked.

*Mulla*, with *Davar*, for the sixth and seventh defendants, submitted to the order of the Court.

*Strangman*, Advocate General, in reply :—

27 Eliz., c. 4, no longer applies to India. Its place has been taken by section 53 of the *Transfer of Property Act*, and even this does not apply here. See section 2 (d) of the *Act*.

[608] *BRAMAN, J.* :—This is a suit by the plaintiff to enforce an alleged gift contained in a deed of 31st July 1902. The principal defendants are the receivers of the alleged donor's estate and the mortgagee. The deed, on which the plaintiffs rely, appears to be a voluntary settlement in common form containing the usual revocation clause. The gist of the document is that the settlor, *Ebrahimibhai Hashambhai*, gives the properties therein mentioned to himself and other trustees in trust (1) for himself for life absolutely, (2) upon his death to his widow, *Rahmatbai*, an annuity of Rs. 100 a month, (3) to his daughter *Jainabai*, plaintiff No. 1, an annuity of Rs. 750 a month, with various bequests to charitable objects.

(1) (1904) 29 Bom. 267.

(2) (1889) 28 Bom. 682.

(3) (1890) 17 I. A. 201.

(4) (1907) 32 Bom. 172.

(5) (1907) 30 Mad. 519.

(6) (1812) 4 N. W. P. H. O. Rep. 155.



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(4) On the death of the said Rahmatbai, her annuity to be devoted to other charitable purposes and on the death of his daughter Jainabai, an event which has not yet happened, a sum of Rs. 1,50,000 to be given to his grandson Mahomedbhai, the minor plaintiff No. 2, with power to the settlor Ebrahimbhai Hashambhai to revoke all the aforesaid bounties at his pleasure. In 1908, the settlor in the exercise of his power revoked the deed of 1902 and his co-trustees thereupon reconveyed to him all the settled properties. He, then, executed the mortgage, on which the defendant No. 4 relies. The parties are Shias. Those are the undisputed facts upon which they go to trial.

The plaintiffs contend that the gift contained in the deed of 1902 was perfected by the settlor opening an account of the rents and profits in the name of the new trust, and therefore became irrevocable at any rate so far as Jainabai and Mahomedbhai are concerned, as they are within the prohibited degrees of relationship.

There are a great many answers to the claim from which I will select six of the most effective which occur to me upon a recollection of the arguments.

(1) That the deed of 1902, upon which the plaintiffs rely, is a wakf and not a deed of gift, and that being so, is void *ab initio*, by reason of the founder having retained a life interest for himself in the dedicated property.

[609] (2) If a gift, then bad, (a) because it is a qualified and a conditional gift, so far as the plaintiffs are concerned, only capable of taking effect *in futuro*, (b) because it was not perfected by actual delivery of possession of the thing given.

(4) If a trust in the English sense within the meaning of sections 5 and 6 of the Indian Trusts Act, then necessarily revocable.

(5) If an ordinary voluntary settlement, which in form it appears to be, then again certainly revocable, as containing a revocation clause to which effect has been given. And I may add under the Indian statute law void *ab initio*, as all voluntary settlements containing general revocation clauses of that kind must apparently be under section 126 of the Transfer of Property Act.

(6) That apart from its form, the deed of 1902 is in substance and reality a testamentary disposition, the settlor's plain intention being that the objects of his bounty should only obtain it after his death: and therefore like all other wills revocable during the testator's life-time.

I will now proceed to deal a little more in detail with each of these answers. According to all the best accredited text books on Mahomedan law, an ordinary gift *inter vivos* must be free from all pious or religious purposes. The deed of 1902 mixes up charities with private donations to the kinsmen of the settlor and it is therefore contended that read as a whole no separate gift can be isolated and cut off from the accompanying religious bequests. Considerations of this kind no doubt weighed with the Advocate General and decided him against pressing the claims of the various charities. For, it cannot seriously be argued that, in view of the life interest reserved by the settlor to himself, if this were a wakf, it would be a good and legal wakf. I am not, however, certain that the argument is so conclusive as the defendants appeared to think. It seems to me that gifts to private persons might be bestowed in the same deed which created charitable trusts and yet that the one might be quite separable and distinct from the other. When the Mahomedan lawyers laid it down



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that a private gift *inter vivos* to be legal and valid must be free from all [610] pious or religious purposes, it is at least arguable that they did not mean that a donor might not, by one and the same act, give a part of his property for a definite private purpose involving no consideration of religion or piety and another part of the property, or even the same part of his property, assuming that the donees had exhausted their private interest in it, at the same time or thereafter in charity. Yet I feel that there is considerable force in the contention; and, having regard to the somewhat rigid and narrow views of the authors of archaic systems of law, I doubt whether, reading this document as a whole and noting how ultimately its effects are directed to the foundation of charitable endowments, a Mahomedan lawyer would not say that the whole of it was affected with the character of a wakf. If that view were adopted, it would be a short and safe cut to the conclusion I am asked to draw. I should, however, hesitate, notwithstanding the completeness and unanswerableness of this contention, once its main premise is granted, to base my decision on this ground alone.

The second and the third answers pre-suppose that the instrument of 1902 was a deed of gift and not a wakf, and it is upon this hypothesis that the case has been most hotly contested.

As a general rule of Mahomedan law, it is, I think, unquestionable that an indispensable condition precedent to a valid gift is that it should be unqualified and *in presenti*. The books are full of prohibitions, with simple illustrations against gift *in futuro*. In the present case, if we look at what was actually intended to be done under the deed of 1902 stripped of technical phraseology, it was this. The donor said:—"I will give this property to myself for my life and after my death I will distribute it" (in the manner I have described roughly above) and at the same time he reserved to himself in explicit terms a power to revoke the whole of the gift during his own life-time. Now it is the rule of early Mahomedan law that however abominable the revocation of the gift might be, that law recognizes it before actual delivery in all cases, and after delivery saving where the gift has been to a [611] relative within the prohibited degrees of consanguinity. Where the gift has been to a stranger or to relatives not within the prohibited degrees, the authorities say that the gift is revocable, even after delivery of possession but only (a) with the consent of the donee, or (b) by the decree of a Judge. The first of these exceptions clearly implies a re-gift by the donee to the donor and is not strictly speaking a revocation at all. The second, however, points equally clearly to the revocability of all gifts at the suit of the donor, even after possession has been given, unless the donee is within the prohibited degrees of relationship. Like so much else in the Mahomedan law, it is not very easy to understand the principle upon which this latter rule is founded or upon which the Judge would give or withhold the relief sought. Presumably his doing so would be something more than a mere formality going as a matter of course; and would depend upon what he considered to be the equities of the parties in the particular case before him. It is not easy, indeed I doubt whether it is possible, to keep a discussion of the defendants' two answers, on the supposition that this was a gift, wholly distinct. For modern case law has confused the originally simple notions of the Mahomedan law-givers so much, both upon the indispensableness of the gift being unqualified, and *in presenti* and actual possession of the thing being given, that the



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two answers constantly overlap, when reference is made to the authorities. It is first, however, desirable to have a clear view of the facts. Now it cannot be denied that the two plaintiffs are related within the prohibited degrees of consanguinity, nor can it be denied that immediately after executing the deed of 1902, the settlor, who, under that deed, not only reserved to himself a complete life interest in the property but was also the only managing trustee, opened an account of the rents and profits in the name of the trust, and it is strenuously contended for the plaintiffs that this was a sufficient delivery of seisin to satisfy the requirements of the Mahomedan law. Further, that if that were so, the gift having been completed by delivery of possession and the donees being the daughter [612] and grandson of the donor, it became from that moment irrevocable. This legal result, it is contended, is in no way affected by the reservation in the deed of gift of a power of revocation or the postponement of the gift to the daughter and grandson to an uncertain future time, depending (1) upon the death of the settlor, and (2) upon the death of Jainabai. In my opinion this contention is unsustainable. Looking to the clear and positive principles of the Mahomedan law, I cannot believe that any gift, which is only to take effect after the death of the donor, and during his life-time is expressly declared to be revocable by him, could ever be a valid gift. The question might have been complicated, had the donor died without revoking the contemplated gifts. But even so, I should still have been of opinion, that as declared in the instrument of 1902, the gifts to Jainabai and the minor plaintiff were illegal and invalid. Then there is the further question whether possession was actually given or whether, indeed, having regard to the nature of the gift, it could have been given. The decision of the Privy Council in *Umes Chunder Sircar v. Mussummat Zahoor Fatima* (1) which was a case between Sunnis, and *Banoo Begum v. Mir Abed Ali* (2), where the parties were Shias, have gone as far, I think, as our Courts are ever likely to go in the way of stretching the rules of the Mahomedan law. The former of these cases decides that anything "like what we call in English law a vested remainder" may be the subject of gift valid according to the Mahomedan law. And our Court of Appeal in *Banoo Begum v. Mir Abed Ali* (2), quoting that judgment with approval, applied it with the less hesitation to Shias because the Court was supplied with translations of a series of excerpts from Arabic text-books of authority which, the learned Judges thought, put beyond question the fact that the Shia law had all along recognized gifts of future and limited estates resembling what we call vested remainders. It is not for me to question the authority of these decisions which are of course binding upon me. I may, however, point out that none of the texts cited in support of the conclusions arrived at by [613] their lordships in *Banoo Begum's* case, as indeed a very cursory examination will show, can really be carried that length. All these texts deal with the giving of a right of residence, a life interest, or an interest for a limited period. One of them certainly speaks of a gift to a man and his descendants, but taking them altogether and in their natural contexts, it is submitted that their plain meaning ought to be confined to what was then in the contemplation of the writers, namely, a single qualified gift; qualified, that is to say, not with reference to any rights which he might have reserved to himself by way of revocation or curtailment but simply with reference to the duration of the gift in time; subject, again, to

(1) (1890) 17 I. A. 201.

(2) (1907) 32 Bom. 172.



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an exception in the case of gifts for residence which, while no doubt also limited in time by the life of the donee, are likewise limited in extent by the peculiar object for which the gift is expressed to be made. But none of these texts or observations to which my attention has been drawn in all the accredited Mahomedan law books (with the exception of a single sentence in Amir Ali) can, I think, support the view that Mahomedan law-givers ever had in contemplation or intended to sanction the gift of a succession of independent and limited estates. I do not believe, speaking for myself, that any reputed Mahomedan law-book of Mahomedan lawyers contains any mention or had the faintest conception of anything so entirely artificial as the estates which our English law has created and recognized. As to the passage in Amir Ali, that is couched in the most sweeping and general terms and the learned author gives as his authority for it one of the texts quoted in *Banoo Begum's* case which I have just referred to. As a mere matter of academic argument, I may be permitted to doubt whether the most ingenious logic could reconcile the indispensableness of giving *de facto* possession *in presenti*, to the validity of a gift *inter vivos* with the gift of a remainder possibly postponed fifty years and therefore not taking effect till long after the death of the donor, being nevertheless a gift valid in Mahomedan law. These cases are indeed plainly examples of the strenuous attempts our Courts are constantly making to expand the rigid rules and principles of archaic systems of oriental law to meet the requirements of a rapidly growing, progressive, [614] and developing society. That attempts of that kind are inevitable, politic, in every sense desirable, is not less clear than that endeavouring to attain their objects by thoroughly consistent and logical reasoning is attended with the very greatest difficulty, even if it be really possible. It would be very easy to substitute the most complex and artificial products of advanced civilized jurisprudence for the extremely crude and simple notions of primitive people. But so long as we profess to respect and give effect to the latter, I confess for my own part that it is beyond my power to reconcile them by any process of completely logical reasoning with all that has preceded and is implied in the former. Yet even so it is not difficult I think to distinguish cases such as those I have referred to from the present case. For, if a man gives his house to A for his life and on his death to B for his life and on his death to C, it is at least possible for the donor as between himself and A the first term in the series of estates to comply with all requirements of the Mahomedan law. He may announce his gift, A may accept it and the donor may then put A in actual possession of the property. I may, however, observe that the illustration I have given is very different from cases of Omra and Sukna mentioned in the texts upon which the judgment in *Banoo Begum* is founded. What the old law-givers had then in contemplation was nothing more than the donor divesting himself of his property in favour of the donee for the time, on the expiration of which the property would automatically revert to the donor. And this principle is not, I think, affected by extending the gift in general terms to the descendants of the first donee. The donee and his descendants are then regarded as the single object of the benefaction, the only difference being that in the natural course of events the addition of descendants would protract the duration of the first gift and postpone its reversion to the donor. Coming back to our present case it will be seen at once that it differs in one very material point. For, the first donee is the donor himself; and it is, therefore, impossible, as in the



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first case I put, for him to comply in any way with those conditions which the Mahomedan law makes indispensable to a valid gift. And that being so, it could only be by a fictional process identifying him in some [616] way with the remoter object of the bounty that the gift could ever be valid at all. This difficulty has pressed very heavily on the learned and eminent counsel who argued the plaintiff's case with so much ability. It has been contended that inasmuch as this gift took the form of a trust, the donees technically at any rate were the trustees, including the settlor himself who was the managing trustee. Therefore, it is said, the only way in which actual seisin could be given was the way which the settlor took, that is to say, by opening a fresh account of the rents and profits of the property in the name of the trust instead of in his own private name. Now, while that might serve in certain cases to surmount the initial difficulty I have been considering, it does not appear to me to touch what is the substantial and real difficulty falling partly under both the defendants' answers on this head. I mean of course that whatever the artificial legal construction of the settlor's position might be, in fact he had retained possession as he indeed intended to retain it in his own hands and for his own use as long as he lived. Further, if we are to borrow a technicality from the English law of trust to fortify this argument and that the trustees were the donees within the meaning of Mahomedan law and that one of them having assumed possession and management of the property, the gift was complete, then I do not see how we can escape from the further consequence that the donees themselves restored the gift to the original donor. If the plaintiffs seek to surmount that objection by invoking another rule of Mahomedan law, that where a person gives to one to whom he stands *in loco parentis*, his possession becomes in law the possession of the donee and the gift therefore irrevocable, the answer is again plain and conclusive. That special rule of law is only applicable in cases where the donor standing *in loco parentis* to the donee purports to give to the latter *in presenti* but himself retains the actual physical possession. I insist upon the words *in presenti* because that appears to be the very foundation of the rule. Here, it was not the intention of the donor to give this property immediately either to his wife, his daughter, or to his grandson, and it could only be where that intention synchronised with the donor retaining possession of the property given, that [616] that possession converted by the intention would be regarded in law as constructively the possession of the donee. There is not, I believe, a single instance of that rule being applied where a father says, "I give my property to myself for my life and on my death to my son," for in such circumstances there can be no intention in the donor to part with the property during his life-time. The most that he can be said to surrender in such cases is the power of alienating the property, and that is not a thing of which possession can be given in any sense compatible with the principles of the Mahomedan law of gift. But these answers appear to me to be absolutely conclusive against the plaintiffs even on the assumption that the deed of 1902 was not a wakf but a deed of gift.

It was next contended that under sections 5 and 6 of the Indian Trusts Act, this was a good trust. With the utmost deference to the eminent and learned Judge who decided the case of *Moosabhai v. Yacoobkhai* (1), I do gravely doubt whether private trusts were known to Mahomedan law. I doubt whether, in any of the standard works upon

(1) (1904) 29 Bom. 267.



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that subject, private trusts will be found in any index. They are mentioned in Mulla's recent work but solely on the authority of *Moosabhai v. Yacoobhai*. The point is perhaps of no great importance, for looked at from the standpoint of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party and therefore subject to all the conditions of a valid gift. But it has been argued in this case that inasmuch as the trust in the English sense does not conflict with any part of the Mahomedan law, if this is a good trust, its effect would be the same as a good gift and therefore the quality of irrevocability would attach to it. I am altogether unable to accede to this contention to which Mr. Lowndes committed himself, I must say, with some diffidence. It amounts, when analysed, to this: that while this may not be a good gift according to the Mahomedan law of gift, it is a good trust according to the English law of trust. There can be no question, however, that if we are to regard it strictly from that point of [617] view, it would like all other trusts be revocable. But then it is argued that this cannot be so because although merely valid as an English trust it has been made by Mahomedans and therefore takes on the whole the character of a Mahomedan gift, the beneficiary being within the prohibited degrees. One feature of that character is irrevocability, that is to say, that while it might be a bad gift in the eye of Mahomedan law because it was qualified, because it was *in futuro*, because possession was not given, yet it is a good trust. A good trust is revocable: a good gift to donees of a class is, amongst Mahomedans, irrevocable. This good trust would be a bad gift amongst Mahomedans but being a good trust and made by Mahomedans and the Mahomedan law having nothing to say upon such a subject, it must take effect as though it were a good and not a bad gift and so become irrevocable. That argument, however ingenious, appears to me to be thoroughly unsound. If it is only a trust because it fulfils the requirements of sections 5 and 6 of the Indian Trusts Act, then it is revocable and has been revoked. If it is anything more than that and seeking to enforce it upon that footing would bring it into conflict with any rule of the Mahomedan law which is the case here, then sections 5 and 6 of the Trusts Act have no application.

The fifth answer is that on the very face of it the deed of 1902 is a voluntary settlement in English common form. I have no doubt that it is, I have no doubt that it is something of which the early Mahomedan law-givers had not the faintest conception; therefore to provide for the legal operation and effect of which they could not possibly have made any provision. If it is no more than that, then it would of course in England be revocable since it contains the usual revocation clause. The Indian law appears to go further and under section 126 of the Transfer of Property Act it is noteworthy that all voluntary settlements containing a revocation clause appear to be *pro tanto* absolutely void.

Lastly, whatever this may be in form, for all practical purposes it really is a testamentary disposition of a part of the settlor's estate. No doubt modern ingenuity will seek ways of this kind [618] of evading the rigid restrictions of the old law. But Courts will, I think, be wary against allowing Mahomedans under the guise of deeds of gifts to will away their property contrary to the provisions of their law. When a man says, "I give the whole of my property to myself for my life-time and on my death to my friend Z," were the Courts to validate such an intention whether wrapped up in the form of a trust or not, it would be lending



themselves to defeat the Mahomedan law of wills. Apart from that consideration a will is of course revocable and therefore if, upon a true construction of the deed of 1902, it should appear to be in substance, whatever it may be in form, a testamentary disposition of property, it could, in the first place, take effect upon no more than one-third of the testator's estate, and in the next place, it would be open to him to revoke it at any time before his death.

These, I think, are reasons enough for my conclusion that the plaintiffs' suit fails and must be dismissed with all costs.

*Suit dismissed.*

Attorneys for plaintiffs :—Messrs. *Payne & Co.*

Attorneys for defendants 1, 2, 3, 6 and 7 :—Messrs. *Matubhai, Jamietram and Madan.*

Attorneys for defendant 4 :—Messrs. *Smetham, Byrne & Co.*

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*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

*In the matter of THE LAND ACQUISITION ACT I OF 1894.*

*THE GOVERNMENT OF BOMBAY, Appellants, v. ESUFALI*

*SALEBHAI, Respondent.\**

[1st November, 1909.]

*Land Acquisition Act (I of 1894)—“Land”—Acquisition of outstanding interest where Government owns fee-simple.*

*Per CHANDAVARKAR, J.:*—To acquire a land [So. under the Land Acquisition Act] is not necessarily the same thing as to purchase the right of fee-simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.

[619] The definition given to the word “land” in section 3 (a) of the Act is not exhaustive.....The use of the inclusive verb “includes” shows that the legislature intended to lump together in one single expression—*viz.* “land”—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all of which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.

*Per BATCHELOR, J.:*—Government are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation, based upon the market value of the whole land, must be distributed among the claimants. In such circumstances there is no insuperable objection to adapting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for.

[Ref. 64 I. C. 93=43 All. 614 (F. B.) 24 C. W. N. 184.]

APPEAL from a reference to the High Court under section 18 of the Land Acquisition Act (I of 1894). In November 1902 Government notified their intention of acquiring, for a public purpose, a certain plot of land, with buildings on it, situate at Parel Road, and, after the usual notices had been issued and other formalities duly observed, the Collector entered upon an inquiry in December 1902. The only claimant appearing at this

\* Reference No. 2 of 1906.

Appeal No. 34 of 1908.



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inquiry was Esufali Salebbhai who was in possession of the land in his capacity as executor of one Salebbhai Heptoola. On 14th May 1904, Government gave notice to the claimant to quit, and on 29th June the Government Solicitor set up the claim that the land belonged to Government, and that Salebbhai was only a tenant by sufferance and had therefore no right to compensation except for the buildings. The inquiry proceeded, however, and the Collector on the evidence decided in favour of Government, and, after arriving at a valuation of the whole plot, awarded to the claimant compensation for the buildings alone. The claimant declined to accept the award and the Collector accordingly referred the matter to the High Court.

Macleod, J., on the reference made a slight alteration in the figures of the amount and awarded the whole sum to the claimant, on the ground that in the first place the Collector had no jurisdiction to decide the question of title as between Gov- [620] ernment and the claimant, and, secondly, Government, after having once proceeded to acquisition under the Act, could not in such proceedings set up the claim of ownership. From this decision Government appealed.

Robertson, with him Strangman, Advocate-General, for the appellants :—

The Judge in the Court below held that he had no jurisdiction to come to any finding on the first six issues, viz., as to title to the land as between Government and the claimant. And yet he awarded the total compensation to the claimant, whose title to it had been disallowed by the Collector. If the Collector had no jurisdiction, then the Judge had no jurisdiction to hear the reference. But the Collector had jurisdiction. It is his duty to ascertain the interest of the claimants, and in doing so he must necessarily decide the interest of Government. The two Allahabad cases, *Imaad Ali Khan v. The Collector of Farakhabad* (1) and *The Crown Brewery, Mussoorie, v. The Collector of Dehra Dun* (2), must be distinguished; they were both decided under the old Act (X of 1870). The power of the Government to levy assessment on land under City of Bombay Land Revenue Act (Bom. Act 11 of 1870) shows they have interest in land.

Jardine, with Setalvad, for the respondent:—The rent due to Government on this land is a demand on it, and not an interest in it. But in any event the Act does not contemplate Government taking up land in which it is interested. Having put the Act into force, Government is estopped from making any claim to any interest. What is acquired is the land and all the interests therein: *Bombay Improvement Trust v. Jalbhoy* (3). The Act thus cannot contemplate Government taking up its own interests, however small. Government could sell its interest to the acquiring body. In section 3 (b) the definition of "person interested" excludes Government, because Government is not interested in [641] the compensation. Section 23 contemplates that the compensation shall be the whole market value of all the interests in the land. See also *Collector of Belgaum v. Bhimrao* (4), which is supported by *Jalbhoy's* case (3). Section 11 (ii) and (iii) clearly exclude Government, and aim at compensating the persons dispossessed. The Crown is not affected in any way by a statute unless there is express provision to that effect in the

(1) (1886) 7 All. 817.  
(2) (1897) 19 All. 339.

(3) (1909) 33 Bom. 483.  
(4) (1908) 10 Bom. L. R. 657.



statute: *Secretary of State for India v. Mathurabhai* (1). If Government has any claim here, it can file a suit.

*Robertson* in reply:—

With regard to the point of estoppel, there was no suggestion of this in any of the issues. But Government is not here acquiring its own interest, it is acquiring land in which it is interested. It is suggested Government might sell its interest to the acquiring body; but suppose Government is acquiring for itself. Section 11 (iii) does not force the Collector to apportion to any person more than compensation for his particular interest. There is no need for the Crown to be expressly mentioned. See *Bell v. Municipal Commissioners for City of Madras* (2).

CHANDAVARKAR, J.:—In my opinion, Macleod, J., from whose decree passed upon a reference from the Collector of Bombay, under the Land Acquisition Act, this is an appeal, has taken too narrow a view of the Act, not supported either by the language and object of its provisions or the law relating to the rights of the Crown.

The question for decision arises under the following circumstances, shortly stated.

The land in dispute having been, in the opinion of Government, required for a public purpose, a declaration to that effect was published by them, and the Collector of Bombay adopted the preliminary steps and observed the formalities, required by the Act, for the compulsory acquisition of the property. The land had buildings on it. The respondent, who claimed both the land and buildings as owner, having declined the amount [622] of compensation offered by Government on the ground of inadequacy, the Collector commenced an inquiry into the value of the property for the purpose of determining the amount of compensation payable under the Act. In the course of the inquiry the Government Solicitor, who represented Government before the Collector, put forward their claim to the land as owners and averred that, as the respondent had held it as a tenant by mere sufferance, he was entitled to compensation in respect of the value of the buildings only. The Collector took evidence and, arriving at the conclusion that Government were owners of the land, he made an award of Rs. 41,693-2-3 as the amount of compensation payable to the respondent for the buildings. The respondent having refused to accept the award and asked for a reference to this Court, the Collector referred the matter accordingly.

Macleod, J., before whom the case came to be heard, has held that the Collector had no jurisdiction to go into and determine the question of title for the purposes of the inquiry before him; that the Act does not apply to land of which Government are, or claim to be, owners; and that, where they have begun by setting the machinery of the Act in motion for the compulsory acquisition of any land from a private individual as owner of it, they cannot plead in these proceedings their own right as owner and claim compensation in respect of it as against him. Upon this view, without going into the question of title to the land raised before him, the learned Judge has directed the whole amount of compensation, both for the land and the buildings, aggregating two lakhs of rupees and odd, to be paid to the respondent, who was claimant before the Collector.

The result of this decree is that the respondent is held not entitled to determination of his right to the land, although sections 30 and 31 of the Act distinctly contemplate that such right must be determined by the

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(1) (1889) 14 Bom. 218.

(2) (1902) 25 Mad. 457 at p. 495.



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Court before the claimant can receive compensation. Further, if the construction which the learned Judge has put upon the language of the Act is correct, land of which the Crown is owner, but which is in the [623] occupation of a subject under a lease or the like, cannot be compulsorily acquired under the Act, however urgent, on public grounds, the need of such acquisition may be.

The result is not satisfactory from the public point of view. But if the Act, on a proper construction of its language, allows it, it cannot be helped. The learned Judge's view is supported by two decisions of the Allahabad High Court which he has cited—*Imad Ali Khan v. The Collector of Farakhabad* (1); *The Crown Brewery, Mussoorie, v. The Collector of Dehra Dun* (2). These, indeed, were decisions under the old Land Acquisition Act (X of 1870); but there is no material difference in principle or language between that and the present Act. In my opinion, the language of the Act, reasonably construed, does not lend itself to the interpretation put upon it by Macleod, J.

It is to be remarked at the outset that the Land Acquisition Act was passed by the legislature for the purpose of compulsorily acquiring any land when it is required for a public purpose or for companies. The legislature has constituted the Local Government the judge of that requirement, and the Collector, agent of that Government, for the purpose of compulsory acquisition. The Allahabad decision in *Imad Ali Khan v. The Collector of Farakhabad* (1) proceeds upon the ground that it is a contradiction in terms to speak of the Collector as seeking acquisition of a land which he asserts is his own. But the Collector is not seeking his own: he is merely the agent of the Local Government who are constituted the statutory authority to acquire the land compulsorily. When the land has been so acquired the land becomes, indeed, absolutely vested in the Government free of all incumbrances (section 16); but that is for devoting the land to the purpose for which its compulsory acquisition was declared necessary. Such is not the case with land of which, in ordinary parlance, it is usual to speak as land owned by Government. Legally, the Local Government own no land. The Crown is the [624] owner of all State lands and property, and these are vested in the Government of India in trust for the Government of the country (21 & 22 Vic., c. 106, s. 37). And the Government, under that power, can use the Crown lands for any purpose. But the Crown remains owner unless the ownership has been transferred to a subject by way of fee-simple. This difference must be borne in mind in interpreting the provisions of the Land Acquisition Act.

It is quite true that there can be no such thing as the compulsory acquisition of land, owned by and in the occupation and control of the Crown. The Land Acquisition Act cannot apply to such lands, because all Crown lands being vested in the Government, they are competent and free to devote any of those lands to a public purpose. It is a contradiction in terms to say that the Government are compulsorily acquiring that which they have already acquired otherwise, both as to title and possession.

But suppose a land owned by the Crown and vested in the Government has been parted with in such a way as to create in favour of a subject of the Crown a limited right to hold and use it for specific purposes while reserving to the Crown the ownership of the land, i. e., the freehold interests in it, not merely the Crown's right to land revenue.

(1) (1885) 7 All. 817.

(2) (1897) 19 All. 389.



As an instance of this kind of land ownership reference may be made to the decision of Westropp, C. J., in *The Justices of the Peace for the City of Bombay v. The G. I. P. Railway Company* (1). In such a case, the land with its freehold interests is not free so as to enable the Government to use it for a public purpose, unless they buy out the person who has the right to hold and use it. And if they buy, the purchase extends only to that person's right to hold and use, in fact, to his partial interest in the land, not to the ownership, because the latter is already in the Crown. Nevertheless, when the sale has taken place, the Crown "acquires" the land in the sense that it is free to use it for any purpose it likes. To acquire a land is not necessarily the same thing as to purchase the right of fee-simple [625] to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.

The land Acquisition Act substitutes a compulsory for a contractual acquisition of land, where it is required for a public purpose. The object is to get at the *land* for a public purpose: and the word *land* has a definition expressly given to it in the Act, which is not exhaustive, because the Act says: "The expression 'land' includes benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth." The use of the inclusive verb "includes" shows that the legislature intended to lump together in one single expression—viz. "land"—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.

Thus, in an ordinary case, where a land in the sense of fee-simple is owned by one person, and the buildings on it are owned by another, the Collector has to enquire into the market value of the land as land having buildings on it, and in so doing he fixes the value of each separately and apportions the compensation accordingly: *Dunia Lal Seal v. Gopi Nath Khetry* (2).

But it is said that the Act cannot have been intended by the legislature to apply where the Crown represented by the Government claims to be interested in the land as owner. In support of this view, Macleod, J., relies principally on sections 11, 15 and 23 of the Act, and he concludes that there is no "provision for the acquisition of anything less than permanent interests in the land, and land in the Act must mean land irrespective of any interests which have been created in it."

This conclusion is opposed to the wide meaning attached to the term "land" by the definition given in section 3 of the Act. It is true that in sections 11, 15 and 23, the word "land" appears [626] at first sight as if it were used in the ordinary sense, but even on that narrow construction due and full effect can be given to the language of those sections consistently with the right of the Crown to intervene and claim its interest as owner of a land acquired for a public purpose as against a claimant.

Macleod, J.'s view, as I understand it, is that because section 11 requires the Collector to determine "the value of the land," to state in his award its area and "the amount of compensation which should be allowed for the land," and because under sections 15 and 23 the Collector and the Court are bound to determine the amount of compensation with reference to "the market value of the land," the plain intention of the legislature

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(1) (1872) 9 Bom. H. C. 217.

(2) (1895) 22 Cal. 820.



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appears to be that what they had in view as the subject-matter of compulsory acquisition and 'compensation' was "land" as distinguished from any interest in it less than permanent. The fact that provision is made in the Act for the determination of the amount of compensation with reference to "land" while the Act is silent as to the acquisition of any interests less than permanent in it, has led the learned Judge to that conclusion. And in supporting his decree, the respondent's counsel has argued before us that in the case of a land of which the Crown is owner, the sections above mentioned can have no meaning and application. Of what use is it, asks the counsel, to determine the area of, and fix the compensation for such land, when the Crown, being its owner, has to pay nothing and receive nothing?

This argument would be unanswerable if it were clear that the determination of the area and of the amount of compensation was absolutely useless and irrelevant in the case of a land owned by the Crown, that, in fact, no necessity could conceivably exist or arise in the case of such lands. The necessity for such determination must, indeed, exist invariably where the land compulsorily acquired was owned by a subject of the Crown. Cases of that kind arising under the Act must, in the very nature of things, be more frequent than cases of lands owned by the Crown. Even if we assume that the legislature had those [627] more frequent cases in view in enacting the provisions of the Act now under discussion, it cannot be maintained that those provisions are altogether valueless and inapplicable to the rarer cases of lands owned by the Crown. Even as to these, it may be sometimes necessary to determine the area and the amount of compensation payable for the land, as distinguished from subordinate interests, as a matter of account, because the acquisition may be for a company or other body, from whose pockets the money is ultimately to come. Due and full effect is given to the sections if we have regard to these considerations. They are intended for most of the cases arising under the Act, and because in some cases they are superfluous, it does not follow that the latter were meant to be excluded from the operation of the act.

According to Macleod, J., "land in the Act must mean land irrespective of any interests which have been created in it", such as the interest of a tenant from year to year or of a tenant holding for a period over a year. He says: "Take the case of a lease for ninety-nine years, fifty years of which have still to run when Government wish to acquire the land. How is the Collector to arrive at the value of the lessee's interest in the remainder of the term?" No doubt in the case of a fee-simple, the so-called tenant is and must be treated as the owner interested in the land entitled to compensation for it. So far I agree with Macleod, J. See *The Collector of Poona v. Kashinath* (1). But I cannot agree when he says that "in the case of lands let out for a period over a year, it is difficult to see how the Government can take action under the Land Acquisition Act if it desires to put an end to the term, unless the words 'the compensation payable for the land' in section 11 can be paraphrased into compensation for those interests in the land which are not vested in Government." Now, as a matter of law, these words have been in effect so paraphrased in cases to which private individuals, not Government, were parties and which have been decided under the Act. In *The Collector of Poona v. Kashinath* (1), there was a claim for compensation

(1) (1886) 10 Bom. 585 at p. 591.



made by certain tenants, who held [628] under an unexpired lease of nine years of the land for gardening purposes at the time of compulsory acquisition by the Collector. And it was held by this Court that "as persons interested in the land under section 3, they are entitled to share in the total compensation awarded for the fee-simple of the property." In *Fink v. The Secretary of State for India* (1) it was held that the term market value of land, as used in the Act, includes not only freehold interests, but also the interests of tenants, etc. In *Narain Chandra v. The Secretary of State for India in Council* (2), it was decided that a yearly tenant is entitled to share in the compensation under the Act as well as a tenant for periods over a year. Macleod J., appears to have been pressed by the difficulty of ascertaining the value of the interest of a lessee holding for a fixed period in the unexpired term of his lease. No guidance is given, indeed, in the Act for the valuation of such interests. The reason appears to be that the legislature, having given a general direction that the amount of compensation payable for a land shall be determined according to its market value, left the decision as to the interests subordinate to the right of ownership or fee-simple to rest upon principles which the Collector or the Court may see fit to apply in each case on grounds of law and equity. Interests in or benefits arising out of land are various, and it would have been practically impossible to mention them exhaustively and provide for each of them in the Act.

The whole question is the intention of the legislature. Did it intend by this Act to exclude from its operation lands let out by Government, without a transfer of the fee-simple? Where that intention is not expressed in explicit terms, it has to be gathered not merely from the language of some sections but by a consideration and comparison of all the sections in the Act bearing on the question for determination, and also from the purview and policy of the Act. Sections 11, 15 and 23 of the Act, on which Macleod, J., has rested his reasoning, must be read with sections 30 and 31. These distinctly contemplate that the amount of compensation determined under those sections must be [629] paid to the person "entitled" to it, or where there are several persons claiming, it must be apportioned among them according to their respective rights. That is the paramount intention of the Act with reference to the payment. In that respect it follows the Lands Clauses Act in England, as to which it has been held that "it is the person who is entitled to the land who ought to have the money." Per Cotton, L. J. in *In re Manor of Lowestoft* (3).

But it is urged that in any case the Land Acquisition Act cannot apply to the Crown, because the Crown is not mentioned in it. In *The Secretary of State for India v. Mathurabhai* (4), there is a dictum of this Court that the rule of construction of English law, according to which the Crown is not affected by a statute, unless there are words in it to that effect, applies to India. That dictum was on the authority of the decision in *Ganpat Putaya v. The Collector of Kanara* (5). The head-note to the report of *The Secretary of State for India v. Mathurabhai* (4) is misleading where it says that, according to the judgment in that case, "the rule of construction, according to which the Crown is not affected by

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(1) (1907) 84 Cal. 599.

(2) (1900) 28 Cal. 152.

(3) (1889) 24 Ch. D. 253, 257.

(4) (1889) 14 Bom. 213.

(5) (1875) 1 Bom. 7 at p. 9.



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a statute unless specially named in it, applies to India." The words "specially named" are the reporter's, not of the Court. The rule of English law is that a statute does not bind the Crown, unless it is named in it expressly or by necessary implication. See the Judgment of Wills, J., in *Cooper v. Hawkins* (1).

In cases arising under the Lands Clauses Act in England, it has been held that the interests of the Crown are not affected by anything in the Act: *In re Manor of Lowestoft* (2), but the ground of that, as explained by Baggallay, L. J., in that case, is that "you cannot by any process under the Lands Clauses Consolidation Act bring the Crown into Court as a litigant to contest any claim before the Court." But the Crown may waive its prerogative in that respect and intervene where its rights and revenue are affected and take the benefit of any particular Act, though it be not named therein. That is so "by the common [630] law of the realm, and from time immemorial the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words," where its revenue is affected: *The Attorney-General v. Constable* (3). And the right of the Crown to intervene and have a trial at bar where it is actually and immediately interested in the litigation, is a branch of the Royal prerogative. [Per Wiles, J., citing Chitty's Practice in *Dixon v. Farrer* (4).] No doubt, though the whole amount of compensation, determined in the present case under the Act, is paid to the respondent, the Crown is not concluded by the payment and is entitled to claim it from him in a separate suit. But, nevertheless, the Court has a duty to perform under the express provisions of the Act before it decrees payment. It has to determine whether the person claiming the amount of compensation, whether for the land or the buildings on it or other interests in it, has the right to receive it in the capacity which he asserts. Under these circumstances it is not sound law, not to say justice, to say to the Crown: "You can sue the claimant if you think you are entitled to what he claims."

I have so far dealt with the case on the assumption that what is claimed on behalf of the Crown is the proprietary title to, or fee-simple of, the land and not merely the right to levy assessment, which exists in the case of lands held by one of its subjects as proprietor, liable to pay assessment. In *Narroji Beramji v. Rogers* (5), the opinion was expressed "that most, though not all, of the lands in Bombay are held in perpetuity," and were estates in which the possessors had a permanent interest. In the case of such lands, the fee-simple of the land would be in the occupier, not in the Crown; and the former would be entitled to the amount of compensation as owner interested in the land. Whether the Government demand called assessment or pension tax, or quite rent, or ground rent, is in reality a tax or rent, is a difficult problem, which has given rise to serious controversy among statesmen and political economists. Macleod, J., thinks the demand in such cases is a [631] tax. I will not venture to discuss that question, because it is not necessary for the purposes of this case. By the pleadings in the Court below, the title asserted on behalf of the Crown is that of owner of the land, who let in the respondent as a tenant for specific purposes, meaning that the latter had no fee-simple of the property. The question before the Court, therefore, is whether at the date of acquisition by the

(1) [1904] 2 K. B. 164 at p. 168.

(2) (1883) 24 Ch. D. 258, 257.

(3) (1879) 4 Ex. Div. 172.

(4) (1856) 17 Q. B. D. 658 at p. 664.

(5) (1867) 4 Bom. H. C. 1 at p. 102.



Collector the respondent had any right to the land apart from the buildings, entitling him to receive the amount of compensation which remains after deducting the amount payable for the buildings as "a person interested in the land."

On these grounds, the decree appealed from must be reversed. As that decree was passed by the learned Judge on the ground of want of jurisdiction to decide the question of title, the disposal of the case by him must be regarded as one on a preliminary point and the case must be remanded for a decision on the question whether the claimant (respondent) had any interest in the land, as distinguished from his interest in it in virtue of the buildings, which entitles him to compensation.

If it be found that he had such interest, the Court below should determine the amount payable to him in respect of it and pass a decree accordingly. If, on the other hand, the Court holds that the respondent has no such interest in the land, he should have a decree for compensation in respect of the buildings only, since there is no dispute as to his right to it.

Before parting with the appeal, I ought to point out that, though the title of the Crown has been asserted in this case, the Crown is formally not on the record. It is represented by the Government of Bombay; but, according to law, in all litigation to which the Crown is a proper party, it is the Secretary of State for India who alone can represent it.

That is how it strikes me at present, and I say so because the point was not raised either before us or in the lower Court. If there is any legal defect on the ground I mention, it can be easily remedied by the Court bringing on the record the Secretary of State so as to make the decision final and binding in law as between the Government and the claimant. [632] See *Kishan Chand v. Jagannath* (1). All costs including those of this appeal shall be dealt with by the learned Judge in his discretion.

BATCHELOR, J.:—This is an appeal by the Government of Bombay from a decision of Mr. Justice Macleod in a reference from the Collector of Bombay under section 18 of the Land Acquisition Act, 1894. The material facts are these. The land in question measures 13,141 square yards and in November 1902 was notified for acquisition by Government in order to the extension of the chemical laboratory in the vicinity of the Sir J. J. Hospital. Certain buildings of considerable value stood upon the land. The usual inquiry prescribed by the Act was begun and continued by the Collector, apparently on the footing that the title to the land as well as to the buildings was in the claimant-respondent, Esufali Salebbhai; but on 29th June 1904 in the course of the inquiry, the Government Solicitor, appearing in what he described as "a new attitude," set up the contention that the land was entirely the property of Government and was held by the respondent on sufferance only. The Collector proceeded with his inquiry and dealt with this disputed question of title. In the end he found, for reasons stated, that the respondent "is thus only a tenant of Government on sufferance, and, Government having through their Solicitor given him notice to quit or deliver up possession of the land under acquisition (Ex. No. 14), which notice has already expired, is entitled to compensation for buildings only, which I accordingly grant." The Collector found that the amount of compensation due in respect of the buildings was Rs. 41,693-2-2, which sum he awarded to the respondent. The compensation due in respect of the land was estimated by

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(1) (1902) 25 All. 183.



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the Collector at a little over Rs. 2 lakhs, but, of course, no part of this sum was awarded to the respondent, as the land was, in the Collector's view, the property of Government. The respondent, being dissatisfied with this decision, claimed a reference to the High Court on the grounds (1) that the amount of compensation awarded for land and buildings was inadequate, and (2) that Government [633] were not entitled to the full value of the land. The reference was heard by Macleod, J., who altered the Collector's figure for the compensation due for both land and buildings from Rs. 2,36,438 to Rs. 2,35,264-7-1 *plus* 15 per cent. for compulsory acquisition and awarded this entire sum to the respondent. This the learned Judge did though he held that neither he nor the Collector had jurisdiction to determine the question of title between Government and the respondent. The result, therefore, is that the respondent gets the large sum of Rs. 2 lakhs on a claim which the learned Judge declined to adjudicate upon and which the Collector decided in favour of Government; in other words, Mr. Justice Macleod was of opinion that, even if Government were the owners of this land, the large compensation due for its acquisition must none the less be handed over to the respondent. This result may, I think, be safely described as startling on the face of it; and it seems clear from the judgment that the learned Judge accepted it only because he conceived himself to have no means of avoiding it upon the language of the Act. That is the sole ground upon which the decision is sought to be justified in appeal, and it is manifest that upon no lower ground can it be supported. Mr. Jardine's argument was that if, owing to faulty draftsmanship or other defect of the Act, its plain effect is as the Court below held, then his client is entitled to take advantage of this circumstance. That, no doubt, is so; but the conclusion is one which the Court will be astute to avoid, if that can be done with due regard to the words of the statute. For we must not lightly attribute to the legislature the intention of working injustice by taking away A.'s property and giving it to B.; in this case taking away what, on the argument, is Government's property and giving it or its value to the respondent. The object of the Land Acquisition Act is to empower Government compulsorily to acquire land on payment of due compensation to the persons dispossessed, and compensation, as I understand it here, means indemnity for monetary loss suffered. It would be strange, indeed, if the result of such an Act were that a person from whom certain buildings were acquired was entitled not [634] only to receive compensation for his buildings acquired but to put into his pocket a very large sum of money in respect of land which *ex hypothesi* belonged to somebody else; that is, in substance, to take away one man's property and give it to another, and the name for a process of that sort is certainly not compensation. If, then, that is the apparent effect of the statute, we must proceed to consider whether it is its real effect, and in so considering we must apply the recognised rules of construction adapted to such a case. Those rules are stated by Maxwell in the following words:—"Where the language of a statute," says that learned author, "in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence." This passage, for which ample authorities are cited in the text, is adduced merely to illustrate the lengths to which



the Court is entitled to go in such cases; here, I think, it is not necessary for us to go nearly so far.

For upon what grounds are we asked to take this severely technical view of the provisions of the Act? Stated briefly, the argument is that, under the Act, Government cannot acquire what is already their own property; that the land here being Government's, Government are not "persons interested" within the meaning of section 3 (b); that when once the compensation due for the whole property, land and buildings, has been ascertained, that whole sum must be awarded to the claimant, or, if there are several claimants, must be apportioned among the claimants; and that, since Government were not "persons interested" or claimants, the only claimant before the Court was this respondent, who consequently was entitled to receive the whole compensation, even though Government were in fact the owners of the land. That was the view which found favour with Macleod, J., and which, on that ground alone, is entitled to great respect: for, in the decision of references under this particular Act and in the administration of the Act generally, that learned Judge has special knowledge and experience to which I can make no claim. [635] I have, however, indicated why, in my view, the conclusion to which he felt himself compelled to come cannot be accepted unless it be imperatively required by the Act; and to those reasons may be added this consideration that, if the lower Court's reading of the Act is right, then Government could never acquire any parcel of land in which they themselves had any interest, great or small, for that interest would go for nothing. Mr. Jardine admits that this would be a necessary consequence, and suggests that, in order to remove the difficulty, Government would have first to sell their own interest so as to render the land a fit object for the operation of the Act. It appears to me that this comes very near to being a *reductio ad absurdum* of the case for the respondent, for it is surely unreasonable to hold that if Government are minded to acquire a parcel of land in which they already hold, say, nine-tenths of the entire interest, they must begin by selling the nine-tenths in order to acquire the entirety, and that though the entirety is acquired by nothing more or less than a forced sale to Government under the provisions of this Act. For the purposes of the present argument it is, of course, assumed that Government are the owners of the land here, and the foregoing considerations seem to me strongly to suggest that, in those circumstances, the respondent can, under the Act, found no claim to the value of the land. In *Bombay Improvement Trust v. Jalbhoy* (1) following *Collector of Belgaum v. Bhimrao* (2), I expressed the opinion that the Act contemplates an inquiry to ascertain the value of the land itself considered as if all interests combined to sell; and I see no reason at present to alter that opinion as to the general scheme of the Act. It is, however, admitted that the point now before us was not decided in *Jalbhoy's case*, but is *res integra* for our decision now. As seems to be conceded on all hands, the draftsmanship of the Act has hardly stood the strain of the severe investigation which its provisions have undergone in this Court in recent years, and it is probably true that the form of procedure prescribed is not easy to adapt to cases of any great complication. But if we except certain matters of indirect inference [636] from the form of procedure, there is nothing in the Act which excludes from its operation cases where Government hold some interest in the land to be acquired, while the

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34 B. 618=5  
I. C. 621=12  
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(1) (1909) 93 Bom. 488.

(2) (1908) 10 Bom. L. R. 657.



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I. C. 621=12  
Bom. L. R.  
84.

extreme frequency of such cases forbids the theory that they were omitted *per incuriam*. And as to the argument that in such cases the Collector would be acquiring, not the land itself, but the separate interest in the land, which the Act does not authorize, I think that that is open to this answer. The procedure laid down in the Act is so laid down as being appropriate to the special case which is considered in the Act, i. e., the case where the complete interests are owned privately. But that special case is, as I understand it, singled out by the legislature as the norm or type with the intent that in other cases which only partially conform to the type the procedure should be followed in so far as it is appropriate, not that such cases should be excluded from the Act because they do not wholly conform to the type. In other words Government, as it seems to me, are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation based upon the market value of the whole land, must be distributed among the claimants. In such circumstances, as it appears to me, there is no insuperable objection to adapting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for. There may be some difficulty in harmonising his view with some of the procedure sections of the Act, but bearing in mind the particular purposes for which that procedure seems to have been designed, I think the difficulty is immeasurably smaller than that which confronts us on the counter-construction; for, on that construction, as I have tried to show, the enactment is fertile not only of grave inconvenience, but of positive injustice.

On the other hand, all serious difficulty is removed if once it be conceded that the combined interests held apart from Government are in such a case as this the "land" to be acquired within the meaning of section 3 of the Act, and, in my opinion, there is nothing in the Act or the decisions which pro- [687] hibits the adoption of this view in the state of facts now before us. In this view the only things acquired from the respondent were the buildings, and they are "land" within the definition in the Act. For these reasons I am of opinion that Mr. Justice Macleod's decree should be varied by discharging so much of it as awards to the respondent the value of the land. As to the manner in which this last question should now be dealt with, it is probable that, as the learned Judge observed, the procedure adopted by the Collector was irregular; but the question before us is, not so much what orders the Collector ought to have passed on the subject, as what order we ought to pass now that in fact the controversy as to title has been placed before the Court, and the parties have incurred all the costs incidental to getting their evidence fully upon the Court's record. It is clear that to set aside the elaborate inquiry which the learned Judge has already made, would benefit nobody, and would merely entail further costs in time and money to both the parties, who are anxious to obtain a decision on the evidence already judicially recorded. I think, therefore, that our best course is not to interfere with the enquiry made, and I should have been glad if I could have seen my way to suggesting that this Appeal Court should now decide the question. But as the decision must, at least to some extent, depend upon the appreciation of oral evidence, I conceive that the proper course is to remand the case for a decision to the lower Court under O. XLI, r. 23. The issues which remain for decision will be these :—



(1) At the material time what interest had the respondent in the land (apart from the buildings) ?

(2) To what compensation is he entitled in respect of that interest ?

Upon these grounds I agree with the order proposed by my learned colleague.

Attorney for Government :—*Bowen.*

Attorney for respondent :—*Messrs. Nanu & Co.*

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34 B. 618=5  
I. C. 621=12  
Bom. L. R.  
34 .

34 B. 638 (=5 I. C. 638 =12 Bom. L. R. 102).

[638] ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

FATMABAI, *Petitioner*, v. DOSSABHOY RUSTOMJI UMRIGAR  
AND OTHERS, *Respondents*.\*

[3rd December, 1909.]

*Application to sue as pauper—Disqualification—Subject-matter of suit—Cause of action—Civil Procedure Code (Act V of 1908), Order XXXIII, rules 1, 2 and 5.*

A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action.

*Held* that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action.

*Dwarkanath v. Madhavray* (1) not followed.

[Fol. 72 I. C. 224=47 Bom. 523; Ref. 75 I. C. 993.]

THIS was an application by one Fatmabai for leave to sue as a pauper under Order XXXIII of the Civil Procedure Code. In her petition she alleged that she had mortgaged certain property with the first respondent, and that the latter, acting fraudulently and collusively, had sold the property to the second respondent at a grossly inadequate price. She, therefore, prayed that the said sale should be set aside, and in the alternative claimed damages. The first respondent admitted that the sale proceeds left a surplus due to the applicant after the satisfaction of the mortgage-debt, and paid into Court a sum of Rs. 101. He then contended that the applicant, inasmuch as she was entitled to Rs. 101, was not a pauper within the meaning of the Order, and further that her petition disclosed no cause of action. The Prothonotary, following the case of *Dwarkanath v. Madhavray* (1), rejected the application, and the question was, at the instance of the applicant, referred to the Judge in Chambers under rule 82 of the High Court. Macleod, J., adjourned the matter into Court.

[639] *Robertson* showed cause for the respondents.

*Baptista* appeared in support of the application.

MACLEOD, J.:—The applicant presented this application to the Prothonotary under Order XXXIII of the Civil Procedure Code for leave to sue as a pauper. Under rule 2 her application was bound to contain all the particulars required in regard to plaints in suits, and was therefore

\* Pauper Petition No. 17 of 1909.

(1) (1886) 10 Bom. 207.



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84 B. 638=5  
I. C. 688=12  
Bom. L. R.  
102.

bound to show a cause of action. Under rule 5, the Court shall reject an application for permission to sue as a pauper *inter alia* when the applicant is not a pauper or when his allegations do not show a cause of action.

The proposed suit was to set aside a sale to the second respondent effected by the first respondent as mortgagee. The applicant as the mortgagor alleged that the mortgagee had not properly advertised the sale and had acted in collusion with the purchaser. The first respondent admitted that there was a surplus due to the applicant after the amount due on the mortgage had been satisfied and paid into Court Rs. 101. He then contended (1) that the application disclosed no cause of action; and (2) that the applicant, being entitled to the sum of Rs. 101 paid in the Court, was not a pauper.

The Prothonotary rejected the application on the ground that the applicant was entitled to Rs. 101, following the decision in *Dwarkanath v. Madhavray* (1).

The applicant then applied, under rule 82 of the High Court Rules, for the matter to be adjourned to the Judge in Chambers and it came on for argument before me.

With all due respect to the learned Judge who decided the case of *Dwarkanath v. Madhavray* (1), I am of opinion that his decision should not be followed; otherwise, whenever an application for permission to sue as pauper is made the respondent can always get the application rejected by paying into Court Rs. 100 out of the amount claimed.

In construing an explanation to a section or rule it is necessary to refer to the section or rule itself. No doubt, in rule 5 (a) reference is made to the 'proposed' suit, whereas in the explanation to rule 1 the word 'proposed' has not been inserted. It is also clear that at the time an application is presented there is no suit in existence. But the only suit that can be referred to in the explanation to rule 1 is the suit which may be instituted under the rule, and to put any other interpretation on the term 'the suit' would make it meaningless. The words 'such suit' in the first part of the explanation clearly refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. As a matter of drafting, it was not necessary to use the word 'such' a second time. There was, therefore, no necessity to use the word 'proposed' in the explanation, though it was necessary in rule 5 (a). However, on the first ground which was not decided by the Prothonotary, I think the application must be rejected as the allegations contained therein do not show a cause of action. But the rejection will be without prejudice to the applicant's right to make another application which does show a cause of action. She must, however, as a condition precedent, pay the respondents' costs of opposing this application.

Attorneys for the petitioner:—Messrs. *Jehangir, Mehta and Somji*.

Attorneys for the respondents:—Messrs. *Mulla and Mulla*.



34 B. 641 (=7 I. C. 650 =12 Bom. L. R. 553.)

ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

**BAPUJI SORABJI FRAMJI AND OTHERS Appellants and Plaintiffs,**  
**v. THE CLAN LINE STEAMERS, LIMITED, AND OTHERS,**  
*Defendants and Respondents.\**

[28th February, 1910.]

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34 B. 640=7  
 I. C. 650=12  
 Bom. L. R.  
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*Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), sections 45 and 47.*

The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed [641] in the following manner. M. & Co., on shipping the goods, handed over the complete shipping documents to B, and received from him an advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B.

On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. Clan Macleod for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes and on 27th March another invoice for the remaining 50 boxes, the material part of the invoice in each case being "No claim concerning these goods can be recognized unless made within fifteen days from delivery to Messrs. W. & Co., Newport, for shipment on your account."

The 250 boxes were put on board the steamer by W. & Co. as the agents of L. & Co., but in obtaining a bill of lading for 500 boxes (including the 250 in question) W. & Co. acted as the agents of M. & Co.

The steamer left Newport on 4th April. Following the usual course of business as above described, M. & Co. handed over to B the shipping documents relating to the 500 boxes and obtained an advance of £255-5-2 (being 65 per cent. of the invoice value). B, on the 6th April, obtained a similar advance from the Bank. On the same day M. & Co. suspended payment, and on 9th April W. & Co., as unpaid vendors of 250 boxes, notified the steamship owners, the first defendants, to stop these goods in transit.

The S. S. Clan Macleod arrived in Bombay on 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April, was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes, and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled.

On the plaintiffs' subsequently suing the steamship owners and their agents for damages.

*Held*, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay.

*Ex-parte* *Golding Davis & Co.* (1) followed.

\*Original Suit No. 866 of 1908.

Appeal No. 27 of 1909.

(1) (1880) 13 Ch. D. 628.



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34 B. 640=7  
L. C. 680=12  
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583.

[642] *Held*, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledgees for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants.

*Held*, further, that the plaintiffs were entitled to join both defendants in the suit.

The utmost benefit which the defendants were entitled to obtain from the position of L. & Co. as sureties [so. to the plaintiffs for the advance made by the latter to M. & Co.] was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs.....The plaintiffs by refusing to take delivery of the 250 boxes had omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission had resulted in loss, the surety was discharged.

*In re Westsinthus* (1) discussed.

IN and prior to the year 1907 the plaintiffs carried on the business of importing hardware into Bombay for sale on commission. Among their constituents in England were Millerson & Co. of Manchester. The course of business followed by the parties and the arrangements by which Millerson & Co. were financed were as follows. Millerson & Co. on shipping goods handed over the complete shipping documents to one Bloch, and received from him an advance of 65 per cent. of the invoice price of the goods. The business was at the risk of Millerson & Co. who were responsible to Bloch for any short fall resulting from the goods realising less than the amount advanced. Bloch's commission, in consideration of his financing the business and bringing Millerson & Co. into direct communication with the plaintiffs in India, was 3½ per cent. on the invoice value of the goods. Bloch then handed over the shipping documents to the National Bank of India in England, and himself received an advance of a similar amount by drawing on a credit opened with the Bank by the plaintiffs. The shipping documents were then forwarded by the Bank to their Bombay branch and handed over to the plaintiffs in exchange for a trust receipt, under which the plaintiffs became absolutely responsible to the Bank for any short fall in the advances made to Bloch. The plaintiffs then realised the goods at the best price obtainable, and rendered account sales for the same. If any short fall [643] resulted on realisation the plaintiffs held Millerson & Co. in the first instance, and, in default of them, Bloch as guarantor liable to make good to them the amount of the advance. By a contract dated 12th February 1907 Lloyd & Co., sold to Millerson & Co., 250 boxes of tin plates, the terms of the contract providing for delivery F. O. B. Newport in four or five weeks from date and payment less 4 per cent. discount in fourteen days. In a letter of 26th February Millerson & Co., gave instructions to Lloyd & Co. and enclosed marks for shipment of the goods to Bombay, and in a subsequent letter of 2nd March instructed them to forward the goods to Whittingham & Co., at Newport in time for shipment to Bombay in S. S. Clan Macleod. An invoice for 200 boxes was sent by Lloyd & Co. to Millerson & Co., on 21st March and a further invoice for the remaining 50 boxes on 27th March. The material parts in each invoice were:—

"No claim concerning these goods can be recognised unless made within fifteen days from delivery."

"F. O. B. Newport."



"To Messrs. Whittingham & Co., for shipment on your account."

Whittingham & Co., acting as agents of Lloyd & Co., put the goods on board, but they obtained the bill of lading (which related to a total consignment of 500 boxes) as agents of Millerson & Co. The S. S. Clan Macleod left Newport on 4th April 1907, and on the following day Millerson & Co. handed Bloch the shipping documents, and, according to the usual course of business, requested an advance of £255-0-2, being 65 per cent. of the invoice price. This advance was duly made, and on 6th April Bloch handed the documents to the National Bank and himself received an advance of a similar amount. The Bank thereupon forwarded the documents to India, and handed them over to the plaintiffs in exchange for a trust receipt dated 29th April 1907.

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Meanwhile, on the same day on which the Bank had made the advance to Bloch, Millerson & Co., suspended payment and called a meeting of their creditors for 12th April. On 9th April Lloyd & Co gave notice to the owners of the S. S. Clan Macleod to stop the 250 boxes of which they were the unpaid vendors. [644] This notice was communicated to Bombay, and when on the arrival of the steamer the plaintiffs presented the bill of lading they were informed by the shipowners' agents of the stop put upon the goods and were offered a delivery order for the remaining 250 boxes alone. This they refused to accept, demanding either delivery of the whole consignment or payment in full of the advance. On 29th June 1907 the plaintiffs repaid to the Bank the amount due on account of the advance and interest, and the trust receipt of 29th April was duly cancelled. On 5th May 1908 this suit was filed, against the shipowners and Messrs. Finlay Muir & Co., their agents, for the recovery of £255-5-2 with interest. The suit came before Mr. Justice Macleod, and was dismissed with costs, the learned Judge holding (*inter alia*) that Lloyd & Co. were the unpaid vendors and the goods were in transit when the notice to stop was received; that the plaintiffs had no cause of action against the second defendants; that the transfer to the plaintiffs of the bill of lading was not by way of pledge or other disposition of value; and that in any event the plaintiffs were bound to exhaust their other securities before proceeding against the goods stopped.

The plaintiffs appealed.

*Sirangman* (Advocate General), with *Inverarity* and *Cohen*, for the appellants.

The reasons of the learned Judge for holding that the second defendants were wrongly joined are not apparent. They refused to give up the goods, and it is immaterial that they were agents acting on the instructions of their principals: *Cranch v. White* (1) and *Davies v. Vernon* (2). An agent who converts goods under orders from his principal is liable for the conversion severally and jointly with the principal. The goods in question, after being placed on board the ship at Newport, ceased to be in transit from Lloyd to Millerson. The contract contained the provision that delivery was to be F. O. B. at Newport and that payment was to be made fourteen days after delivery. The notice requiring claims to be made within fifteen days of delivery [645] at Newport is also significant. The bill of lading was made out in the name of Millerson and not Lloyd, and included goods which were not Lloyd's. Delivery was thus clearly given to Millerson at Newport. If Whittingham & Co. were acting as agents of Lloyd, they were doing so only for the purpose of giving

(1) (1885) 1 Bing N. C. 414.

(2) (1844) 6 Q. B. 443.



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delivery to Millerson on the steamer named by Millerson. The case is on all fours with *Cowasjee v. Thompson* (1), where, although, as here, the seller had put the goods on board, they were held to be no longer in transit. See also *Schotsmans v. Lancashire and Yorkshire Railway Co.* (2) and *Ex parte Miles* (3). It is not disputed that Millerson pledged the goods to Bloch and that Bloch pledged them to the Bank. If it is argued that the Bank took the pledge on their own account and not on the plaintiffs, then by delivery in exchange for the trust receipt they transferred to the plaintiffs all their rights as pledgees. Thus the goods covered by the bill of lading were specifically pledged to the plaintiffs, and apart from the question of duration of transit they were entitled to receive from the defendants either the goods or their invoice value or the sum for which they were pledged. With regard to marshalling the defendants are clearly not entitled to put forward any claim. The doctrine of marshalling only applies to securities within the control of the Court: see *Webb v. Smith* (4). Further, the point was not raised in the written statement, and the plaintiffs' position with regard to the goods must have changed between the date of the arrival of the ship and the time when the point was taken.

*Robertson*, with *Lowndes*, for the respondents.

The master of the *Clan Macleod* received the goods merely as carrier to Millerson. The goods were sold F. O. B., but transit did not end till the termination of the voyage. Lloyd had marked the goods for Bombay and the ship was bound for Bombay: see *Berndtson v. Strang* (5). The case of *Cowasjee v. Thompson* (1) is not really a case of stoppage *in transitu* at all. The case turned on the point that the goods had been paid for. So in [646] *Ex parte Miles* (6) the facts were such as to show that the transit ended on shore. The cases of *Bethell v. Clark* (7), *Berndtson v. Strang* (5) and *Ex parte Rosevear China Clay Co.* (8) all show that it does not matter whether Whittingham & Co. took out the bill of lading as Millerson's agent or not. See also as to duration of transit *Jackson v. Nichol* (9), *Spalding v. Ruding* (10) and *Kemp v. Falk* (11). Again, the plaintiffs were only factors, not *bona fide* pledgees for value. In any case they were not pledgees till 29th June 1907. The defendants can claim the right to marshal. And this right extends not only to the other 250 cases but to all other goods of Bloch's which are in the plaintiff's possession: see *In re Westzynthius* (12). *Webb v. Smith* (4) has no relation to this case. When the shipmaster receives notice to stop, he is bound to deliver to the unpaid vendor: Sale of Goods Act, section 46 (2). See also *The Tigris* (13).

*Strangman* in reply cited *Kendal v. Marshall Stevens & Co.* (14), *Ex parte Gibbes* (15), *In re Winkphela* (16) and *Cahn v. Pockett's Bristol Channel Steam Packet Company Ltd.* (17).

SCOTT, C. J.:—The first question which has been argued in this case is whether at the time when Lloyd & Co. gave a notice to the "Clan

(1) (1845) 3 Moo. I. A. 422.  
(2) (1857) L. R. 2 Ch. 382.  
(3) (1885) 15 Q. B. D. 89.  
(4) (1885) 30 Ch. D. 192.  
(5) (1867) L. R. 4 Eq. 481.  
(6) (1885) 15 Q. B. D. 89.  
(7) (1888) 20 Q. B. D. 615.  
(8) [1879] 11 Ch. D. 560.  
(9) (1899) 5 Bing. N. C. 508.

(10) (1843) 6 Beav. 376.  
(11) (1882) 7 A. C. 573.  
(12) (1888) 5 B. & Ad. 817.  
(13) (1863) 32 L. J. Ad. 97.  
(14) (1858) 11 Q. B. D. 356.  
(15) [1876] 1 Ch. D. 101.  
(16) [1904] P. 42.  
(17) [1899] 1 Q. B. 648.



"Macleod" at Liverpool on the 9th of April 1907 to stop the goods which they had despatched under a contract of sale to Millerson & Co. the goods were in transit or had reached the possession of Millerson & Co. or any person on their behalf.

The contract for the sale of the 250 cases supplied by Lloyd & Co. was made in England and the obligations incidental to that contract must be decided according to the law of England.

Section 45 (1) of the Sale of Goods Act, 1893, is as follows:—

"Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the [647] purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian."

This appears to be a codification of the case law of England upon the subject.

The appellants are the holders of a bill of lading issued by the agents of the "Clan Macleod" in favour of Millerson & Co. acknowledging the shipment by them on board that steamer of 500 boxes of tin plates of which 250 are the boxes which the vendors gave notice should be stopped *in transitu* on the 9th April 1907.

The contract under which these goods were sold to Millerson & Co. provided that delivery should be F. O. B. Newport in four or five weeks from the 12th of February 1907—terms of payment less 4 per cent. discount in fourteen days.

On the 26th of February 1907, Millerson & Co. wrote to Lloyd & Co. as follows:—

"Herewith we beg to hand you instructions and marks for our shipment to Bombay. We have received a call from Messrs. Whittingham's agents, who tell us that the goods were too late to be shipped on the boat leaving Newport on the 28th instant. We have instructed Messrs. Whittingham and given marks same as we give to you. We hear from them that the next boat from Newport sails the third week in March, kindly have our order ready for this boat and oblige."

To that letter was appended a diagram of the mark to be put upon the cases by Lloyd & Co. which indicated that the cases were to be shipped to Bombay.

On the 2nd of March 1907, Millerson & Co. again wrote to Lloyd & Co.:—

"We have this day received notice from Messrs. W. M. Whittingham that the next steamer leaving for Bombay is the "Clan Macleod" closing on the 30th inst. Kindly forward goods to them in time for a shipment by this steamer and oblige."

On the 21st of March 1907, Lloyd & Co. enclosed to Millerson & Co. an invoice for 200 out of the 250 boxes contracted for, of which the material parts are as follows:—

"No claim concerning these goods can be recognised unless made within fifteen days from delivery to Messrs. W. M. Whittingham & Co., Newport, for shipment on your account."

[648] That was followed on 27th March by an invoice in the same terms relating to the 50 boxes remaining to make up the total amount contracted for.

Messrs. Whittingham & Co. were the agents of Lloyd & Co. for the purpose of putting the 250 boxes upon the steamer under the contract for delivery F. O. B. and they were paid by Lloyd & Co. for that service. It is, however, not disputed that Whittingham & Co. also did some work for Millerson & Co. for they obtained from the agents of the steamer the bill of lading above referred to relating to the 250 boxes supplied by Lloyd &

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Co. and 250 belonging to Millerson & Co. received from other suppliers. Under these circumstances the appellants contend that the transit from Lloyd & Co. to the buyer ended at Newport, the place designated in the contract for delivery; although Bombay had been mentioned subsequently to the sellers as being the ultimate destination of the goods. It is urged that the bill of lading shows clearly that the goods had reached the hands of an agent on behalf of the buyers who was required to do something on account of the buyers in order to forward them to their ultimate destination, that it cannot be said that in obtaining the bill of lading Whittinghams' servant was the agent of the sellers inasmuch as the bill of lading related to 250 boxes with which the sellers were in no way concerned. Reliance is also placed upon the clause in the invoice that no claim concerning these goods can be recognised unless made within fifteen days from delivery, that is, from delivery at Newport, and it is said that the sellers cannot be allowed to say that all their obligations end within fifteen days from delivery at Newport if for the purpose of transit the place of delivery is to be taken to be Bombay. With regard to this clause in the invoice it is to be observed that it is no part of the contract. It is a warning of a kind which sellers often put in bills and invoices but it does not follow that it is anything more than a *brutum fulmen*. If this clause is eliminated from consideration it is difficult to find any point relied upon by the appellants which was not also present in the case of *Ex parte Golding Davis and Co.* (1), a case which bears a singularly close resemblance to that [649] which we have now under consideration so far as the question of transit is concerned. There the contract was made between the suppliers and their buyers for delivery of 100 drums per month; shipment F. O. B. Liverpool, and the buyers actually had a branch at Liverpool. After the contract was made, the buyers' Liverpool branch sent instructions to the suppliers to ship 100 drums on board a named ship for New York then lying at Liverpool. The goods were accordingly shipped by the suppliers. The wharfinger's receipts stated that they were received for shipment on board the ship on account of buyers at Liverpool. That receipt was handed to the shipping brokers of the ship who then procured the signature of the master of the ship to the bill of lading, the bill of lading stated that the goods were shipped by Taylors and Sons, who were buyers from the original buyers to be delivered unto order or to assigns at New York. The original buyers having suspended payment the suppliers served a notice of stoppage *in transitu* on the master of the ship, the ship's agents and the brokers for the ship. The Registrar in Bankruptcy held that the notice was of no effect, on the ground that, the bill of lading being the name of sub-purchasers the property in the goods was transferred to them, and the *transitus* was at an end as between the suppliers, and the original buyers, when the goods were placed on board and the bill of lading was made out. An appeal was preferred and it was argued for the respondents that what took place was equivalent to a delivery of the goods to the original buyers at Liverpool and a sending of the goods on a new *transitus* and that the signing of the bill of lading by shipmaster in favour of the sub-purchaser was a complete attornment. James, L. J., however, said:

"A mere transfer of a bill of lading or any other sale of the goods, though it transfers the whole property in the goods, does not determine the *transitus*. And it seems to me that the goods now in question were clearly *in transitu* at the time when

(1) (1880) 13 Ch. D. 628.



the transaction took place between Knight and Son and Taylor and Sons. They left the vendors' warehouse for the purpose of their being put on board a ship which was to deliver them in New York. That *transitus* was never altered and never ceased, because the goods have since been delivered in New York accordingly. There was a *transitus* continuing from the vendors' warehouse to New York."

[650] Cotton, L. J., said :

"The journey indicated by the contract between the original vendors and the purchasers was still continuing, there had been no new or different journey, indicated, and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end, because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. Winslow that what occurred in the present case was equivalent to that, but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that, and then starting the goods as from their possession on a different and new voyage."

The decision in that case was attacked subsequently on a different point, but it has never been doubted that the judgments with regard to the question whether the transit had ended were correct. In the subsequent case of *Ex parte Falk* (1), Baggallay, L. J., said :

"I desire to add that the doubts which, in *Ex parte Golding Davis & Co.*, I said that I had entertained during the argument turned entirely upon the special circumstances of that case. My doubt was whether the goods had not been delivered at Liverpool to Knight and Son and then started on a fresh *transitus*. Upon consideration I was satisfied that that was not the right view of the facts."

Even if the position of Whittingham & Co. in the present case were less equivocal and if they had been employed solely on behalf of the buyer and not on behalf of the sellers it would not be conclusive in favour of the appellants' contention.

Mr. Justice Mathew in *Bethell v. Clark* (2) said :

"The authorities show that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit."

[651] For these reasons, we think, that the learned Judge of the lower Court was right in holding that the transit did not cease at Newport and that Lloyd & Co. were entitled to stop the goods as they did after they had started on a voyage to Bombay.

The next question which arises is whether the right of stoppage exercised by Lloyd & Co. is limited by the existence of any rights in the plaintiffs. The proviso to section 47 of the Sale of Goods Act, 1893, is as follows :—

"Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of lien (or retention) or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien (or retention) or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

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(1) (1880) 14 Ch. D. 446.

(2) (1887) 19 Q. B. D. 560.



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It is to be observed that the terms of that proviso do not apply to the facts of the present case for, here the bill of lading has not been "transferred" to any person as buyer or owner of the goods. It was issued by the agents of the ship to the buyers and by them endorsed as security for advances made. It is, however, we think, clear that the position of a pledgee of a bill of lading issued on behalf of the ship to the buyer is not worse as against an unpaid seller stopping *in transitu* than the position of a pledgee from a buyer of a bill of lading issued originally to the seller and transferred by him to the buyer of the goods. Thus in *Kemp v. Falk* (1), a case in which the rights of the pledgee of a bill of lading were given effect to in priority to an unpaid seller stopping *in transitu*, Lord Blackburn stated that bills of lading were made out which were signed not as is usual by the master but by the shipowner himself and that Mr. Kiel (the buyer) got those bills of lading.

The question then is whether the plaintiffs represented any interests acquired by way of pledge of the bill of lading.

[652] The plaintiffs had prior to 1906 business dealings with one Albert Bloch selling goods for him on commission. In July 1906, Bloch arranged with Millerson & Co. a hardware consignment business to Bombay on terms set out in his letter of the 30th July 1906. The business was to be at risk for account and debit of Millerson & Co. who were to consign the goods. Millerson & Co. were to hand to Bloch complete shipping documents in exchange for 65 per cent. of the amount of the invoice. Should the goods after deducting all charges realise less than the 65 per cent. advanced Millerson & Co. were to refund to Bloch any short fall; on the other hand, any surplus that might arise was to be credited to Millerson & Co. in account. In consideration of Bloch putting Millerson & Co. in direct communication with his constituents in India and of his financing the business his commission was to be 3½ per cent. on the invoice value of the goods to be paid when the advance should be made. It was agreed that when account sales were rendered from India the goods would be charged with the selling commission, etc., of 3½ per cent. in addition to Bloch's commission as well as out of pocket and customary incidental expenses in India; interest at 6 per cent. being charged on the sums advanced; all goods were to be sold on or before arrival and in no case were any goods to remain unsold for a longer period than three months from date of shipment. Bloch then arranged with the plaintiffs to finance him and to sell Millerson & Co.'s goods. The terms of this business are set out in a letter addressed by the plaintiffs to Bloch dated the 23rd of November 1906.

We now beg to enumerate the terms of this business as settled by our Mr. K. S. Framji and shall thank you to confirm same.

(1) You are to receive from the National Bank of India, Ltd., on handing over to the Bank complete shipping documents of the goods shipped to us as consignments by Messrs. A. Millerson & Co., 65 per cent. of the invoice value of the goods.

(2) We are to realise these goods at best price that we can obtain for them at our discretion and render account sales for same. Should there be any short fall in the amount advanced as above the same is to be made good to us by Messrs. A. Millerson & Co., in the first instance, failing which you are to make good the same as you guarantee these friends.

[653] (3) We are to deduct from the sale-proceeds all charges, interest, incurred upon the goods plus a commission of 9½ per cent. on all goods (including 1 per cent. for finance commission), and a commission of 2½ per cent. (including finance) on all yarns.

(1) (1892) 7 A. C. 578.



(4) We are to finance this business to such amounts and to such extent as we may deem right.

(5) The above terms also apply to manufacturers, direct business to India.

The second term is important. The plaintiffs' duty was to realise the goods and any short fall on realisation in the amount advanced was to be made good to plaintiffs in the first instance by Millerson & Co., failing which, Bloch was to make it good as guarantor.

In order to carry out these arrangements the plaintiffs arranged with the National Bank of India in London to finance the consignments that might be sent to the plaintiffs by Millerson & Co. through Bloch by paying to Bloch 65 per cent. of the invoice value of the goods on his handing to the Bank complete shipping documents for the same, the Bank being bound to hand over the documents to the plaintiffs' firm in Bombay upon the terms existing between them for that class of business and up to the amount of the cash credit allowed to them by the Bank. The plaintiffs were also to be responsible to the Bank for any short fall in the advances made by them to Bloch.

On the 5th of April 1907, Millerson & Co. delivered to Bloch bills of lading and invoices for the 500 boxes of tin plates already referred to shipped by "Clan Macleod," to the plaintiffs in Bombay and requested payment of the advance of 65 per cent. upon the invoice value amounting to £255-5-2. On the same day Bloch acknowledged the receipt of the documents and enclosed his cheque for £255-5-2. That cheque was received by Millerson & Co. on the 6th of April. On the 5th April Bloch handed to the National Bank the documents for the 500 cases and requested payment of a cheque for £255-5-2 being 65 per cent. of the invoice value. A cheque for this amount was sent to Bloch on the 6th of April. On the same day Millerson & Co. called a meeting of their creditors for the 12th of April and on the 9th of April Lloyd & Co. notified the first defendants to stop [654] the 250 cases supplied by them to Millerson & Co. The shipping documents after being received by the Bank were transmitted in the usual course of business to Bombay and were handed to the plaintiffs on the 29th of April in exchange for a trust receipt of that date, whereby the plaintiffs undertook in consideration of the Bank handing to them the shipping documents held as security for the payment of £255-5-2 to land, store, and hold the goods until sale, and sell the goods as the agent or trustees of the Bank, and until such sale to hold the goods and afterwards the sale-proceeds thereof as the property of the Bank, and subject to the Bank's security thereon, and to hand the proceeds of sale to the Bank advising them in respect of what shipment the payment was made, so that, they might apply the payment to its appropriate advance undertaking that the proceeds of the goods should be treated by plaintiffs as belonging to the Bank and earmarked as the Bank's property until the advance should be fully paid and satisfied by the plaintiffs, and the plaintiffs undertook that if the goods covered by the trust receipt should not be sold for cash, or if in the case of any goods delivered against Bazaar chits or promissory notes, the Bazaar chits or promissory notes, should not be realised in sufficient time to permit of the advance being paid at the due date to hand to the Bank within sixty days the full amount of the advance money with interest at 7 per cent. running from the 6th of April 1907 up to the approximate date of arrival of remittance in London, such payments to be made in sterling.

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We entertain no doubt that Bloch was the pledgee of the bills of lading from Millerson in consideration of the advance of £255-5-2; that the National Bank were pledgees of the bills of lading from Bloch in consideration of the advance to Bloch of that sum at the request of, and for and on account of, the plaintiffs, and that the plaintiffs were the holders of the bills of lading under their arrangements with the Bank being bound to repay to the Bank the full amount of the advance made to Bloch by the 29th of June 1907. There is no question but that the plaintiffs fulfilled their obligations to the Bank by handing to them on that date a demand draft on London in return for which they received the shipping documents together with the [655] trust receipt duly cancelled; and they were after that date the pledgees for value of the bill of lading if indeed they did not, being the transferees of the Bank's rights in respect of the advance of £255-5-2 as against the defendants, occupy that position from the 29th of April.

The "Clan Macleod" arrived in Bombay on the 13th of May and the plaintiffs duly presented the bill of lading for the 500 boxes of tin plates. The second defendants, however, as agents for the owners stated that with reference to the bill of lading they had been asked by Messrs. Lloyd & Co. in London to put a stop on 250 boxes marked F.E.L.S. The plaintiffs then by their letter of the 15th of May gave the second defendants the option of either delivering the whole consignment of 500 boxes on presentation of the bill of lading or making good to them the amount of the advances "paid by them" namely £255-5-2 on those goods. The second defendants, however, replied that they had been advised to deliver 250 boxes out of the 500 to Messrs. Glade & Co. and for the balance enclosed a delivery order to enable the plaintiffs to take delivery. The plaintiffs then by their solicitor's letter of the 18th of May pointed out that they had made an advance upon the whole of the 500 boxes constituting the consignment and the bill of lading, for all those boxes were assigned to them by way of pledge; that the advance was made in good faith; and that Lloyd & Co. were not entitled even though they might be unpaid vendors to stop the goods in transit except on payment or tender to the plaintiffs of the advance which had been made. The only reply from the second defendants was that they had given the plaintiffs a delivery order for 250 boxes out of the consignment under instructions from the owners of the steamer and beyond that they were not prepared to accept any responsibility. The plaintiffs having declined to accept anything but the full payment of the advance or the full amount of the goods mentioned in the bill of lading, the 250 boxes, which were not the subject of Lloyd & Co.'s stoppage orders, were eventually sold, and realised about Rs. 600.

It appears that the defendants refused delivery to the holders of the bill of lading under an indemnity received from Lloyd [656] & Co. But as they had not offered to discharge the lien of the defendants for £255-5-2, Lloyd & Co. were not entitled to receive the goods and the shipowners, namely, the first defendants and their agents, the second defendants, are liable for conversion and the plaintiffs are entitled to join them both in this suit: see *Bates v. Pillings* (1); *Leslie v. Wilson* (2).

The next question which arises is: What is the amount of the liability? The case was argued on the footing that the defendants, though bailees, were entitled to set up against the plaintiffs a *jus tertii*, namely

(1) (1826) 6 B. & C. 38.

(2) (1821) 6 Moore 415.



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that of Lloyd & Co. It was urged on behalf of the defendants, and the argument found favour with the learned Judge, that assuming the plaintiff at the date of suit to be the pledgees of the bills of lading the liability of the defendants is nil, because the plaintiffs had other means of securing payment of the advances made by them through the National Bank to Bloch. In support of this argument the case of *In the matter of Westzinthus* (1) has been referred to. In that case the contest was between the unpaid seller of certain oil and the assignees of the bankrupt buyers. The pledgee of the bills of lading for the oil had held a quantity of other goods of the buyers all of which he had realised for a sum in excess of the advances made by him, and the point which was decided in the case was whether the goods of the unpaid seller could be brought into the bankrupt buyers' estate for distribution among their creditors when the pledgee of the bills of lading, who was the only person having a right superior to the unpaid seller, had already been satisfied out of the bankrupt's own assets. It was held that once the pledge had been satisfied the goods or their value must be restored to the unpaid seller.

The contention that the plaintiffs are bound to realise and enforce all other securities at their disposal before resorting to the goods of Lloyd & Co. mentioned in the bill of lading is based upon a passage in the judgment of Lord Denman where he says :

"If, then, *Westzinthus* had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become [657] a surety to *Hardman* for *Lapage's* debt, and would then have a clear equity to oblige *Hardman* to have recourse against *Lapage's* own goods, deposited with him, to pay his debt in case of the surety ; and all the goods, both of *Lapage* and *Westzinthus*, having been sold he would have a right to insist upon the proceeds of *Lapage's* goods being appropriated, in the first instance to the payment of the debt."

The learned Judge in the lower Court treating Lloyd & Co. as sureties has held that any loss, which may have been suffered by the plaintiffs owing to their inability to apply the proceeds of the goods stopped by Lloyd & Co. in satisfaction of their advance upon the bill of lading, can be made good by charging Bloch for the same in account. He says that the plaintiffs have actually debited Bloch in account with the amount of the advance. We have been unable to find in the evidence anything to support this statement. The plaintiffs' clerk Anandrao Harishankar states : "We have not got back the advances made on the 500 cases in suit." Similarly Bloch has not recovered the amount of his advance from Millerson & Co. He states that at the time when Millerson & Co. suspended payment, the amount due to him for advances was £7,640-14-0 including the advance of £255 against the bill of lading. He also says that he thinks he will be a loser on the whole business with Millerson & Co. ; that although he had brought the estate (meaning thereby the margins payable to Millerson & Co. on realisation) it has turned out a failure. If, however, we assume that the plaintiffs have debited Bloch in account with the amount advanced against the bill of lading, there is nothing to show that they have recovered it or will recover it without objection from Bloch : it is not clear how Bloch is liable in respect of it under the terms of his agreement with the plaintiffs so long as they have not realised the goods against which the advances were made, for Millerson & Co. were to be responsible for any short fall on realisation in the first instance and Bloch was to be liable on their default for the same short fall. Bloch as a guarantor would be entitled to insist

(1) (1888) 5 B. & Ad. 817.



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that the goods, the sale of which was contemplated, should be realised before he could be charged with liability. Again, even if Bloch is liable to the plaintiffs in respect of the advance, it does not appear to us that Lloyd & Co. would be entitled to any [658] remedy against Bloch as they have not paid or performed all they were liable for as sureties. See Contract Act, section 140. The utmost benefit, we think, which the defendants are entitled to obtain from the position of Lloyd & Co. as sureties is the right to the security of the 250 boxes which they were willing, from the outset, should be received by the plaintiffs and which were, therefore, available for sale in or towards satisfaction of the advance made against the bill of lading. This, we think, follows from either section 139 or section 141 of the Contract Act. The plaintiffs by refusing to take delivery of the 250 boxes have omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission has resulted in loss the surety is discharged.

Now the value of the 250 cases not shipped by Lloyd Co. was, according to the invoice, £194-15-10. The goods were sold during the progress of the suit in February 1909 for Rs. 1,625-8-0 from which Rs. 1,022-12-7 were deducted for customs duty, Port Trust, and King's warehouse charges, leaving a surplus of Rs. 602-11-5.

We do not think that it can be fairly assumed against the plaintiffs that the full invoice value would have been realised upon a forced sale of the 250 boxes in order to ease the surety. At the same time it may be that the sale in February 1909 is not a fair criterion of the price the goods would have realised if they had been sold at once after their arrival in May 1907. In the absence of evidence upon the point we allow Rs. 2,000 as the price which might have been realised at a forced sale in May 1907; and of that sum Rs. 602-11-5 is in the hands of the Collector of Customs.

It is obvious that this amount of Rs. 2,000 is not sufficient to discharge the claim of the plaintiffs for £255-5-2 and interest at 6 per cent. per annum and no offer or tender has been made by the defendants in respect of the plaintiffs' claim.

We, therefore, hold that the plaintiffs are entitled to recover from the defendants the difference between Rs. 2,000 and £255-5-2 calculated at 1s. 4d. per rupee with interest at 6 per cent. per annum and costs properly incurred in the realisation of [659] their security. They are, however, not entitled to recover such costs as are attributable to their unsuccessful contentions upon the issue of stoppage *in transitu*. These costs we assess at one-third in each Court.

We, therefore, reverse the decree of the lower Court and decree that the defendants do pay to the plaintiffs the sum of Rs. 1,828-14-0 with interest thereon at 6 per cent. per annum and two-thirds of the costs of this suit throughout. The respondents must assign to the appellants the Rs. 602-10-7 in the hands of the Collector of Customs.

*Decree reversed.*

Appellants' solicitors:—Messrs. Craigie, Blunt & Caroe.

Respondents' solicitors:—Messrs. Crawford, Brown & Co.



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Before Mr. Justice Macleod.

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IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877  
AND IN THE MATTER OF SARAFALLY M. MOJJI.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877  
AND IN THE MATTER OF JAFFER JUSUB.  
[7th July, 1910.]

*Specific Relief Act (I of 1877), section 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), sections \* 33 and 34.*

A Municipal election petition having been lodged with the Chief Judge of the Small Causes Court, the latter unseated two of the successful candidates [660] and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as

\* Section 33. (1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may, at any time, within fifteen days after the result of the election has been declared, apply to the Chief Judge of the Small Cause Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, have, according to the results declared by the Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.

(2) If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the said election and against whose election no cause of objection is found, shall be deemed to have been elected.

(3) The said Chief Judge's order shall be conclusive.

(4) If he sets aside an election or if, when he declares a person who has been declared elected disqualified for being a Councillor, there is no other candidate who can be deemed to have been elected, proceedings for filling the vacancy or vacancies shall be taken under section 34.

(5) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election.

Section 34. (1) If from any cause no Councillor is elected at any general election, the retiring councillor or councillors shall, if willing to serve, be deemed to be re-elected.

(2) If, in any such case the retiring Councillor is not willing to serve, or some of the retiring Councillors are willing to serve and some are not, or

if, in the case of an election to fill a casual vacancy, no Councillor is elected, or if, in the case of any election, an insufficient number of Councillors are elected, the Commissioner shall, without delay, inform the Corporation of the circumstances, and thereupon the Corporation, so far as it is constituted, may appoint a duly qualified person to fill the vacancy, or each vacancy, as the case may be, and, if the Corporation shall fail within fifteen days after receipt of such information to appoint a person as aforesaid, the commissioner shall appoint another day for holding a fresh election.

(3) A fresh election held under this section shall be held subject in all respects to the same provisions as if it were an election to fill a casual vacancy.



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[661] elected." He declined to inquire further into the claims of any other candidate or to declare any other candidate elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so.

The two highest of the other unsuccessful candidates thereupon obtained rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (2) above mentioned.

*Held*, that the case fell within the general principle referred to in *Ex parte Milner* (1) that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue.

Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34.

An application under section 33 (1) should name the persons whose election is objected to.

[Ref: 80 I. C. 401=16 M. L. J. 494=19 L. W. 632.]

At the triennial general election of Municipal Councillors held in January 1910 fifteen candidates presented themselves to contest the eight vacancies in the Mandvi Ward. Eight candidates were declared by the Municipal Commissioner duly elected. A petition was shortly afterwards lodged with the Chief Judge of the Small Causes Court, under section 33 of the Municipal Act (Bom. Act III of 1888), praying for the setting aside of the election of these eight Councillors, or of one or more of them, on the ground of personation, coercion and undue influence. The inquiry resulted in the Chief Judge setting aside the election of two of the eight Councillors, namely, those standing 3rd and 6th respectively on the list returned by the Municipal Commissioner. Proceeding under the latter part of section 33 (2) [662] of the Act, the Chief Judge held that only one candidate could in any event fulfil the conditions therein set out, and that, as objection existed against that candidate—in this case, number 9 on the list—, no other could be declared elected. The two vacancies thus caused were later filled by the Corporation under the provisions of section 34. On 13th June 1910 on the petition of Jaffer Jusub, who stood 10th on the list of candidates, Macleod, J., granted a rule nisi to issue to the Chief Judge to show cause why he should not proceed to direct under section 33 that the petitioner be deemed to have been duly elected. A similar rule was granted on the petition of Sharafally Mamooji, who stood 11th on the list. The two rules were consolidated and argued together.

*Kemp* (with him *Jardine*, Acting Advocate General) appeared for the Chief Judge of the Small Causes Court to show cause.

Section 45 of the Specific Relief Act provides that the Act required to be done must be clearly incumbent on the public officer. But here the Act is not in any event incumbent on the Chief Judge without further inquiry. The High Court has no power to interfere where the Judge has



exercised his discretion in a matter within his jurisdiction. Even if it has the power it will not use it in such cases. It will only interfere where the Judge has wrongfully refused to perform his duty and not where he has gone wrong in performing it: see *Clifton v. Furley* (1), *In re Milner* (2) and *The Queen v. The Judge of Pontypool County Court* (3). This case must be distinguished from *In re Brighton Sewers Act* (4), where the Judge refused to perform his duty. In *In re Bowen* (5) it was held that the construction of a statute was within the jurisdiction of the County Court Judge, and even if his construction was erroneous a prohibition could not issue. Here the case is even stronger. Not only is the matter decided by the Chief Judge within his jurisdiction, but it is within his exclusive jurisdiction. The Act which created the right claimed by the petitioners also laid down their remedy. The whole point is fully dealt with [663] in *Bhaishankar v. Municipal Corporation of Bombay* (6). The judgment of Jenkins, C. J., in that case went much further than the actual decision, and is entirely against the petitioners. In any case the Chief Judge's construction of section 33 (2) is not only correct, but the only possible construction. Any other reading makes the word 'next' superfluous. Only one candidate can have the next highest number of valid votes, and the fact that there is cause of objection against him cannot release other candidates from fulfilling the first condition. The section does not enable, much less compel, the Chief Judge to go down the list till he comes to a candidate against whom no objection exists. The supposed intention of the legislature cannot be read in when the words are clear: *Vestry of St. John's, Hampsted v. Cotton* (7). Lastly, the interference of the High Court where it lies, is purely discretionary, and many considerations arise as to the use of that discretion: see *The Queen v. Church Wardens of All Saints, Wigan* (8). Such a rule, if granted, would lead in future to delay and uncertainty. In every election petition the Chief Judge must decide numerous points of law, and all these might be disputed in the same way. This is an indirect appeal, where no appeal lies.

*Jardine*, Acting Advocate General, appeared for the Municipal Commissioner.

The only interest of the Commissioner in this case is that the section should be read aright. The Court should bear in mind that the construction of the Act has not come before it as *res integra*, and even though mistaken should not be interfered with lightly, especially if a reasonable interpretation has been given. The petitioners here are in reality appealing. They have also been guilty of delay. Such an application as this ought to have been made at the earliest possible moment. Had the Corporation known of this petition, they would have refrained from filling the vacancies until they knew the result. But as it is, the vacancies have both been filled. Finally, the rule cannot be made absolute in its present form. The Court, if it decides to interfere, will have to give directions to the Chief Judge. Must the inquiry [664] be re-opened, or must he decide, as to the validity of votes and causes of objection, on such evidence only as has been adduced?

*Seta'vad*, for the petitioners, in support of the rule.

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(1) (1861) 7 H. N. 783.

(2) (1851) 15 Jur. 1037.

(3) (1894) 63 L. J. Q. B. 702.

(4) (1892) 9 Q. B. D. 723.

(5) (1851) 15 Jur. 1196.

(6) (1907) 81 Bom. 604.

(7) (1886) 12 A. C. at p. 6.

(8) (1876) 1 A. C. at p. 620.



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There was no undue delay. The petitioners applied at the earliest opportunity,—the first day of term. The Corporation would probably have filled the vacancies in any case, as, otherwise after fifteen days they would have lost their right to do so under section 34. The cases cited with regard to the jurisdiction and discretion of the High Court to interfere are all in my favour. They all show that this Court will interfere where the lower Judge has refused to perform his duty. The duty of the Chief Judge in this case was, according to section 33 (2), to declare the petitioners elected. This he wrongfully refused to do. He had jurisdiction and refused to entertain it. The case of *Bhaishankar v. Municipal Corporation* (1) only decided that a suit would not lie in a matter in which the Chief Judge's order was conclusive. It has no application here. The Chief Judge's construction of the section is wrong. It is not necessary to give it such a narrow meaning even if such meaning is possible, and it was obviously not the intention of the legislature. The weakness of that reading is apparent when its alleged effect in restricting the Chief Judge to the consideration of one candidate could be nullified by the filing of a series of petitions. For I submit that it would be so nullified. The Chief Judge in his judgment has not found any cause of objection against the petitioners, and it is therefore clearly incumbent on him to declare them elected. The order should be that he should proceed according to law.

MACLEOD, J.:—In January last the triennial election of eight Councillors for B Ward Mandvi to the Municipal Corporation of the City of Bombay was held according to the provisions of the City of Bombay Municipal Act III of 1888. There were fifteen candidates and the result of the poll was duly declared by the Municipal Commissioner under section 28 (p) of the Act. Under section 28 (q) the first eight candidates were deemed to be elected.

A petition was then presented under section 33 of the Act by one Husenbhai Abdulabbai Laljee to the Chief Judge of the [665] Small Causes Court praying that the whole election or the election of the eight Councillors or of one or more of them might be set aside and a scrutiny held. The fifteen candidates and the Municipal Commissioner were made respondents. The Chief Judge held an inquiry and set aside the election of Lakhamsey Nappoo and Khimji Hirji Kayani who occupied the 3rd and 6th positions amongst the successful candidates.

The Chief Judge then came to the conclusion that under section 33 (2) he was only empowered to consider the claim of Fuzulbhai Joomabhai Laljee, the candidate obtaining the next highest number of votes to the candidates returned as elected, to be held to be deemed to have been elected, but as he held that a valid cause of objection existed to Fazulbhai being declared elected he declined to direct that Fazulbhai should be deemed to be elected.

He further held that as there was no other candidate according to the interpretation he placed on the section who could be deemed to be elected, proceedings for filling up the two vacancies would have to be taken under section 31 of the Act.

Sarasally Mamooji, who stood tenth on the list as notified by the Commissioner, then presented a petition to this Court under section 45 of the Specific Relief Act asking for an order that the Chief Judge do proceed to direct under section 33 of the Bombay Municipal Act that the

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(1) (1907) 31 Bom. 604.



petitioner shall be deemed to have been duly elected and for such further and other relief as the circumstances of the case might require.

On the 13th June I granted a rule against the Chief Judge and directed that notice should be given to the Municipal Commissioner and also to Sir Jamsetji Jeejeebhai and Dr. Rajabally V. Patell who had been appointed by the Municipal Corporation purporting to act under section 34 to fill the vacancies caused by the decision of the Chief Judge. The rule was argued before me on the 23rd June. Mr. K. Kemp appeared to show cause on behalf of the Chief Judge; Mr. Jardine, Acting Advocate General, appeared to watch the proceedings on behalf of the Municipal Commissioner while the two gentlemen above mentioned had intimated to the petitioner that they did not intend to take any part in the proceedings.

[666] It was first contended by Mr. Kemp that the Court had no jurisdiction to entertain the petitioner's application. Now under section 45 of the Specific Relief Act the High Court of Bombay may make an order requiring any specific act to be done or forborne within the local limits of its Ordinary Original Civil Jurisdiction by any inferior Court of Judicature, provided that (a) an application for such order be made by some person whose property franchise or personal right would be injured by the forbearing or doing (as the case may be) of such specific act and (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such Court in its public character. Rule 530 of the Bombay High Court Rules prescribes the manner in which the application should be made. The Small Causes Court is an inferior Court of Judicature within the local limits of its Ordinary Original Civil Jurisdiction, and the petitioner's franchise has been injured by the Chief Judge refusing to consider his claim to be deemed to have been elected. Therefore if I am of opinion that it was clearly incumbent on the Chief Judge under section 33 to consider the petitioner's claim, I have jurisdiction to direct the Chief Judge to do so.

I may here deal with the contention that the petitioner has been guilty of delay so as to disentitle him to relief.

The Chief Judge delivered his judgment on the 13th April. The petitioner obtained a certified copy of the judgment on the 23rd April. The High Court vacation had then commenced and the petition was presented on the first day the Court sat after the vacation. It is suggested that it should have been presented during the vacation, but the petitioner was under no obligation to do so, and I think he was perfectly justified in waiting until the Court reopened after the vacation. Then Mr. Kemp urged that the Chief Judge had exercised his discretion in a matter wholly and exclusively within his jurisdiction and that acting on well-known principles this court would not interfere. But in this case it is not a question of discretion, the Chief Judge has said: "As I read section 33 the legislature has given me no power to consider the claim of any of the remaining candidates to fill these two [667] vacancies except the claim of No. 9." If he had said, "I have the power but I decline to exercise it in favour of any of the unsuccessful candidates," his decision would have been conclusive.

This case falls within the general principle referred to in *Ex parte Milner* (1) that where an inferior tribunal improperly refuses to enter upon a complaint, a mandamus will issue. And see *The Queen v. The*

(1) (1851) 15 Jur., 1087.

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*Judge of the Pontypool County Court* (1), where the High Court refused to interfere with the decisions of the County Court Judge, as, in the words of Wright, J. "he had not really declined jurisdiction. He might or might not have made a mistake but it could not be said he had refused to entertain case."

Lastly, it was suggested that even if I differed from the Chief Judge I should not give directions on the ground of public policy as the success of the petitioner in this case might lead to applications of a frivolous nature being made to this Court. That may be a reason why this Court will not interfere when the lower Court has exercised its discretion but when jurisdiction has been declined it is a matter of public policy that a subject should not be lightly deprived of a franchise to which he is entitled by law.

I now come to the merits of the case. What are the powers and duties of the Chief Judge under section 33 of the Bombay Municipal Act which has been materially altered by Bombay Act V of 1905? Within fifteen days after the result of an election being declared any person enrolled in the Municipal election roll may apply to the Chief Judge (1) if the qualification of any person declared to be elected for being a Councillor is disputed or (2) if the validity of any election is questioned for certain reasons mentioned or for any other cause. It is open to argument whether the word 'election' means the election proceedings as a whole, or the election of an individual candidate. This question was discussed by Sir Lawrence Jenkins, C. J., in *Bhaishankar v. Municipal Corporation of Bombay* (2) but in the [668] opinion of the learned Chief Justice it mattered little which view prevailed. I should be inclined to think that neither view is wholly correct.

An objection to the election proceedings as a whole must include an objection to each of the individual candidates. An objection to the election of a particular candidate may involve an inquiry into the whole of the election proceedings as regards that candidate. What does seem clear from the wording of sub-section (2) is that an application under sub-section (1) should name the persons whose election is objected to.

The powers of the Chief Judge under sub-section (2) were changed by the amending Act and in order to prescribe the procedure to be followed in consequence of that change the following words were added to sub-section (1): "If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates, who, although not declared elected, have, according to the results declared by the Commissioner under section 33, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate"

It was open, therefore, to the applicant in the Small Causes Court to ask for a declaration that No 15, for instance, should be deemed to have been elected, in which case he was bound to make Nos 9 to 14 parties to his application. I do not understand, however, the last words of the sub-section 'as against the said candidate.' The applicant would not be proceeding against the particular candidate he wished to be declared elected, and it would seem more in agreement with the context if the sub-section ended as follows:—'as against the successful candidate or candidates the validity of whose election is being questioned.'

(1) (1894) 68 L. J. Q. B. 702.

(2) (1907) 31 Bom. 604.



Sub-section (2) enacts what the Chief Judge is to do when an application is made under sub-section (1). He has to make such inquiry as he may deem necessary and—

1. If he finds that the election was a valid election and that the person whose election is objected to is not disqualified he shall confirm the result of the election.

[669] 2. If the Chief Judge finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void.

3. If the Chief Judge finds that the election is not a valid election he shall set it aside.

The words "so far as concerns the person whose election is objected to" appearing in the Act before the amendment have now been omitted. It may be they were considered superfluous, but whether the Chief Judge declares a person's election null and void on the ground that he is disqualified or sets aside an election as not valid, in either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the election, and against whose election no cause of objection is found shall be deemed to have been elected.

The Chief Judge dealing with this part of sub-section (2) says in his judgment:

"The last part of clause 2 of section 33 seems to contemplate only one candidate coming in in the event of one or more of the successful candidates being unseated by the Court, that one candidate being the gentleman with the next highest number of votes to the candidates returned as elected provided no cause of objection exists against him. Hence if the election of the whole eight successful candidates were set aside the Court would only have power to declare the ninth candidate elected in place of the eight returned candidates and if any cause of objection existed as to him nobody could be declared elected."

Later on he says:

"As the elections of the third and sixth respondents have been set aside the question to be considered is whether any cause of objection can be urged against the ninth respondent who in the ordinary course and who alone under section 33 (2) can be declared elected in place of the unseated candidates."

Whatever the section may contemplate, the Court must give effect to its plain grammatical meaning and, with all due deference to the learned Chief Judge, that meaning is perfectly clear. Under section 33 (2) of the Act as it stood before it was amended by Bombay Act V of 1905 the Chief Judge, if he set aside an election, had no power to fill the vacancy so created. It was [670] only in the case of a person's election being held null and void on the ground that he was disqualified for being a Councillor that the Chief Judge could direct that the candidate, if any, with the next highest number of votes after the person disqualified or after all the persons who were returned as elected should be deemed to be elected. I am clearly of opinion that under that section the Chief Judge had power to fill up any number of vacancies caused by the election of candidates being declared null and void so far as the number of unsuccessful candidates allowed in order of votes obtained by them. However that may be, the amendments, introduced by Act V of 1905, leave no room for ambiguity. It is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected but the candidate with the next highest number of valid votes and against whose election no cause of objection is found. The Chief Judge in stating

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what the section in his opinion contemplated has omitted to notice the word 'valid'. No doubt the Chief Judge would be entitled to presume that all the votes in favour of a candidate as declared by the Commissioner were valid but if a vacancy has to be filled all the unsuccessful candidates are open to attack and the last on the list may prove to be the one with the next highest number of valid votes.

The object of the latter portion of sub-section (1) added as above mentioned by Bombay Act V of 1905 now becomes clear. The change in sub-section (2) has enabled an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected and if the applicant in this case had applied for a declaration in favour of No. 15 he was bound, as I have pointed out above, by sub-section (1) to make Nos. 9 to 14 parties of his application. As far as I can gather no such declaration was asked for but all the candidates were made parties to the application. If the Chief Judge could only consider whether No. 9 should be deemed to be elected or not, the latter portion of sub-section (1) expressly added by the amending Act would be meaningless.

Then is there anything in the section which can be held to limit the power of the Chief Judge to filling up one vacancy [671] only, when he has set aside the election of more than one of the successful candidates? Under section 13 of the General Clauses Act words in the singular shall include the plural and *vice versa* provided there is nothing repugnant in the subject or context.

The section has been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected; therefore I see nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was suggested that the Chief Judge might have to direct that candidates with a very small number of votes should be deemed to have been elected. That is a matter for the legislature and not for the Court, but I may point out that it would be possible for this to occur even if the view of the Chief Judge was correct and only the claim of the next man out could be considered.

In my opinion, therefore, it was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies.

I direct accordingly that the Chief Judge do proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection is found should be declared to be deemed to be elected. If only one qualifies, or none qualifies, proceedings for filling the vacancy or vacancies will have to be taken under section 34.

My decision in no way interferes with the discretion of the learned Chief Judge. It does not lie within his discretion to refuse to exercise duties clearly imposed upon him by statute when by such refusal the franchise of some person has been injured.

Attorneys for the petitioner :—Messrs. *Thakurdas & Co.*

Attorneys for the Municipal Commissioner :—Messrs. *Crawford, Brown & Co.*

Attorneys for the Chief Judge :—Messrs. *Little & Co.*



34 B. 672 (=7 I. C. 939=12 Bom. L. R. 682).

[672] APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

MANCHAND PANACHAND GUJAR (original Defendant 3), Appellant,  
v. KESARI KOM KHUPCHAND AND ANOTHER (original Plaintiffs),  
Respondents.\*

[14th April, 1910.]

*Limitation Act (XV of 1877), section 8, Schedule II, article 179, Explanation 1—  
Limitation Act (IX of 1903), section 7—Minor decree-holders—Applications for  
execution by guardian—Attainment of majority by one decree-holder—Application  
by guardian takes effect in favour of all—Right of the major decree-holder to give  
discharge to the judgment-debtors in respect of the judgment-debt.*

Two minor sisters, who were born in the years 1881 and 1887, obtained a decree against the defendants in May 1900. The minor decree-holders were represented by a guardian appointed by the Court. The said decree was confirmed by the High Court in appeal in March 1901. Subsequently the guardian presented applications for the execution of the decree in 1904, 1905 and 1906, and while the last application was pending the guardian died. Thereupon the decree-holders presented an application for execution as majors in 1908. The defendants contended that as the elder decree-holder had attained majority, the application by the guardian was, as to her, unauthorized and the execution of the decree was barred as against her. It was further contended that as the elder decree-holder could from the time of her attaining majority make an application and give a good discharge to the judgment-debtor for the decretal-debt without the concurrence of the minor, time had, therefore, run against both under section 8 of the Limitation Act (XV of 1877) or section 7 of the Limitation Act (IX of 1903).

*Held* that by reason of the first explanation of article 179 of the Limitation Act (XV of 1877) an application made by a representative of one of joint decree-holders takes effect in favour of all. Therefore, though the elder decree-holder had attained majority, the applications made by the guardian as the next friend of the minor decree-holder took effect in favour of both.

*Held*, further, that the contention under section 8 of the Limitation Act of 1877 or section 7 of the Limitation Act of 1903 was inconsistent with the decisions in *Govindram v. Tatia* (1) and *Zamir Hasan v. Sundar* (2), the applicability of which had not ceased owing to any change in the words of section 7 of the Limitation Act of 1903.

FIRST appeal from the decision of V. N. Rahurkar, First Class Subordinate Judge of Satara, in an execution proceeding.

[673] The facts of the case were as under:—

Two minor Hindu sisters, Kesari and Thaku, who were born in the years 1881 and 1887 respectively, obtained a decree against three defendants in the Court of the First Class Subordinate Judge of Satara on the 1st May 1900. The minors were represented by one Balaram, a guardian appointed by the District Court of Satara, and he having subsequently died his brother Ramji assumed the management of the minor's estate *suo motu*. The said decree was confirmed by the High Court in March 1901. In the years 1904, 1905 and 1906 the guardian presented applications for the execution of the decree, and while the last application was pending the guardian Ramji died. Thereupon, in the year 1908 the two decree-holders, Kesari and Thaku, filed the present application for execution as majors. At the time of the application the ages of Kesari and Thaku were 27 and 21 years respectively. Kesari being a major in the years

\* First Appeal No. 102 of 1909.

(1) (1895) 20 Bom. 888.

(2) (1899) 22 All. 199.



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1904, 1905 and 1906 when the guardian presented applications for the execution of the decree, the defendants contended that those applications were made by an unauthorized person, therefore, they did not avail the plaintiffs and owing to this reason the present application was beyond time.

The Subordinate Judge overruled the defendants' objection and allowed execution to proceed for the following reason :—

Kesari and Thaku were joint decree-holders. Under section 231 of the Civil Procedure Code of 1882 Thaku could apply for the benefit of herself and her sister. She was a minor. Section 7 of the Limitation of 1877 or of 1908 would save the bar of limitation even if there had been no previous applications at all (20 Bom. 383; 6 Bombay Law Reporter 647). In this case there were previous applications and the present application which was made within three years from the attaining of majority by Thaku cannot be barred.

Defendant 3 preferred an appeal.

*N. M. Patwardhan* for the appellant (defendant 3).—

Kesari had attained majority when the applications for execution were made by the guardian. He had therefore no authority to make the applications. Those applications were therefore ineffectual and the present application which is made by Kesari and Thaku is barred by limitation. Further, Kesari having attained majority could give a valid discharge to the judgment-debtor during the [674] minority of Thaku under section 231 of the Civil Procedure Code of 1882. Therefore under section 8 of the Limitation Act of 1877 time began to run against Kesari and Thaku both. Supposing they were not joint creditors or claimants under that section, still under the provisions of section 7 of the Limitation Act of 1908 there can be no doubt as to Kesari's right to grant a discharge to the judgment-debtor and the bar of limitation is not saved.

*K. N. Koyaji* for the respondents (plaintiffs).—

The decree to be executed was a joint decree, therefore, an application for execution made by one joint decree-holder would take effect in favour of both under the first explanation to article 179 of the Limitation of 1877: see the Full Bench ruling of the Allahabad High Court in *Zamir Hasan v. Sundar* (1). With respect to the right of Kesari to give discharge to the judgment-debtor during the minority of Thaku, we contend that the 'discharge' mentioned in section 8 of the Limitation Act of 1877 refers to a discharge which is wholly the act of the party given the discharge. Here the judgment-creditors were sisters and neither could give a discharge on behalf of the other. The discharge under section 231 of the Civil Procedure Code of 1882 is a power exercised by the Court and not by the party: *Zamir Hasan v. Sundar* (1); *Govindram v. Tatia* (2). The change of language in section 7 of the Limitation Act of 1903 has made no difference with regard to the question of discharge. Either section contemplates a case like that of a manager capable of giving a discharge on behalf of the whole joint family. We therefore submit that our present application is within time.

SCOTT, C. J.:—It is contended in this appeal that the learned Subordinate Judge was wrong in holding that an application for execution of a decree which had been passed in favour of two Hindu females during their minority, was not barred.

The application was made in 1908 and at that date the age of the elder decree-holder was 27 and that of the younger decree-holder 21. There had previously been several applications for [675] the execution

(1) (1899) 22 All. 199.

(2) (1895) 20 Bom. 338.



of the decree, for, Ramji, the brother of the deceased guardian of the minors, had in 1904, 1905 and 1906 presented different darkhasts purporting to act as the guardian of both the decree-holders.

Now as a guardian had been appointed for them they did not attain the age of majority until 21 and at the time of the applications in 1904, 1905 and 1906 the younger decree-holder was still a minor.

It is contended that the elder had attained the age of majority and that, therefore, the execution of the decree must be barred as regards her. It is, however, pointed out by the Full Bench in *Zamir Hasan v. Sundar* (1), that by reason of the first explanation of article 179 of the Limitation Act an application, made by a representative of one of joint decree-holders, takes effect in favour of all; therefore, though the elder decree-holder Kesari had attained majority the applications made by Ramji as next friend of Thaku took effect in favour of both.

It is also argued that under section 8 of the Limitation Act of 1877, or, at all events under section 7 of the Limitation Act of 1908, the elder decree-holder Kesari could, from the time of her attainment of majority, make an application under section 231 of the Code of Civil Procedure of 1882 and give a good discharge to the judgment-debtor in respect of the judgment-debt.

That contention, however, is inconsistent with the decisions in *Govindram v. Tatia* (2) and *Zamir Hasan v. Sundar* (1), and the applicability of those cases has not ceased owing to any change in the words of section 7 of the Limitation Act of 1908.

I, therefore, think that the learned Judge in the lower Court came to the right conclusion, and I dismiss this appeal with costs.

*Appeal dismissed.*

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34 B. 676 (=7 I. C. 945=12 Bom. L. R. 697.)

[676] APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

BAI SHRI VAKTUBA (original Defendant 1), Appellant, v. THAKORE AGARSINGHJI RAISINGHJI (original Plaintiff), Respondent, AND RANSINGHJI AGARSINGHJI (original Defendant 2), Appellant, v. THAKORE AGARSINGHJI RAISINGHJI (Original Plaintiff), Respondent.\*

[13th April, 1910].

*Specific Relief Act (I of 1877), section 42—Civil Procedure Code (Act VIII of 1859), section 15—15 and 16 Vic., c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.*

A Talukdar-plain'iff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877) and that it was premature.

*Held*, that the suit was maintainable, it being within the provisions of section 42 of Specific Relief Act (I of 1877).

\* Joint Appeals Nos. 46 and 57 of 1906.

(1) (1899) 22 All. 199.

(2) (1895) 20 Bom. 888.



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*Held*, further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course.

*Yool v. Ewing* (1) distinguished.

FIRST appeal from the decision of Chandulal Mathuradas, First Class Subordinate Judge of Surat, in Suit No. 503 of 1902.

The plaintiff, who was the Talukdar of the Guaf State in the Dhandhuka Taluka, sued for a declaration that the minor defendant 2 was not his son and that he was not born to his wife, defendant 1, and also to obtain a perpetual injunction restraining the defendant 1 from proclaiming to the world that defendant 2 was his son, from establishing that the said defendant was his natural born son and from claiming maintenance from the plaintiff as such son. The plaintiff alleged that he was married to defendant 1 about ten or twelve years before the suit, [677] that thereafter she lived with the plaintiff as his lawfully wedded wife but as no son was born to her on account of ill-health and other natural defects, the plaintiff married a second wife, that defendant 1, thereupon, with a view to set up a supposititious son, left the plaintiff and went to live with her father in the village of Vadgaum in Cambay and that in a previous proceeding instituted by the plaintiff against defendant 1 in the Court at Cambay she urged that a son was born to her, hence the present suit.

Defendant 1 answered that the suit was unsustainable under the provisions of the Specific Relief Act, that the plaintiff had filed a similar suit in the Court at Cambay and he withdrew it without liberty to file a fresh suit, therefore, the present suit was opposed to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882, that she had no natural defects and she all along served the plaintiff as his wife, that as she was expecting her confinement she went to live with her father and gave birth to defendant 2 on the 1st September 1901 at her maternal uncle's house, that defendant 2 was plaintiff's son and that no cause of action had accrued to the plaintiff.

The Subordinate Judge found that the plaintiff's suit was not opposed either to the provisions of section 43 of the Specific Relief Act or to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882. He, therefore, allowed the claim.

Defendants preferred joint appeals Nos. 46 and 57 of 1906.

*Raikes*, with *T. R. Desai*, appeared for the appellant (defendant 2) in appeal No. 57 of 1906.

We contend that a suit like the present cannot lie in a Civil Court. The plaintiff-Talukdar claimed a declaration that the infant-defendant is not his son, that his wife was not pregnant and that no son was born to her. The lower Court erred in making the declaration relying on illustration (a) to section 42 of the Specific Relief Act. We submit that (1) such a declaration cannot be made under section 42 and that, (2) even if it can be made the lower Court erred in the exercise of its discretion in granting the relief against the infant.

First, because there is no denial by the infant-defendant of any right or character of the plaintiff, nor is he interested in [678] denying the plaintiff's title to such character or rights because his own rights have not yet come into existence. The plaintiff, as Talukdar, is entitled to enjoy



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his estate for life and the fact of the infant's existence is no denial of the plaintiff's rights during his life-time. The infant has not claimed anything against the plaintiff, therefore section 42 of the Specific Relief Act has no application. Section 15 of the Civil Procedure Code of 1859 as interpreted by the High Courts and the Privy Council supports our contention: *Kathama Natchiar v. Dorasinga Tever* (1), *Sheo Singh Rai v. Mussumut Dakho* (2). The English Statute on which section 42 of the Specific Relief Act is based is in the same direction: 15 and 16 Vic. c. 86, s. 50. These authorities show that the plaintiff is not entitled to the relief which has been granted to him. A declaratory decree should not be made unless there is a right to some consequential relief which, if asked for, might have been granted: *Fischer v. Secretary of State for India* (3).

Secondly, even if such a case falls under section 42 of the Specific Relief Act, the present is not the case in which the Court should exercise its discretion in plaintiff's favour: *Yool v. Ewing* (4), *North-Eastern Marine Engineering Company v. Leeds Forge Company* (5). The interest of the minor defendant should not be prejudiced by deciding a question which will arise in the future. It would not be necessary to decide at this stage intricate questions when no immediate effect can be given to the decision and when the postponement of the decision will not prejudice the plaintiff's rights in any way: *Hunibutti Kerain v. Ishri Dutt Koor* (6). English Courts always keep back the decision in such cases. On the merits we submit that the evidence in the case does not justify the finding in plaintiff's favour. Direct and circumstantial evidence of a strong character is required in a case of this nature.

*Inverarity, Branson and B. G. Desai*, with *M. N. Mehta*, and *N. K. Mehta*, appeared for the respondent (plaintiff).

The present suit is maintainable under section 9 of the Civil Procedure Code of 1908 and section 42 of the Specific Relief Act. [679] Section 9 of the Civil Procedure Code allows all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. There can be no doubt of the civil nature of the present suit and there is no law which either expressly or impliedly bars such a suit: *Aunjona Dasi v. Prahlad Chandra Ghose* (7), *Mir Azmat Ali v. Mahmud-Ul-Nissa* (8). The Talukdari estate of which the plaintiff is the owner is impartible and inalienable without the sanction of Government under section 31, clause 1 of the Gujarat Talukdars' Act, and it descends according to the rule of primogeniture. It has been held in *Himmatsing v. Ganvatsing* (9) that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate. See also *Ramchandra Sakharam Vaoh v. Sakharam Gopal Vaoh* (10). Supposing that the defendant is a legitimate son, he would be entitled to an interest in the estate and so he would be interested in denying the plaintiff's right being free from his claim to maintenance out of the estate. Therefore the present suit clearly falls under section 42, illustration (f) of the Specific Relief Act. The rulings in *Rajah Nilmony Singh v. Kallu Churn Bhattacharjee* (11) and *Kathama Natchiar v. Dorasinga Tever* (1) were not decided under section 42 of the

(1) (1875) L. R. 2 I. A. 169.

(2) (1879) L. R. 5 I. A. 97.

(3) (1899) L. R. 26 I. A. 16 at p. 27.

(4) (1903) Ir. Rep. 1 Ch. 434. 1

(5) (1906) 1 Ch. 325.

(6) (1879) 5 Cal. 512.

(7) (1870) 6 Beng L. R. 243.

(8) (1897) 20 All. 96.

(9) (1875) 12 Bom. H. C. R. 94.

(10) (1877) 2 Bom. 346.

(11) (1874) L. R. 2 I. A. 83.



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Specific Relief Act. They went upon the old Chancery Practice Cases. The law has been altered in this respect; see Daniel's Practice, pp. 630, 631. No action or pleading is now open to the objection that a mere declaratory judgment order is sought thereby and the Court is empowered to make a binding declaration of rights whether any consequential relief is or could be claimed or not. The power thus given is discretionary and whether the Court will exercise its discretion depends on the circumstances of the particular case: *Ellis v. Duke of Bedford* (1), *West v. Lord Sackville* (2).

Under the Judicature Act a suit can be maintained for perpetuating testimony, Order 37, Rule 35. No such procedure is provided in India and so it becomes necessary to file suits of this [680] nature while facts are fresh, witnesses are alive and are in a position to depose to facts of a recent date as pointed out by the Privy Council in *Chandrasanji v. Mohansangji* (3). The decision in *Yool v. Ewing* (4) is not applicable to the present case. In that case there was no question relating to a right to an impartible estate and the rules and orders relied on in that case were not similar to section 42 of the Specific Relief Act.

SCOTT, C. J.:—The plaintiff claims in this suit a declaration that the second defendant is not his son and that he was not born to the first defendant and for an injunction restraining the defendant 1 from proclaiming to the world that the defendant 2 is plaintiff's son and from claiming maintenance for him as such son.

The plaintiff is a Talukdar and the first defendant is his wife, who alleges that, after leaving the plaintiff's house, a son was born to her who had been begotten by the plaintiff.

No claim for maintenance has as yet been made on behalf of the second defendant. He is an infant less than two years of age and neither he nor anyone on his behalf has set up any claim by him as heir to the estate of the plaintiff. The Talukdari estate of which the plaintiff is owner descends according to the rule of primogeniture, it is impartible and inalienable without the consent of Government and it has been held in this Court that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate, *Himmatsing v. Ginpatsing* (5).

The question which arises at the outset is whether such a suit as this will lie. It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute.

[681] In *Kathama Natchiar v. Dorasinga Tevar* (6) the Judicial Committee state:—"They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure of 1859, the effect of which has been so much discussed. Mr. Dwyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the Mofussil, before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these

(1) (1899) 1 Ch. 494 at p. 499.

(2) (1908) 2 Ch. 825.

(3) (1906) 30 Bom. 528.

(4) (1904) Ir. Rep. 1 Ch. 484.

(5) (1875) 13 Bom. H. C. R. 94.

(6) (1875) L. R. 2 I. A. 169 at 179.



propositions was cited; and their Lordships conceive that if the legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being:—'No suit shall be open to an objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.' Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause." It was held by their Lordships in the case from which the above quotation is drawn, that the application of section 15 of the Code of Procedure of 1859 must be governed by the same principles as those upon which the Court of Chancery proceeded in exercising the power conferred by 15 and 16 Vic., c. 86, s. 50, with such slight modifications as might be required by the different circumstances of India and by the different constitution of the Courts in that country, and that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court; or under special circumstances as to jurisdiction in some other Court.

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There can, we think, be no doubt that if the law as to declaratory decrees were still governed by section 15 of Act of 1859, this [682] suit would not be maintainable, having regard to the decisions in England under 15 and 16 Vic., c. 86, s. 50, and the opinion expressed by the Judicial Committee in the case above referred to. The law, however, is now governed by section 42 of the Specific Relief Act of 1877, which provides as follows:—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so."

On behalf of the defendant, reliance is placed upon a passage in the judgment of the Judicial Committee in *Fischer v. Secretary of State for India in Council* (1) to the effect that there can be no doubt as to the origin and purpose of section 42 that it was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852 (15 and 16 Vic., c. 86) as interpreted by the Judicial decisions and that before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. The Judicial Committee however in that case were not considering exhaustively the different cases in which declaratory decrees might be passed.

It is contended on behalf of the plaintiff that he is a person entitled to a right to his Talukdari estate free from any claim to maintenance by or on behalf of the second defendant, and therefore that the Court may, in its discretion, make a declaration in this suit that he is so entitled.

(1) (1893) L. R. 26 I. A. 27.



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There can, we think, be no doubt that the assertion which has been proved to have been made by the father of the first defendant with reference to the paternity of the second defendant, may lead to serious consequences from the point of view of [683] the plaintiff. It is well known that disputes often arise as to the true paternity of boys who are put forward as heirs to Talukdari estates. The prevalence of such disputes is illustrated by the letter of the Collector of Ahmedabad of the 9th of December 1897, Exhibit 131 in this case, where he calls attention to the desirability of Talukdars having their wives submitted to medical examination, when it is alleged that they are pregnant. It is not that such boys are often objected to as being bastards but as being supposititious sons of women who have never borne sons.

As a particular instance of the evil now under discussion, we may refer to a passage in the judgment of the Judicial Committee in *Chandrasangji v. Monansangji* (1), where, with reference to a case of an alleged supposititious child of a Talukdar, their Lordships observe:—"The extraordinary length of time which was allowed to elapse after the 14th May 1883, the date upon which everything turns, and the 12th December 1894, when the present suit was filed, is also a circumstance very adverse to the respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which, from its nature, specially required to be disposed of while the facts were fresh."

It appears to us that having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son, not admitted by him, had been born to his wife, his contention as to his right under section 42 of the Specific Relief Act is perfectly reasonable and we hold that this suit is a suit which falls within the purview of section 42.

The question then arises is whether the Court below in entertaining the suit has exercised a proper discretion in the matter. On the one hand, it is extremely desirable that all evidence which may be forthcoming with reference to the birth and paternity of [684] the second defendant should be taken while it is still available. On the other hand, we have to bear in mind the considerations stated as follows by Mr. Justice Joyce in *N. E. Marine Engineering Co. v. Leeds Forge Co.* (2). "In simple cases, the mere fact that A is supposed to contemplate the bringing of an action against B, or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A to have it declared that A has not a good cause of action against B, I think that is so whether the result depends merely upon questions of law or upon facts, as to which there would, or might, be a conflict of evidence and a protracted trial. Ordinarily, an intending plaintiff may postpone his action as long as he pleases at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not."

We do not think that in the present suit these considerations are of much force. For it is not the case here that the plaintiff is seeking

(1) (1906) 80 Bom. 528 at p. 538.

(2) (1906) 1 Oh. 325 at 329.



prematurely to force his opponent's hand; on the contrary the plaintiff's own hand has been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff is entitled to repel now when the material evidence is obtainable. To hold that, although the suit is maintainable, the Court below wrongly exercised its discretion in granting the declaration sought amounts for practical purposes to holding that the plaintiff, openly threatened with this serious claim, is condemned to inactivity for, it may be, 20 or 30 years, leaving it to the claimant to file his suit at such time as most assists him in taking the plaintiff at a disadvantage. The remarks of the Judicial Committee which we have already quoted indicate how prejudicial to the plaintiff's cause such inactivity would be, and it is plain that every day during which the plaintiff remained quiescent under an adverse claim of this character, would strengthen the case against him.

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[685] We have not overlooked the fact that the second defendant is an infant of very tender years who was represented only by the official Nazir of the Court as his guardian, and we have considered whether it would not be best to reverse the decree under appeal and stay the suit with liberty to the plaintiff to apply for its removal from the Stayed List in the event of the second defendant setting up any claim based upon the allegation that he is the plaintiff's son. But having regard to all the circumstances and being of opinion that the lower Court has come to a correct conclusion upon the question of fact we think that our proper course is to affirm the decree. It is no longer the practice to stay suits against infants until they have attained full age, as it is generally considered that an infant's case can be sufficiently placed before the Court by a duly constituted guardian. Such a guardian we have here, and though the whole of the case for the defence is that which was put forward by the first defendant, that is a circumstance of no moment to the present argument. From the very nature of the case the claim on behalf of the infant had to be put forward during his infancy, and the person best qualified to put it forward was the first defendant. In reality indeed it is as much her claim as his, and the record satisfies us that she has supported her pretensions with all the evidence procurable in that behalf. The plaintiff, being entitled to bring this suit, is entitled on the evidence to the decree made in his favour, and his rights are not to be curtailed by reason of the fact that the false claim made against him had to be made while the second defendant was yet an infant. Technically the infant has been duly represented; substantially his case has been put before the Court fully and completely with all, even more than all—the evidence which could honestly be called in aid of it. In the interests of justice it is of the highest importance that claims of this character should be investigated and decided without unnecessary delay, and when the controversy has once been brought to trial the decision should ordinarily follow in the usual course. We do not find in this case sufficient reasons for upsetting the decision come to and suspending the whole dispute indefinitely.

[686] Much reliance has been placed by the defendant's Counsel upon the case of *Yool v. Ewing* (1). That, however, was a case in which no question arose as to the right of inheritance to an impartible and inalienable estate and the words of the Rules and Orders relied upon by the Master of the Rolls as indicating that no suit for a declaration of

(1) (1904) Ir. Rep. 1 Oh. 434.



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bastardy could be maintained, are not identical with the terms of section 42 of the Specific Relief Act.

We affirm the decree of the lower Court and dismiss the appeal with costs.

We order the appellant to pay the Court fees which would have been paid by him if he had not been permitted to appeal as a *pauper*.

*Decree affirmed.*

84 B. 686 (=7 I. C. 945=12 Bom. L. R. 707).

APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heat n.*

NANABHAI BAJIBHAI PATEL (*original Defendant*), Appellant,  
v. THE COLLECTOR OF KAIRA AND OTHER LEGAL REPRESENTATIVES  
OF INAMDAR PANDURANG SADASHIV (*original Plaintiffs*), Respondent.\*

[8th July, 1910.]

*Bombay Land Revenue Code (Bombay Act V of 1879), sections 3 (11) and 217†—Survey settlement introduced into Inam village—Inamdar's name entered as Khateadar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.*

Section 217 of the Bombay Land Revenue Code (Bombay Act V of 1879) is not restricted in its application to registered occupants only : it invests "the holders of all lands" in alienated villages with the same rights and imposes [687] upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have.

The term "holder" as defined in clause 11, section 3 of the Land Revenue Code, is wide enough to include even a tenant who has entered into possession under an occupant.

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree passed by M. N. Choksi, Subordinate Judge at Nadiad.

Suit by an Inamdar to recover enhanced rent from his tenant.

The plaintiff, Pandurang Sadashivrao, as Inamdar of the village of Manjipura in the Nadiad Taluka, was the grantee of the Royal share of revenue. At his request Government introduced survey settlement into the village, at which the plaintiff's name was entered as Khateadar or registered occupant of the lands in the village, inclusive of the land in dispute.

The defendant was the permanent tenant of the lands in dispute and was in possession long before the survey settlement was introduced. He used to pay Rs. 45-13-1 every year to the plaintiff as rent.

\* Second Appeal No. 186 of 1905.

† The sections run as follows :—

Section 3 (11)—"holder" or "landholder" signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons, or for the public ; it includes a mortgagee vested with a right to possession.

217—When a survey settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to occupants and registered occupants shall be applicable, so far as may be, to them.



The plaintiff then enhanced the rent to Rs. 80 ; but the defendant declined to pay and contended that all he was liable to pay was the survey assessment under section 217 of the Bombay Land Revenue Code, 1879.

The plaintiff filed a suit to recover the enhanced assessment from the defendant. The Court of first instance held that the plaintiff was not entitled to enhance the rent and dismissed the suit.

[688] On appeal, the lower Appellate Court held that the plaintiff was entitled to enhance the rent to a reasonable extent. It therefore, in recognition of plaintiff's right to enhance the rent, allowed an enhancement of 10 annas and 11 pies.

The defendant appealed to the High Court. The Inamdar-plaintiff having died was represented by the Collector of Kaira.

The appeal came up for hearing before a Bench composed of Russell and Aston, JJ., when their Lordships delivered the following interlocutory judgment on the 8th November 1905.

RUSSELL, J. :—This is a suit by an Inamdar claiming the right to enhance the rent of the defendant, who has been held to be a permanent tenant. A similar point was lately discussed by this High Court in the case of *Rajua v. Balkrishna Gangadhar* (1). The judgment in that case lays down what are the essential issues to be decided in a case of this nature. Inasmuch as findings on these issues have not been recorded by the learned Judge, it is impossible for this Court to pass any decree in this case.

We accordingly remand this case to the lower Appellate Court for findings on the following issues :—

(1) Was the Inam grant of the soil or of the Royal share of the revenue?

(2) Was the defendant, or any predecessor in title of his, in possession of the lands in suit at or before the date of the grant in Inam under which the plaintiff claims?

(3) If so, was he in possession at that time as tenant of the person to whom the Inam grant was made, and had he Mirasi rights?

(4) Is it rent or assessment that is payable?

(5) Has the plaintiff the right by virtue of usage or otherwise to enhance as against the defendant?

(6) If there is a right to enhance, then to what extent can the enhancement be made having regard (a) to the usage of the locality in respect of land of the same description and tenure and (b) what is fair and equitable?

[689] In addition we would add a further issue, viz.

(7) Inasmuch as the learned Judge has found that the survey settlement has been introduced into this village, what effect, if any, will that have, having regard to section 217, Land Revenue Code, upon the plaintiff's alleged right to enhance the defendant's rent or assessment?

Fresh evidence to be adduced if necessary.

Findings to be returned in two months.

The findings recorded on the issues were as follows :—

(1) That the *inam* was the grant of the Royal share of revenue.

(2) In the negative.

(3) Not necessary to decide.

(4) It is the rent that is payable.

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(5) The plaintiff as owner has a right to enhance the rent as against the defendant.

(6) That the rent can be enhanced to Rs. 45 8-0 only.

(7) That the introduction of survey settlement in the village will have no effect on the right to enhance the defendant's rent.

The appeal came up for disposal before Chandavarkar and Heaton, JJ.  
*L. A. Shah* for the appellant:—

The defendant, as permanent tenant, is a holder of the land in dispute (see section 3, clause 11 of the Bombay Land Revenue Code, 1879); and as such he is liable to pay only Government assessment under section 217 of the Code. The mere fact that the Inamdar is the registered occupant makes no difference. The defendant is the holder and as such he is entitled to the benefit of section 217. See also *Surshangji v. Naran* (1).

*G. S. Rao*, Government Pleader, for the respondent:—

The applicability of section 217 is governed by the expression "so far as may be" which it contains. The Inamdar is the registered occupant, and as such he is the "holder" within the [690] meaning of the section. His tenant—permanent or otherwise—is not a holder. If it were not so, the result would be that a registered occupant cannot let out his land on any term he likes, which is not the case even in a Khalsa village.

*L. A. Shah*, in reply.

CHANDAVARKAR, J.:—The respondent is Inamdar of the village in which the land in dispute is situate and brought the suit out of which this appeal arises to recover enhanced rent. The appellant contested the claim on several grounds, one of which, material for the purposes of this appeal and decisive of the case, was that he was entitled to the benefit of section 217 of the Land Revenue Code and liable to pay only the Government rate of assessment levied on the land. The lower Appellate Court has disallowed that defence on the ground that the appellant is not a registered occupant of the land. But section 217 does not restrict its application to registered occupants only. It may be and indeed the lower Court finds that the appellant holds the land as a mere tenant under the Inamdar and that the latter has also acquired the right of occupancy. But section 217 invests "the holders of all lands" in alienated villages with the same rights and imposes upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have. "Holder," as defined in clause 11 of section 3 of the Code, is wide enough to include even a tenant who has entered into possession under an occupant.

It was urged for the respondent that by the concluding part of section 217 the legislature intended it to apply "so far as may be." But those words are used of the latter part of the section only and do not, when grammatically read, operate to limit the plain language of the first part.

The decree must be reversed and the plaintiff must be given a declaration that he is entitled to recover from the defendant only the amount of assessment levied under the Land Revenue Code. As the defendant admits the amount claimed, the claim as to that is also awarded, but this award shall be without prejudice to the right declared by this decree. The respondent must pay the appellant's costs throughout.



[691] HEATON, J. :—It is now established beyond controversy that the plaintiff is grantee only of the Royal share of the revenue; that the defendant is a permanent tenant under the plaintiff and that when the survey settlement was introduced into this village the Inamdar's name was entered as Khatedar or registered occupant of the lands in suit. At that time however, as for long before and since, the actual occupant was the defendant or his predecessor in title, who held as a permanent tenant. That being so, how does section 217 of the Bombay Land Revenue Code operate in this case? In virtue of being a permanent tenant, the actual occupant at the date of the settlement was one "in whom a right to hold land is vested." Therefore he was a "holder" within the meaning of that term as used in the Land Revenue Code. Consequently he "shall have the same rights and be affected by the same responsibilities in respect of the lands in his occupation as the occupants in unalienated villages." Therefore the defendant during the continuance of the settlement is only under an obligation to pay the survey assessment and no more.

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The fact that at the time of the settlement the Inamdar's name was entered as Khatedar does not seem to me to affect the question. The right to cultivate the land vested in the tenant and that right carried with it a right to hold during the continuance of the settlement at no higher rent than the survey assessment, as soon as by the will of the Inamdar the settlement was introduced.

That is sufficient in my opinion for the decision in the case and therefore it is unnecessary to express any opinion on the other interesting point in the case: viz. whether after the earlier litigation evidenced by exhibits 61 and 62 it was open to the Courts to find on the evidence that the defendant or his predecessor in title was not in possession of the lands in suit, at or before the date of the grant in inam.

Therefore I agree with the order proposed by my learned colleague.

*Decree reversed.*



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*Ss. 8 and 15—Court-fees Act (VII of 1870), s. 7, sub-cl. 4, cls. (c) and (d)—Suits Valuation Act (VII of 1887), sec. 8—Civil Procedure Code (Act XIV of 1882), sec. 551—Civil Procedure Code (Act V of 1908), sec. 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.*—The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped. Against the order of the Assistant Resident the plaint appealed to the Resident at Aden, and on the 23rd September 1908 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court. The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case. A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864). *Held*, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section



**Aden Act (II of 1864)—(Concl'd.).**

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8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court. Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden. *Held*, further, that the plaintiff's claim being valued at Rs. 130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit. *RHIMBAI JAMALBHOY v. MARIAM BINTE ABDUL*, (1909) 34 Bom. 267

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**Aden Courts Act (II of 1864).**

*Ss. 8 and 9—Presidency Small Cause Courts Act (XV of 1882), sec. 69—Resident's Court—Application to state a case to the High Court—Application unconditional before delivery of judgment.—*A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay, under section 8 of the Aden Courts Act (II of 1864) should make an unconditional application to him in that behalf before judgment is delivered. *Ralli Brothers v. Goculbhai Mulchand*, (1890) 15 Bom. 376 and *Bank of Bengal v. Vyabhoy Gangji*, (1891) 16 Bom. 618, applied. Section 9 of the Aden Courts Act (II of 1864) gives the Resident the same option of either reserving his judgment or delivering it contingent on the opinion of the High Court as section 69 of the Presidency Small Cause Courts Act (XV of 1882) gives to the Presidency Small Cause Court. *BHAGAVANDAS DHAR. AMSI v. A. BESSE FRENCHMAN* (1909) 33 Bom. 708

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**Adjustment.**

*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115. See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258, 34 Bom. 575*

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**Administrator-General's Act (II of 1874).**

*S. 36—Hindu Wills Act (XXI of 1870), secs. 2 and 5—Indian Succession Act (X of 1865), sec. 187—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.—*A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by sec. 187 of the Indian Succession Act (X of 1865) which is incorporated in Hindu Wills Act (XXI of 1870). The provision of the



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Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1970) of sec. 187 of the Indian Succession Act (X of 1865). NARAYAN SRIDHAR v. PANDURANG BAPUJI, (1910) 34 Bom. 506	... 780

### Administration Suit.

*Indian Trusts Act (II of 1882), sec. 34—Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such.*—So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit. TRIMBAK MAHADEV v. NARAYAN HARI, (1909) 33 Bom. 429. 270

*Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1882), sec. 375—Adjustment of suits, what is—Written submission necessary.*—The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision. *Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by the section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal



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consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code. *Samibai v. Premji Pragji*, (1895) 20 Bom. 304 and *Pragdas v. Girdhardas*, (1901) 26 Bom. 76, considered and distinguished. *RUKHANBAI v. ADAMJI SHAIK RAJBHAI*, (1908) 33 Bom. 69 ...

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*Civil Procedure Code (Act V of 1908), s. 33, Order XX, Rules 6 and 7—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal. See CIVIL PROCEDURE CODE, 34 Bom. 182* ...

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*Practice—Civil Procedure Code (Act V of 1908), Order I, Rule 8—Suit filed by plaintiff representing body of creditors—Application to be made party.—Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties. *VASSONJI TRICUMJI & Co. v. ESMAILBHAI SHIVJI*, (1909) 34 Bom. 420* ...

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**Adoption.**

*Gift of a son by first husband in adoption by a Hindu widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), ss. 2, 3, 4 and 5.—According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption, the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it. The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent. *Panchappa v. Sangambasawa*, (1899) 24 Bom. 89, considered. *PUTLABAI v. MAHADU*, (1908) 33 Bom. 107* ...

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*Hindu law—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.—Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her*



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any right to the estate or entitle her to transfer it by way of sale or mortgage. Thus, if a widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate. *Lakshman v. Radhabai*, (1887) 11 Bom. 609 and *Moro v. Balaji*, (1894) 19 Bom. 809, followed. *Sreeramulu v. Kristamma*, (1902) 26 Mad. 143, not followed. *RAMAKRISHNA v. TRIPURABAI*, (1908) 33 Bom. 88 ...

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*Hindu law—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.—*

When a married Hindu having a son is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted. In the absence of any special custom, Jains are governed by the ordinary Hindu law. *KALGAUDA TAVANAPPA v. SOMAPPA TAMANGAUDA*, (1909) 33 Bom. 669 ...

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*Succession to the adopted son—Adoptive mother entitled to succeed in preference to the adoptive father to a son taken in adoption—*

*Mitakshara—Hindu Law. See HINDU LAW*, 33 Bom 404 ...

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*Hindu Law—Mother's sister's son also father's brother's son.—*The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son. The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas, nor Sagotras. *Ramchandra v. Gopal*, (1908) 33 Bom. 619, followed. *WALBAI v. HRERBAI*, (1909) 34 Bom. 491 ...

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**Adverse Possession.**

*Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.—*The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage-bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G. and he had to file a suit against G. to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1898. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant: the



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latter contended that the claim was barred by adverse possession. *Held*, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G.'s possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against G. during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other. The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other. *AMRITA RAVJI v. SHRIDHAR NARAYAN*, (1908) 33 Bom. 317 ...

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*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title. See OWNERSHIP*, 33 Bom. 712 ...

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*Saranjam—Inam—Claim to hold as Mirasi tenant—Limited interest.—Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants. Held*, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected. *TRIMBAH RAMCHANDRA v. SHEKH GULAM ZILANI*, (1909) 34 Bom. 329 ...

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**Agreement.**

*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Difference between agreement and contract—Indian Trusts Act (II of 1882), sec. 84—Indian Contract Act (IX of 1872), secs. 2 (g), (h), 20—35, 65. See CONTRACT ACT*, 33 Bom. 411. ...

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*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable for specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document—Stamp Act (II of 1899), s. 2 (5) (b). See STAMP ACT*, 33 Bom. 426 ...

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**Agriculturist.**

*A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2. See DEKKHAN AGRICULTURISTS' RELIEF ACT*, 33 Bom. 504 ...

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*Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2, cl. 2—Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit for account. See DEKKHAN AGRICULTURISTS' RELIEF ACT*, 34 Bom. 161 ...

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**Alienation.**

*Bhag—Unrecognized sub-division of a bhag—Suit to set aside alienation—Limitation—Bhagdari Act (Bom. Act V of 1862), section 8. See BHAGDARI ACT, 33 Bom. 116* ...

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*Hindu Law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation. See HINDU LAW, 33 Bom. 88* ...

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*By widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow—Hindu Law.—The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1907) 30 All. 1 and *Vinayak v. Govind* (1900) 25 Bom. 129, followed. The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate. *PILU v. BABAJI*, (1909) 34 Bom. 165* ...

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**Amendment of Pleadings.**

*Defence of the bar of limitation—Practice as to amendment of plaint—Civil Procedure Code (Act V of 1908), O. VI, r. 17. See CIVIL PROCEDURE CODE, 33 Bom. 644* ...

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**Amendment of Plaint.**

*Application for leave to amend plaint after arguments heard in appeal disallowed.—After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character. *BAYABAI v. HAJI NOOR MAHOMED*, (1908) 34 Bom. 244* ...

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*Civil Procedure Code (Act XIV of 1882)—Amendment of plaint by referring to document not included in list of documents relied on.—At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application. On appeal:—Held, that the amendment should have been allowed. *GUNNAJI BHAWAJI v. MAKANJI KHOOSALCHAND*, (1909) 34 Bom. 250...*

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*Civil Procedure Code (Act XIV of 1882), sec. 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by represen-*



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<i>tatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Limitation—Treatment of co-defendants as co-plaintiffs—Limitation Act (XV of 1877), secs. 22, 28. See LIMITATION ACT, 34 Bom. 91</i>	... 518
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<i>Civil Procedure Code (Act XIV of 1882), Ss. 244, 310A, 311—Decree — Execution — Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under s. 310A when they also fall under s. 244, Civil Procedure Code, 1882.—Within a month of the sale at a Court auction, the judgment-debtor applied to the Court to set aside sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code, (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code. <i>Held</i>, (1) that the order passed by the Subordinate Judge was appealable. <i>Pita v. Chunilal</i> (1906) 31 Bom. 207, followed, (2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must</i>	



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- be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882. Decree of the District Judge confirmed. *Gulam Ahad Chowdhry v. Jadhister Chandra Shaha*, (1902) 30 Cal. 142, followed. *HARIHAR KANTA v. RAMA PANDU*, (1909) 33 Bom. 698 ... **439**
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*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge.*—A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended. Against the order of the District Judge an appeal was preferred to the High Court. *Held*, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 583. *Birajan Kooer v. Ram Churn Lall Mahata* (1881) 7 Cal. 719, followed. *BAI MANI v. KHEMCHAND*, (1908) 33 Bom. 104 ... **66**
- Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree.**—An appeal lie against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties. *SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED*, (1908) 33 Bom. 216 ... **136**
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Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.—When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators. An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests. <i>Muhammad Newaz Khan v. Alam Khan</i> (1891) 18 Cal. 414 and <i>Laldas v. Bai Lala</i> (1908) 11 Bom. L. R. 20, followed. <i>BHAURAO v. RADHABAI</i> (1909) 33 Bom. 401.	252
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*Letters Patent, 1865, cl. 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.—An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion. Per CHANDAVARKAR, J.:—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself. The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred. *Montoya v. London Assurance Company* (1851) 6 Ex. 451 at p. 458, referred to. The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration, but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some*



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of the Companies are formally parties to the proceedings in appeal. As to the objection that even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory. *Per* BATCHELOR, J.:—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact. *ATLAS ASSURANCE COMPANY, LIMITED v. AHMEDBHOY HABIBBHOY*, (1908) 34 Bom. 1.

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*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), s. 107—Lien—Charge. See* LEASE, 33 Bom. 610 ...

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<b>Bhagdari and Narwadari Tenures Act (Bom. Act V of 1862)—(Consolid.).</b>	<b>PAGE</b>
so as to bar a suit for recovery by the individual alienor or his representatives in interest. The Bhagdari Act (Bom. Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person. <i>Dala v. Parag</i> (1902) 4 Bom. L. R. 797 and <i>Jethabhai v. Nathabhai</i> (1904) 28 Bom. 399 distinguished. ADAM UMAR v. BAPU BAWAJI (1908) 33 Bom. 116 ...	73
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<i>Shetsanadi lands—Rules framed under Act XI of 1852 (Bombay)—Government continuing the shetsanadi lands to the family of the shetsanadi who is discharged by Government without any fault on his part—Continuance on condition of paying full survey assessment on the lands—Subsequent resumption of the lands by Government.—On the death in 1865 of the then shetsanadi, one B, Government appointed one Y as the new shetsanadi; but under the rules framed under Bombay Act XI of 1852, Government continued the shetsanadi lands to the family of B on condition of their paying full survey assessment on the lands. The remuneration of Y was made payable out of the extra assessment recovered in 1905. Government resumed the lands and handed them over to Y for his services. Held, that both the order passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the</i>	



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land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment. *Held*, also, that the proceedings of 1905 were on the supposition that what was done in 1865 on B's death had the effect of continuing the lands in dispute as one reserved for *shetsanadi* service; but that was not its effect, and the proceedings in question were *ultra vires*. *YELLAPPA v. MARLINGAPPA* (1910) 34 Bom. 560

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**Bombay City Improvement Act (Bom. Act IV of 1898).**

*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of 1894), s. 23. See LAND ACQUISITION ACT, 33 Bom. 483*

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**Bombay Civil Courts Act (XIV of 1869).**

S. 16—*Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure—Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court. *Laxmi v. Aba* (1908) 32 Bom 634, followed. *RANCHHODDBHAI v. COLLECTOR OF KAIRA*, (1909) 33 Bom. 371*

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S. 24—*Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Suits Valuation Act (VII of 1887), s. 11. See RESTITUTION OF CONJUGAL RIGHTS, 34 Bom. 236*

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*Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 24.—The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial. The plaintiff having objected that the order of the Assistant Judge was without jurisdiction. *Held*, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction. Section 24 of the Civil*



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Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction. *Haji Umar Abdul Rahiman v. Gustadji Muncherji*, (1910) 34 Bom. 411 ...

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**Bombay District Municipal Act (Bom. Act III of 1901).**

*Clerk in the cess collection department of a District Municipality—Public Servant—Obstruction to a public servant—Penal Code (Act XLV of 1860), ss. 21, 186. See PENAL CODE, 33 Bom. 213 ...*

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**Bombay Land Revenue Code (Bom. Act V of 1879).**

*S. 48—Government—Assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of Statute.—The plaintiff, who was the occupant of land used for agricultural purposes, paid to Government the assessment chargeable on "land appropriated" for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff had let it out for stacking timber and derived profit from this special user of the land. Government levied an additional assessment on the land on account of that special user, purporting to do so under section 48, clause (b) of the Code. Held, that the lands could not be charged with any additional assessment in respect of the special user under section 48, clause (b), of the Code; for the expression "appropriated for any purpose" in the clause means set apart for that purpose to the exclusion of all other uses. The Bombay Land Revenue Code (Bombay Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject. *SECRETARY OF STATE v. LALDAS* (1909) 34 Bom. 239 ...*

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**—Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905)**

*Ss. 33 and 34—Specific Relief Act (I of 1877), sec. 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court.—A Municipal election petition having been lodged with the Chief Judge of the Small Causes Court, the latter unseated two of the successful candidates and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as elected." He declined to inquire further into the claims of any other candidate or to declare any other candidates elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so. The two highest of the other unsuccessful candidates thereupon obtained, rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to*



**Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905.)—(Contd.).**

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declare them elected under section 33 (2) above mentioned. *Held*, that the case fell within the general principle referred to in *Ex parte Milner* (1851) 15 Jur. 1037 that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue. Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section. It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34. An application under section 33 (1) should name the persons whose election is objected to. IN THE MATTER OF THE SPECIFIC RELIEF ACT (I OF 1877) AND IN THE MATTERS OF SARAFALLY MAMOOJI AND JAFFER JUSUB (1910) 34 Bom. 659 ...

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**Bombay Municipal Act (Bom. Act III of 1888).**

S. 251A, cl. (a)—*Building*—"Directly over or directly under"—*Construction*.—The words "directly over or directly under" in section 251A, clause (a), of the City of Bombay Municipal Act (Bom. Act III of 1888) should be understood in the restricted sense of immediately over or immediately under, so that in effect under this section a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes. Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense. CURRIMBOY EBRAHIM, SIR, v. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, (1909) 34 Bom. 496 ...

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S. 305—*Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes*.—The owners of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing, etc., all ways, roads, etc. The applicant was one of those lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay



issued a notice to the applicant, under section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888), calling upon him to level, metal, drain and light the public street in front of his building. The applicant failed to comply with the notice, for which he was prosecuted under section 471 of the City of Bombay Municipal Act, 1888. He contended that he was not the owner of the premises within the meaning of section 305 of the Act. The Magistrate overruled the contention and convicted him. *Held*, that the mere owner of the land who had let it out under a building scheme for building purposes was not the owner of the property, because the property contemplated by section 305 necessarily embraced buildings, whether erected or to be erected; and the legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property. The word "premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of immediately preceding sections of the Act. That group (sections 302—307) has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302—304 is that of buildings either erected or projected. That is the kind of property dealt with in what has gone before section 305; and therefore that is its "*præmissa*." It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them. *EMPEROR v. RAMCHANDRA BHASKAR MANJRI* (1910) 34 Bom. 593

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 S- 354—*Construction—Municipal Commissioner—Power to remove dangerous structure—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.—*The primary object of section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888), is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals. The word 'appear' in the section does not involve 'appear to the eye.' It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive Engineer



because it has previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure. The discretion must not be arbitrary: *Paskal v. Passmore* 15 Pa. St. D. 304; *Gangjibhoy v. The Municipal Corporation of Bombay* (1899) 1 Bom. L. R. 754 at p. 764. But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued, based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner has not exercised his discretion. The Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains. Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice. *LALBHAJ v. MUNICIPAL COMMISSIONER OF BOMBAY* (1908) 33 Bom. 334 ...

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- S. 377—*Municipal Commissioner—Neglected premises—Notice to remove nuisance—Magistrate's discretion.*—The accused was served with a notice of requisition under section 377 of the City of Bombay Municipal Act, 1888, requiring him to remove filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him. He failed to comply with the requisition, and a prosecution was instituted against him. The Magistrate viewed the premises; and having so viewed them, but without hearing any evidence acquitted the



accused, as the premises did not appear to him to be in a filthy condition:—*Held*, that the premises having appeared to the Commissioner in a filthy condition, the notice was validly issued under section 377 of the City of Bombay Municipal Act, 1888; and that there having been a non-compliance with the notice, the offence was complete. *Held*, further, that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under section 377. Section 377 of the City of Bombay Municipal Act, 1888, enacts, that the only condition precedent to the valid issue of a requisition is that it shall appear, not to the Magistrate, but to the Commissioner, that the premises are in the condition specified in the section. *EMPEROR v. RAJA BAHADUR SHIVLAL MOTILAL*, (1910) 34 Bom. 346

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- S. 390—*Factory—Municipal Commissioner, permission of—Unauthorised factory*.—The accused obtained the Municipal Commissioner's permission (section 390 (1) of the City of Bombay Municipal Act, 1888), to establish a hand-loom factory worked by an oil engine: but by means of this oil engine he also established a flour mill without any permission. The accused was, therefore, charged with the offence under section 390 (1) of the Act. *Held*, that the accused was guilty of a technical offence under section 390 (1) of the City of Bombay Municipal Act, 1888: for although the accused had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory. *EMPEROR v. MULJI DAMODARDAS* (1909) 34 Bom. 344

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- S. 394—*Indian Railways Act (IX of 1890), s. 7—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary*.—The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—  
"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?" *Held*, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorises the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and using the Railway notwithstanding anything in any other enactment for the time being in force. The storing of timber was necessary for the



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convenient making, &c., of the Railway line. Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890) the Governor-General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1. MUNICIPAL COMMISSIONER OF BOMBAY v. G. I. P. RAILWAY COMPANY, (1908) 34 Bom. 252	619
<b>Bombay Regulation (II of 1827.)</b>	
S. 56— <i>Pleader—Misbehaviour—Suspension of Sanad—High Court's disciplinary jurisdiction.</i> —Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Regulation II of 1827). GOVERNMENT PLEADER v. JAGANATH (1908) 33 Bom. 252	159
<b>—Regulation (V of 1827).</b>	
S. XV, cl. 3— <i>Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.</i> —A usufructuary mortgage executed in the year 1869 contained the following agreement:—"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received." In the year 1906 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage. <i>Held</i> , on second appeal by the plaintiffs, that the mortgage in suit was governed by clause 3, section XV of Regulation V of 1827, and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie. The decree of the appellate Court reversed and that of the first Court restored. <i>Mahadaji v. Joti</i> , (1892) 17 Bom. 425 and <i>Ramchandra v. Tripurabai</i> (1898) P. J., p. 43 followed. <i>Shaik Idrus v. Abdul Rahiman</i> (1891) 16 Bom. 303, <i>Sadashiv v. Vyankatrao</i> (1895) 20 Bom.	



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<b>Bombay Regulation (V of 1827)—(Concl'd.).</b>	
296 and <i>Krishna v. Hari</i> (1908) 10 Bom. L. R. 615, explained.	
PARASHARAM v. PUTLAJIRAO, (1909) 34 Bom. 128 ...	541
<b>Buildings Constructed by Lessees.</b>	
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## Cash Allowance.

*Tastik*—Arrears of cash allowance, suit to recover—*Limitation Act* (XV of 1877, Sch. II, Arts. 131, 64. The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shri Madhukeshwar at Barawasi, a sum of Rs. 96 as arrears of a cash allowance (*tastik*) which the former was entitled to receive



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from the property of the latter. Defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal, *Held*, that the claim was properly allowed. A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* immoveable property, in the nature of a periodically recurring right. The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment. *SAKHARAM HARI v. LAXMIPRIYA TIRTHA SWAMI*, (1909) 34 Bom. 349 ...

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## Caste-Question.

*Regulation II of 1827, sec. 21—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.*—The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff. *Held*, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court. *Held*, also, that the fact that there had been no



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allegation of any special (1907) page by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. *GADIGEYA v. BASAYA*, (1910) 34 Bom. 455 ...

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**Caste-Questions, Jurisdiction of Civil Courts in—**

*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.—*As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan. *Held*, that as trustee of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed. *Bank of Bombay v. Suleman* (1908) 32 Bom. 466 at p. 474, referred to. *Held*, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance. *Held*, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed. *Held*, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste. The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savaichand* (1880) 5 Bom. at p. 84 F. N. *Lalji Shamji v. Walji Warahman* (1895) 19 Bom. 507, referred to and distinguished. *Held*, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908) *JETHABHAI NARSEY v. CHAPSEY COOVERJI*, (1909) 34 Bom. 467 ...

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<i>Practice—Dissolution of partnership—Assets in hands of receiver—Judgment-creditor—Solicitors' lien for costs</i> —showed that at common law that a solicitor is entitled to a lien on costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership. <i>Ridd v. Thorne</i> [1902] 2 Ch. 344, followed. Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court. <i>Kewney v. Attrill</i> (1886) 34 Ch. D. 345, followed. <i>A. HAJI ISMAIL AND CO. v. RABIA-BAI</i> , (1909) 34 Bom. 484	766
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<b>Charitable trusts.</b>	
<i>The Trustees and Mortgagees Powers Act (XXVIII of 1866), s. 34—Non-applicability to Charitable Trusts—Indian Trusts Act (II of 1882), secs. 1, 2—Statute of Frauds (29 Ch. ii, C. 3), sec. 7—Civil Procedure Code (Act XIV of 1882), s. 539—"Further or other relief", meaning of—Parsis—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.—The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did the Indian Evidence Act entirely superseded it. Held by Davar, J.:—Section 539 of the</i>	



Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, viz. (a) the appointment of new trustees, (b) vesting trust property in the trustees, and (c) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust-deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads. A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882. Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community. *Peshotam Hormasji Dustoor v. Meherbai* (1888) 13 Bom. 302 and *Bai Shirinbai v. Kharshedji* (1896) 22 Bom. 430, followed. Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism. Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion. *Held by BEAMAN, J.*—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it. The expression "such further or other relief" in the



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section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e.g.*, removing fraudulent trustees, restraining a breach of trust, and so forth. Any extension or limitation of the scope of a trust so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust. The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrian while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation. Conversion—In the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father. *SIR DINSHA MANEKJI PETIT v. SIR JAMSETJI JIJIBHAI*, (1908) 33 Bom. 509 ...

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Chief Judge of Small Causes Court, Jurisdiction and discretion of.

*Specific Relief Act (I of 1877), s. 45—General principles underlying interference by High Court—Municipal election petition—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), Ss. 33 and 34. See SPECIFIC RELIEF ACT, (I of 1877), s. 45, 34 Bom. 659 ...*

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City of Bombay Municipal Act (Bom. Act III of 1888).

*S. 354—Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear" meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house. See BOMBAY MUNICIPAL ACT, 33 Bom. 334 ...*

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Civil Court, Jurisdiction of.

*Regulation II of 1827, s. 21—Caste question—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself. See REGULATION, II of 1827, 34 Bom. 455 ...*

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**Civil Nature, Suit of.**

*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Civil Court—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 9.—See CIVIL PROCEDURE CODE, 33 Bom. 387* ...

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—**Procedure Code (Act VIII of 1859).**

**S. 15—15 and 16 Vic., c. 86, s. 50—Specific Relief Act (I of 1877), s. 42—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.**—A Talukdar-plaintiff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877), and that it was premature. *Held*, that the suit was maintainable, it being within the provisions of section 42 of the Specific Relief Act (I of 1877). *Held*, further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course. *Yool v. Ewing* (1903) Ir. Rep. I ch. 434, distinguished. *BAI SHRI VAKTUBA v. THAKORE AGARSINGHJI RAISINGHJI*, (1910) 34 Bom. 676 ...

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—**(Act XIV of 1882).**

*Amendment of plaint by referring to document not included in list of documents relied on.*—At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application. On appeal: *Held*, that the amendment should have been allowed. *GUNNAJI BHAWAJI v. MAKANJI KHOOSALCHAND*, (1909) 34 Bom. 250 ...

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**S. 11—Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts.**—The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarat, sued the defendant, Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarat in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math; (2) for an account of the money received by the defendant as a Shankaracharya in Gujarat with a decree for payment to the plaintiff of the sum found to have been so received by the defendant; and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarat and from claiming and receiving offerings in Gujarat



- as Shankaracharya of the Jyotir Math or a branch of that Math. The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff. On appeal by the defendant, *Held*, dismissing the suit, that to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with. For interference with mere dignity no suit can be maintained. For voluntary offerings received no suit will lie. *Sri Sunkur Bharti Swami v. Sidha Lingayah Charanti* (1843) 3 Moo. I. A. 198, *Sangapa v. Gangapa* (1878) 2 Bom. 476 and *Rama v. Shivram* (1882) 6 Bom. 116, referred to. *Boyer v. Dodsworth* (1796) 6 T. R. 681, followed. *MADHUSUDAN PARVAT v. SHRI SHANKARACHARYA*, (1908) 33 Bom. 278 ... 175
- S. 13—*Res judicata*—*Plea of res judicata can prevail even where its effect is to sanction what is illegal*—*Bhagdari and Narwadari Tenures Act* (Bom. Act V of 1862), s. 3.—A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. *CHHAGANLAL v. BAI HARKHA*, (1909) 33 Bom. 479 ... 301
- S. 13—*Res judicata*—*Capacity of parties*—*Matter substantially in issue*—*Civil Procedure Code* (Act XIV of 1882), s. 13.—The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager. *Held*, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*. If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) s. 13 does not apply. *HARGOVAN RAMJI v. MULJI HARJIVAN*, (1909) 34 Bom. 416... 723
- S. 28—*Land situate at different villages and in possession of different persons under different titles*—*One suit to recover possession of the lands*—*Misjoinder of parties or causes of action*—*Interlocutory judgments against different defendants*—*Final judgment for possession to be reversed till the conclusion of*



- the trial.*—The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale, mortgage or lease from the widow of the last male holder. In the lower Court the suit was dismissed for misjoinder of parties or cause of action. *Held*, on second appeal, that though the land were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case. *Ishan Chunder Hazra v. Rameswar Mondol* (1897) 24 Cal. 831 and *Nando Kumar Nasker v. Banomali Gayan*, (1902) 29 Cal. 871, approved. *Sami Chetti v. Ammani Achy* (1873) 7 Mad. H. C. R. 260, *Vasudeva Shanbhaga v. Kuleadi Narnapai* (1874) 7 Mad. H. C. R. 290, *Mahomed v. Krishnan* (1887) 11 Mad. 106 and *Parhati Kunwar v. Mahmud Fatima* (1907) 29 All. 267, referred to. *Kachar Bhoj Vaija v. Bai Rathore*, (1883) 7 Bom. 289, distinguished. *UMABAI v. VITHAL*, (1908) 33 Bom. 293 ... 185
- S. 31—*Limitation Act* (XV of 1887), secs. 22, 28—*Civil Procedure Code* (Act V of 1908), Order I, rule 9—*Lands attached to vatan*—*Joint owners*—*Lease*—*Lease good till the death of the surviving joint owner*—*Gordon Settlement of 1864*—*Suit by representatives of one joint owner to recover possession*—*Representatives of the other joint owner joined as co-defendants with the representatives of the lessee*—*Plaintiffs' claim allowed to the extent of their share*—*Appeal by plaintiffs and co-defendants claiming their share*—*Limitation*—*Treatment of co-defendants as co-plaintiffs*—*Amendment of plaint and decree*. See LIMITATION ACT, 24 Bom. 91 ... 518
- Ss. 43 and 50—*Transfer of Property Act* (IV of 1882), s. 90—*Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property*—*Decree against mortgaged property alone*—*Sale*—*Amount realised not sufficient*—*Application for supplemental decree to recover balance by sale of other property*—*Limitation*—*Putting forward allegations at a late stage*.—In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realised by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under



section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor. The first Court found that the claim for a personal decree against the mortgagor was time-barred. On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree. On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed. *Held*, further, that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally. **GULAM HUSSAIN v. MAHAMADALLI IBRAHIMJI**, (1910) 34 Bom. 540...

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**Ss. 102, 103, 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.**—Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses. The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in. **ESMAIL EBRAHIM v. HAJI JAN MAHOMED**, (1908) 33 Bom. 475 ...

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**Ss. 234, 244, 252—Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Limitation Act (XV of 1877), sch. II, art. 179.**—A money decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act



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- XIV of 1882). *Umed Hathising v. Goman Bhaiji* (1895) 20 Bom. 385, followed. There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882). Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties. *SHIVRAM v. SAKHARAM*, (1908) 33 Bom. 39 ... 25
- Ss. 235, 320—*Gujarat Talukdar's Act* (Bom. Act VI of 1888), secs. 28, 29B and 29E—*Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under sec. 29E of the Gujarat Talukdar's Act* (Bom. Act VI of 1888)—*Managing Officer—Talukdari Settlement Officer*.—When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882). *Hirachand Harjivandas v. Kasturchand Kasi-das* (1893) 18 Bom. 224, explained. The effect of section 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarat Talukdar's Act (Bom. Act VI of 1888) it may then proceed with the execution. The expression 'managing officer' in section 29E of the Act is merely a compendious term for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the 'managing officer' is merely a synonym for 'Talukdari Settlement Officer.' Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Talukdari Settlement Officer is also the managing officer. *PURUSHOTTAM v. RAJBAL*, (1909) 34 Bom. 142 ... 550



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- S. 244—*Decree—Execution—Transfer of Property Act (IV of 1882), s. 93. See DECREE, 33 Bom. 273* ... 172
- Ss. 244, 310A, 311—*Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under s. 310A when they also fall under s. 244, Civil Procedure Code, 1882.—Within a month of the sale at a court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code. Held, (1) that the order passed by the Subordinate Judge was appealable, *Pita v. Chunilal* (1906) 31 Bom. 207, followed, (2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882. Decree of District Judge confirmed. *Golam Ahad Chowdhry v. Judhister Chundra Shaha* (1902) 30 Cal. 142 followed. *HARIHAR KANTA v. RAMA PANDU*, (1909) 33 Bom. 698* ... 438
- Ss. 244, 252, 647—*Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under s. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.—C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be executed both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale: and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the*



property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title. *Held*, that as the property was sold by the Court at C's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under sections 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the explanation to section 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned. It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—*Held*, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. *GOKULSING BHIKARAM v. KISANSINGH*, (1910) 34 Bom. 546

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- S. 258—*Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.*—A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The



Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872. *Held*, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. *Per Chandavarkar, J.*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law. *Per Heaton, J.*—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. **TRIMBAK RAM-KRISHNA v. HARI LAXMAN**, (1910) 34 Bom. 575 ...

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*Ss. 278, 282, 283, and 287—Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor.*—Plaintiffs obtained a money-decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage. Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment-creditors but purchasers and that what was attached and sold was equity of redemption, therefore, the purchasers could not claim more than they bought. *Held*, that, as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment-creditors and not purchasers. *Held*, further, that the plaintiff under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage. **GANESH v. PURSHOTTAM** (1908) 33 Bom. 311 ...

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- Ss. 320, 323—*Decree—Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Gujarat Talukdars' Act (Bom. Act VI of 1888, as amended by Act II of 1905), sec. 31. See GUJARAT TALUKDARS' ACT, 33 Bom. 443* ... 279
- Ss. 373 and 622—*Dekkhan Agriculturists' Relief Act (XVII of 1879)—Civil Procedure Code (Act V of 1908), sec. 115—Redemption suit—Sale really a mortgage—Sec. 10 A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.—Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed, was really a mortgage. The suit was not governed by section 10 A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10 A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit. Held, that the Court acted with material irregularity in passing the order. The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant. A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force. MAHIPATI v. NATHU, (1909) 33 Bom. 722* ... 455
- S. 375—*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Adjustment of suits, what is—Written submission necessary.—The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told*



them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision, *Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code. *Samabai v. Premji Pragji* (1895) 20 Bom. 304 and *Pragdas v. Girahardas* (1901) 26 Bom. 76, considered and distinguished. *RUKHANBAI v. ADAMJI SHAIK RAJBHAI* (1908) 33 Bom. 69

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S. 375—*Dekkhan Agriculturists' Relief Act* (XVII of 1879), s. 12—*Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.*—There is nothing in the provisions of section 12 or in any other section of the *Dekkhan Agriculturists' Relief Act*, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908. A compromise means the settlement of a disputed claim. Where a party complains that a compromise effected in his name by his pleader was unauthorized, he must move the Court to cancel all that has been done and to revive the suit. *Basan-gowda v. Churchigirigowda*, (1910) see p. 408 *ante*, followed. *PIRAJI v. GANAPATI*, (1910) 34 Bom. 502

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Ss. 503, 505, and 588—*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal.*—A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended. Against the order of the District Judge an appeal was preferred to the High Court. *Held*, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under



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section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588. *Birajan Kooer v. Ram Churn Lall Mahata*, (1881) 7 Cal. 719, followed. *BAI MANI v. KHIMCHAND*, (1908) 33 Bom. 104 ...

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S. 539—*Religious or Charitable Trusts*—"Further or other relief," meaning of—*Held by Davar, J.*:—Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, viz., (a) the appointment of new trustees, (b) vesting trust property in the trustees, and (c) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust-deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads. A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882. Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. *Held by Beaman, J.*:—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it. The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, e. g., removing fraudulent trustees, restraining a breach of trust, and so forth. Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust. *SIR DINSHA MANEKJI PETIT v. SIR JAMSETJI JIJIBHAI*, (1908) 33 Bom. 509 ...

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S. 551—*Suit for declaration and injunction*—*Rejection of plaint as not properly stamped*—*Appeal*—*Application to state a case to High Court*—*Summary dismissal of appeal*—*Application for revision*—*Jurisdiction*.—See JURISDICTION, 34 Bom. 267 ...

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—(Act V of 1908).

Ss. 2 (17), 80—*Public officer*—*Suit against public officer*—*Notice of claim necessary*—*Cantonment Committee is public officer*—*Cantonments Act (XIII of 1889), s. 80 applies to actions ex delicto and not to actions ex contractu*.—A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a



"public officer" within the meaning of section 2, clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given. The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*. *Rajmal v. Hanmant*, (1895) 20 Bom. 697, considered. *CECIL GREY v. THE CANTONMENT COMMITTEE OF POONA*, (1910) 34 Bom. 583

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S. 9—*Civil Court—Jurisdiction—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.*—The plaintiffs, as members of the committee of management of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers, owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office. *Held*, that the suit was of a civil nature. An action would lie against the plaintiffs by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered. *TRIMBAK GOPAL v. KRISHNARAO PANDURANG*, (1909) 33 Bom. 387

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S. 11—*Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata.*—A suit filed in *forma pauperis* was decided on the 10th



February 1908. An application for leave to appeal in *forma pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *forma pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it. *Held*, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period. The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

CHINTAMAN VYANKATARAO v. RAMCHANDAR VYANKATRAO, (1910) 34 Bom. 589

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- S. 24—*Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*—The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial. The plaintiff having objected that the order of the Assistant Judge was without jurisdiction. *Held*, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction. Section 24 of the Civil Procedure Code (Act V of 1908)



- empowers the District Court to withdraw any suit *and* try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction. **Haji Umar Abdul Rahiman v. Gustadji Muncherji**, (1910) 34 Bom. 411 ... 720
- S. 33, Order XX, Rules 6 and 7—*Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal*.—In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal. On second appeal by the plaintiff, *Held*, that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred. **Bai Divali v. Shah Vishnav Manordas**, (1910) 34 Bom. 182 ... 576
- S. 115—*Application for revision*. See JURISDICTION, 34 Bom. 267. 629
- S. 128 *Cause of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Indian Contract Act (IX of 1872), ss. 39, 73, 120*. See CONTRACT ACT, 34 Bom. 192 ... 582
- S. 151—*Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable*. The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause Court for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction. *Held*, setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court. **Ganesh Narayan v. Purushottam Gangadhar**, (1909) 34 Bom. 135 ... 546



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**S. 151**—*Caste—Trustees of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1882), ss. 5 and 6, to creation of trusts to caste funds.—Held, lastly when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908). See TRUSTS ACT (II OF 1882), secs. 5 and 6, 34 Bom. 467* ...

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**Order I, Rule 3, Order II, Rule 3**—*Grades of several defendants in one suit—"Same act or transaction"—"Series of acts or transactions"—Practice.—In reading Order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joinings several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit both the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact. The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested." It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary. UMABAI v. BHAI BALWANT, (1908) 34 Bom. 358* ...

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**Or. I, r. 8**—*Practice—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit.—Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent*



him. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties. *VASSONJI TRILOUMJI & Co. v. ESMAIL-BHAI SHIVJI*, (1909) 34 Bom. 420 ...

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Or. I, r. 9—*Limitation Act (XV of 1877), secs. 22, 28—Civil Procedure Code (Act XIV of 1882), secs. 31—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiff's claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decrees. See LIMITATION ACT, 34 Bom. 91* ...

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Or. VI, r. 17—*Amendment of pleadings—Defence of the bar of limitation—Practice as to amendment of plaint.—The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs. 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation. The lower appellate Court being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their Pleader, allowed the amendment to be made and ultimately allowed the plaintiff's claim. The defendants in appeal to the High Court contended that the amendment was wrongly allowed. Held, that the amendment was rightly allowed. The defence of limitation was a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received. Per BATHURLOO, J.:—Under the Civil Procedure Code, 1908 Or. VI, r. 17, all amendments ought to be allowed, at any stage of the proceedings, which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which*



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could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not? *KISANDAS RUPCHAND v. RACHAPPA VITHOBA*, (1909) 33 Bom. 644

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*Or. XXXIII, Rules 1, 2 and 5—Application to sue as pauper—Disqualification—Subject-matter of suit—Cause of action.—* A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action. *Held*, that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, Rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action. *Dwarkanath v. Madhavrav*, (1886) 10 Bom. 207, not followed. *FATMABAI v. DOSABHOY RUSTOMJI UMRIGAR*, (1909) 34 Bom. 638

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**Cocaine.**

*Import by sea into the Bombay Harbour—"Import," meaning of—Sea Customs Act (VIII of 1878), s. 19—Bombay Abkari Act (Bom. Act V of 1878), secs. 3 (10), 9, 43. See BOMBAY ABKARI ACT, 33 Bom. 380*

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*Illegal possession—Removal—Transportation of cocaine—Bombay Abkari Act (Bom. Act V of 1878), secs. 43 (b), 47. See ABKARI ACT, 34 Bom. 342*

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**Commission to Examine Witness.**

*Insolvent's property at Shanghai—Property of insolvent at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act (11 and 12 Vict., c. 21), secs. 7, 26 and 36. See INSOLVENCY ACT (INDIAN), 33 Bom. 462*

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**Company.**

*Insurance against fire—Liability of Company for further loss. See INSURANCE, FIRE, 34 Bom. 1*

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**Compensation.**

*Compulsory acquisition of land—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result.—The method of*



hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploiter that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself. When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway. Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated. In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule.

TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY  
v. KARSANDAS, (1908) 33 Bom. 28

"Market value of land"—Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of 1894), sec. 23. See LAND ACQUISITION ACT, 33 Bom. 483

Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award—Land Acquisition Act (I of 1894), s. 18. See LAND ACQUISITION ACT, 33 Bom. 325

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**Compensation—(Conold.).**

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*Land Acquisition Act (I of 1894)—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice. See LAND ACQUISITION ACT (I OF 1894), 34 Bom. 486* ...

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**Compromise.**

*Transfer of Property Act (IV of 1882), s. 54—Sale—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary. See TRANSFER OF PROPERTY ACT, 34 Bom. 139* ...

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*Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside—Court—Inherent powers—Practice. See PRACTICE, 34 Bom. 408* ...

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**—meaning of.**

*Dekkhan Agriculturists Relief Act (XVII of 1879), sec. 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.—A compromise means the settlement of a disputed claim. See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879). SEC. 12, 34 Bom. 502* ...

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*Gujarat Talukdars' Act (Bom. Act VI of 1888, as amended by Act II of 1905), s. 31—Decree—Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), secs. 320, 323.—In execution of a money decree against a talukdar several villages belonging to him were attached: and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of talukdari lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of section 31 of the Gujarat Talukdars' Act, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhast preferred by the decree-holder should be disposed of. *Per CHANDAVARKAR, J.* :—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the*



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consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it. Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumentur rite et solenniter esse acta donec probetur in contrarium*. In such cases "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred. Section 31 of the Gujarat Talukdars' Act (Bom. Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite. *PURSHOTTAM v. HARBHAMJI*, (1909) 33 Bom. 443 ...

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- ver part payment—Agreement by way of marriage brokerage—Difference between agreement and contract—Indian Trusts Act (II of 1882), sec. 84—Indian Contract Act (IX of 1872), secs. 2 (g), (h), 20—35, 65. See CONTRACT ACT, 33 Bom. 411 ... 259*
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- Ss. 2 (g), (h), 20—35, 65—Indian Trusts Act (II of 1882), sec. 84—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.—By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered. *Held*, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant. Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section. GULABOHAND v. FULBAI, (1909) 33 Bom. 411 ... 259*
- Ss. 39, 73, 120—Suit for price of goods bargained and sold—Cause of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), s. 128.—Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count; thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiff to the defendant. The cause of action was said to sound in debt and not in damages. In section 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits*



Contract Act (IX of 1872.)—(Contd.).

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as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India. The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under section 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract. *Per Batchellor, J.*—Section 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy. *P. R. & Co. v. BHAGWANDAS*, (1909) 34 Bom. 192 ...

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Ss. 215, 216—*Principal and Agent—Construction of Contract—Agent appointed to sell goods buying them on his own account.*—Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of an account of the latter. The principal is free to exercise that right or not. The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election. Where an agent, appointed to sell his principal's goods for a fixed price,



**Contract Act (IX of 1872.)—(Concl'd.).**

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buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. *Salomons v. Penler* (1865) 3 H. & C. 639 and *Andrews v. Ramsay & Co.* [1903] 2 K. B. 635 referred to. *JOACHINSON v. MEGHJEE VALLABHDAS*, (1909) 34 Bom. 292 ...

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*Salt pans—Lease under a license from Collector—Lessee not to sub-let without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Suit by sub-lessee to recover deposit cannot lie—Salt Act (Bom. Act II of 1890), secs. 11 and 47. See SALT ACT, 33 Bom. 636 ...*

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*Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contractual obligations.—The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company. Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage. The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened. *DULLABHJI SAKHIDAS v. THE G. I. P. RAILWAY CO.* (1909) 34 Bom. 427 ...*

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*Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal.—The guardian ad litem appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian ad litem takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian ad litem.*

SHAPURJI HORMASJI v. MONOSSEH JACOB, (1909) 34 Bom. 374

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*Practice—Dissolution of partnership—Assets in the hands of receiver—Judgment-creditor—Charging order—Solicitor's lien for costs.*

See SOLICITOR'S LIEN FOR COSTS, 34 Bom. 434

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*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice—Civil Procedure Code (Act XIV of 1882), secs. 102, 103 and 117. See CIVIL PROCEDURE CODE, 33 Bom. 475*

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*Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside—Practice. See PRACTICE, 34 Bom. 408*

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*Suit for declaration and consequential relief—Valuation—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8. See SUITS VALUATION ACT, 33 Bom. 307*

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**Court-fees Act (VII of 1870).**

*S. 7, cl. (IV) (b), and cl. (V)—Suits Valuation Act (IX of 1887), sec. 8—Suit for partition and separate possession of joint family property—Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction.—The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in lands at five times the assessment (i. e., at Rs. 489-6-0) for Court fee purposes and in the moveables at Rs. 1,455-8-0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of First Class Subordinate Judge, as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court-fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under section 7, clause (iv) (b) of the Court-fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of Second Class Subordinate Judge. Held, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge. Held, further, that the suit fell not within section 7 (iv) (b) but under section 7 (v) of the Court-fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, did not apply. That, therefore, it was the market value of the lands, houses, &c. that determined*



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the jurisdiction of the Subordinate Judge. <i>Motibhai v. Haridas</i> (1896) 22 Bom. 315, commented on. <i>DAGDU v. TOTABAM</i> , (1909) 33 Bom. 658	414
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<b>Criminal Procedure Code (Act V of 1898).</b>	
S. 106 (3)— <i>Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.—Section 106, clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. Mahmudi Sheikh v. Aji Sheikh</i> (1894) 21 Cal. 622, <i>Muthiah Chetti v. Emperor</i> (1905) 29 Mad. 190 and <i>Paramasiva Pillai v. Emperor</i> (1906) 30 Mad. 48. dissented from. <i>Dorasami Naidu v. Emperor</i> (1906) 30 Mad. 182, referred to with approval. <i>EMPEROR v. BHAUSING</i> , (1908) 33 Bom. 33	21
Ss. 162, 288— <i>Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and Procedure.—During the trial of an accused person the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magis-</i>	



## Criminal Procedure Code (Act V of 1898)—(Contd.)

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- trate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—*Held*, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial: not to corroborate statements made prior to the trial. (2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admission by the co-accused which could possibly be used against himself, but could not be proved and used against the accused. The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial.—*EMPEROR v. AKBAR BADOO*, (1910) 34 Bom. 599 ... 839
- S. 109, 123, 397—*Penal Code (Act XLV of 1860), sec. 329—Concurrent sentences—Consecutive sentences.*—The accused was proceeded against under section 109 of the Criminal Procedure Code, and sentenced on the 6th July 1909 under section 123 of the code to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months: the second sentence was directed to take effect on the expiry of the first sentence. *Held*, that the two sentences ought not to run consecutively; but must run concurrently. *EMPEROR v. ARJUN*, (1909) 34 Bom. 326 ... 666
- S. 195—*Sanction to prosecute—Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), ss. 37, 38.*—Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, the Full Court of that Court has no power to revoke the sanction. *Per Chandavarkar, J.*—The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court. *Per Batchelor, J.*—The jurisdiction conferred by section 38 of the Act is not appellate, but revisional only. *SHIVLAL PADMA, In re* (1909) 34 Bom. 316 ... 660



Ss. 195, 478—*Sanction to prosecute—Subsequent order to prosecute passed under s. 478.*—The grant of a sanction to prosecute to a private individual under section 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under section 478 of the Code. *Queen-Empress v. Shankar* (1888) 13 Bom. 384, followed. *EMPEROR v. NAGJI GHELABHAI*, (1909) 34 Bom. 88 ...

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Ss. 225, 233, 234, 235, 236 and 237—*Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), secs. 124A and 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes.*—The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial. *Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay. *Held*, further, that the trial was not bad as there had been no misjoinder of charges. *Per Chandavarkar, J.*:—It is true that the Magistrate framed two charges, one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the Indian Penal Code, so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure. There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind. *Per Heaton, J.*:—Section 234 of the Criminal Procedure Code does not say that at most, a trial must be limited to three charges: it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of two articles on two different dates. These two offences were, as charged



punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind. The word "section" in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the operation of section 234 of the Code, an offence because it is made the subject of more than one charge. Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in section 235 (clause 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge. *EMPEROR v. TRIBHOVANDAS*, (1909) 33 Bom. 77 ...

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**Ss. 233, 234, 235, 236, 237 and 239—Charges, joinder of charges—**  
**Privy Council, leave to appeal to, in criminal case—Practice and procedure.**—The accused was charged with an offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860) in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them. *Held*, that there was no irregularity in the trial on the ground of misjoinder of charges. Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234. The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. Sections 235 (2) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year. Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice. *Ex parte Carew* [1897] A. C. 719 and *Dinizulu v. Attorney-General of Zululand* (1889) 61 L. T. 740, followed. *In re BAI GANGADHAR TILAK*, (1908) 33 Bom. 221 ...

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## Criminal Procedure Code Act (V of 1898)—(Concl'd.)

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S. 269.—*Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure.*—The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323. of the Code) respectively. The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors on the second charge and to write a judgment. *Held*, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trial with the aid of assessors enforced, he cannot be heard to complain. *EMPEROR v. MAVSING*, (1909) 33 Bom. 423 ...

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S. 435.—*High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned.* See *HIGH COURT*, 34 Bom. 378 ...

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**Criticism.**

*Language used in criticism which strikes at the root of all respect for the Court—Contempt of Court.* See *CONTEMPT OF COURT*, 33 Bom. 240 ...

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**Curator's Act (XIX of 1841).**

Ss. 3, 4 and 14.—*Oath's Act (V of 1840)—Death of representative Vantandar—Deceased widow representative—Vatandar—Death of the widow—Application by the nearest heir of the deceased male—Vatandar for possession—Six months, calculation of—Property claimed by right "in succession"—Inquiry upon solemn declaration—Affidavit upon solemn affirmation.*—One Kotrappa, representative Vatandar of Deshagat Vatan, died in 1893. His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotrappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that, (1) Under s. 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and (2) In granting the application the Judge did not follow the procedure which is made imperative by the words of s. 3 of the Curator's Act (XIX of 1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant). *Held*. confirming the order, that,



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(1) The decease of the proprietor whose property was claimed by right "in succession" referred to in section 14 of the Curator's Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder. (2) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation, the statements in the affidavit furnished sufficient grounds for action under s. 4 of the Curator's Act (XIX of 1841) having regard to the provisions of the Oath's Act (V of 1840). <i>BHIMAPPA v. KHANAPPA</i> , (1909) 34 Bom. 115	533
<b>Custom.</b>	
<i>Pakki Adat agency—Place of performance of contract by Pakki Adatya—Jurisdiction. See PAKKI ADAT AGENCY</i> , 33 Bom. 364	229
<i>Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Burden of proof—Hindu law. See HINDU LAW</i> , 33 Bom. 693	436
<b>Damages.</b>	
<i>Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance—Municipality—Negligence. See NEGLIGENCE</i> , 33 Bom. 393	247
<i>Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package—The Indian Railways Act (IX of 1890), sec. 75, sch. II, cl. (1). See RAILWAYS ACT</i> , 33 Bom. 703	443
<b>Measure of.</b>	
<i>Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Sale of Goods Act (56 and 57 Vic., c. 71), secs. 45 and 47. See SALE OF GOODS ACT (56 AND 57 VIC., c. 71), secs. 45 AND 47</i> , 34 Bom. 640	865
<b>Dangerous Condition.</b>	
<i>Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house—City of Bombay Municipal Act (Bom. Act III of 1888), s. 354. See BOMBAY MUNICIPAL ACT</i> , 33 Bom. 334	210
<b>Daughters, Inheritance of.</b>	
<i>Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants in-common.—In the Bombay Presidency a daughter taking property from her father inherits it as <i>stridhan</i> and daughters take their shares separately and absolutely. When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship</i>	



**Daughters, Inheritance of —(Concl'd.).** **PAGE**

between them. In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject. *VITHAPPA v. SAVITRI*, (1910) 34 Bom. 510 ... 782

**Death of Judgment-debtor.**

*Civil Procedure Code (Act XIV of 1882), ss. 244, 252, 647—Decree—Execution—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under s. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser Auction purchaser not a stranger. See CIVIL PROCEDURE CODE (ACT XIV of 1882), SECS. 244, 252, 647, 34 Bom. 546 ...* 805

**Debt.**

*Hindu law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), ss. 234, 244, 252—Limitation Act (XV of 1877), sch. II, art. 179. See HINDU LAW, 33 Bom. 39 ...* 25

*Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Hindu law—Civil Procedure Code (Act XIV of 1882), sec. 276. See HINDU LAW, 33 Bom. 264 ...* 166

*Hindu law—Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes. See HINDU LAW, 34 Bom. 72 ...* 506

**Declaration of Ownership, Suit for.**

*Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession—Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land. Held, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title. *Runjeet Ram Panday v. Goburdhan Ram Panday* (1873) 20 W. R. 25 (Civ. Rule.) and *Agency Company v. Short* (1888) 13 App. Cas. 793, followed. *Framji Cursetji v. Geculdas Madhoji* (1892) 16 Bom. 338, referred to. *GANPATI v. RAGHUNATH*, (1909) 33 Bom. 712 ...* 448

**Right, Suit for.**

*Public road—Right of marching in procession with a car—Injunction restraining interference with the right—Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground*



**Declaration of Rights, Suit for—(Conclud.).**

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that the road being public the plaintiffs could not sue unless special damage were shown and proved. On second appeal by the plaintiffs held, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege *Sadgopachariar v. A. Rama Rao* (1902) 26 Mad. 376, followed. *BASLINGAPPA PARAPPA v. DHARMAPPA BASAPPA*, (1910) 34 Bom. 571 ...

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**Declaration, Suit for.**

*Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8. See SUITS VALUATION ACT*, 33 Bom. 307 ...

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*Land held as Saranjam—Decision of the Inam Commissioner—Finality—Exclusion of Jurisdiction of Civil Courts—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a). See REVENUE JURISDICTION ACT*, 34 Bom. 232 ...

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*Specific Relief Act (I of 1877), Sec. 42—Civil Procedure Code (Act VIII of 1859), Sec. 15—15 and 16 Vic, c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay. See CIVIL PROCEDURE CODE (ACT, VIII of 1859), SEC. 15—15 AND 16 VIC., C. 86, s. 50*, 34 Bom. 676 ...

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*Hereditary Offices Act (Bom. Act III of 1874), secs. 25, 36—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Jurisdiction. See HEREDITARY OFFICES ACT*, 34 Bom. 101 ...

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**—and injunction, suit for.**

*Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction—Aden Act (II of 1864), secs. 8 and 15. See JURISDICTION*, 34 Bom. 267 ...

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**Declaratory decree.**

*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Suit of a civil nature—Civil Court—Jurisdiction—Civil Procedure Code (Act V of 1908), sec. 9. See CIVIL PROCEDURE CODE*, 33 Bom. 387 ...

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**Decree.**

*Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252—Limitation Act (XV of 1877), sch. II, art. 179.—Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties. *SHIVRAM v. SAKHARAM*, (1908) 33 Bom. 39 ...*

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*Civil Procedure Code (Act XIV of 1882), secs. 235, 320—Gujarat Talukdar's Act (Bom. Act VI of 1888), secs. 23, 29B and 29E—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—*



## Decree—(Contd.).

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- Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under section 29E of the Gujrat Talukdar's Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer. See CIVIL PROCEDURE CODE, 34 Bom. 142* ... 550
- Execution—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.—An application for redemption or foreclosure of a decree nisi is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree nisi is made absolute there is no decree capable of execution. Where a decree nisi contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree. *Ajudhia Pershad v. Baldeo Singh* (1894) 21 Cal. 818 and *Nandram v. Babaji* (1897) 22 Bom. 771, follow. *SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED*, (1908) 33 Bom. 273* ... 172
- Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under sec. 244, Civil Procedure Code, 1882—Civil Procedure Code (Act XIV of 1882), secs. 244, 310A, 311. See CIVIL PROCEDURE CODE, 33 Bom. 698* ... 439
- Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), ss. 320, 323—Gujarat Talukdars' Act (Bom. Act VI of 1888, as amended by Act II of 1905), s. 31. See GUJARAT TALUKDARS' ACT, 33 Bom. 443* ... 279
- No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order—Practice. See PRACTICE, 33 Bom. 216* ... 136
- Civil Procedure Code (Act V of 1908), s. 33, Order XX, Rules 6 and 7—Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Appeal. See CIVIL PROCEDURE CODE, 34 Bom. 182* ... 576
- Civil Procedure Code (Act V of 1908), sec. 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the first Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable. See CIVIL PROCEDURE CODE, 34 Bom. 135* ... 546
- Execution of decrees—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgages overpaid*



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- himself from rents and profits—Mortgagee's right to execute decree for rent.*—In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—*Held*, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decrees were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off. *MUGAPPA v. MAHAMADSAHEB* (1909) 34 Bom. 260. 624
- Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed—Limitation Act (XV of 1877), Art. 179, cl. 4. See LIMITATION ACT, 34 Bom. 68 ... 503*
- Execution—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law—Limitation Act (XV of 1877), Art. 179. See LIMITATION ACT, 34 Bom. 189 ... 580*
- Pensions Act (XXIII of 1871), secs. 6, 8, 11—Toda giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector. See PENSIONS ACT, 34 Bom. 154 ... 558*
- Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15D, cl. (3).—Held, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings. *NAVLAJI SARDARMAL v. RAMA DHONDI*, (1909) 34 Bom. 158 ... 560*
- Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the*



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*adult members—Transfer of Property (Act IV of 1882), s. 85.*  
*See TRANSFER OF PROPERTY ACT, 34 Bom. 354* ... 684

**—, Execution of.**

*Civil Procedure Code (Act XIV of 1882), s. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), s. 115. See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 258, 34 Bom. 575* ... 823

*Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective. See PRE-EMPTION, 34 Bom. 567* ... 819

**Decree-holder.**

*Civil Procedure Code (Act XIV of 1882), s. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), s. 115. See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 258, 34 Bom. 575* ... 823

**—Major, right of, to give discharge.**

*Limitation Act (XV of 1877), s. 8, sch. II, art. 179, expl. I—Limitation Act (IX of 1908), s. 7—Minor decree-holders—Application for execution by guardian Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge in respect of the judgment-debt. See LIMITATION ACT (XV OF 1877), S. 8, Sch. II, Art. 179, Expl. I, 34 Bom. 672* ... 885

**Dekkhan Agriculturists' Relief Act (XVII of 1879).**

*Civil Procedure Code (Act XIV of 1882), ss. 373 and 622—Civil Procedure Code (Act V of 1908), s. 115—Redemption suit—Sale really a mortgage—Sec. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.—Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed was really a mortgage. The suit was not governed by section 10 A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit. Held, that the Court acted with material irregularity in passing the order. The Court should not allow a suit to be withdrawn after the parties are ready for trial if such with-*



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drawal may operate to the prejudice of the defendant. A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force. <i>MAHIPATI v. NATHU</i> , (1909) 33 Bom. 722	455
<i>Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent—Execution—Decree.</i> See DECREE, 34 Bom. 260	624
S. 2— <i>Agriculturist</i> —A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act—In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1886. The defendant was an agriculturist at the date of the mortgage; but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1886: it was admitted that the defendant was not an agriculturist at the date of the suit. <i>Held</i> , that the liability incurred by the defendant was to pay back the money borrowed by him; and that liability was incurred when the money was borrowed in 1871. <i>Held</i> , further, that in 1871, the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879. <i>Held</i> , also, that the defendant was not entitled to the benefit of the Act. <i>MAHADEV NARAYAN v. VINAYAK GANGADHAR</i> , (1909) 33 Bom. 504	318
S. 2—"Agriculturist"— <i>Interpretation</i> —"Earns his livelihood"— <i>Sources of income</i> .—In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Court must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of his livelihood and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture. <i>Dwarkojirav Baburav v. Balkrishna Bhalchandra</i> (1894) 19 Bom. 255, explained. <i>CHUNILAL v. VINAYAK</i> , (1909) 33 Bom. 376	237
S. 2— <i>Agriculturists—Definition—Interpretation</i> .—Section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist," one in clause 1 and the other in clause 2. The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him. The second clause, which gives a special definition of	



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- the term "agriculturist" for the purposes of Chapters II, III, IV, and VI and section 69 of the Act, is not exhaustive but is merely inclusive and is intended for a special purpose. The decision in *Mahadev Narayan Lokhande v. Vinayak Gangadhar Purandhare* (1909) 33 Bom. 504 does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the Dekkhan Agriculturists' Relief Act, 1879, if he was not an agriculturist at the time the liability in question was incurred even though it may be that he was an agriculturist within the meaning of the first clause of section 2 at the time of the suit. *DAMODAR NANDRAM v. MANUBAI*, (1909) 34 Bom. 65 ... 501
- S. 2, cl. 2—*Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit for account—Agriculturist.*—The plaintiff whose land and residence was in Ratnagiri District executed a mortgage in the year 1881. The Dekkhan Agriculturists' Relief Act (XVII of 1879) which extended to the districts of Poona, Satara, Sholapur and Ahmednagar, was not applicable to the Ratnagiri District in the year 1881. In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of section 15D of the Act (XVII of 1879) and contended that he was an agriculturist in 1881, that is, when the liability under the mortgage was incurred. *Held*, that the plaintiff could not sue under section 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881). The expression "then define by law" in section 2, clause 2 of the Act (XVII of 1879) relates to the time when any part of the liability was incurred. *SHANKAR RAMKRISHNA v. KRISHNAJI GANESH*, (1909) 34 Bom. 161 ... 562
- S. 7—*Defendant summoned for examination—Payment of batta.*—It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it. *GANGASHANKAR v. BADHUR MADHUBHAI*, (1908) 33 Bom. 249 ... 157
- S. 12—*Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleaders compromising without authority from his client—Client to apply to cancel the compromise.*—There is nothing in the provisions of section 12 or in any other section of the Dekkhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908. A compromise means the settlement of a disputed claim. Where a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court to cancel all that has been done and to revive the suit. *Basan-gowda v. Churhigirigowda* (1910) see page 408 ante, followed. *PIRAJI v. GANPATI*, (1910) 34 Bom. 502 ... 777



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- Ss. 12 and 13—Retrospective effect—Indebtedness existing at the date of the passing of the Act as well as future indebtedness.*—The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provinces including sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—  
 "Whether section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?" *Held* in the affirmative that section 13 of the Act is retrospective. Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness. *SIVLAL JETHABHAI v. BHIKHA RAMJAN*, (1909) 34 Bom. 221 ... **599**
- S. 15 D, Cl. (3)—Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation.*—In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court found that a sum of Rs. 100 was due by the plaintiff to the defendant. The defendant appealed. The appellate Court, on the plaintiff's application that his suit should be treated as one for redemption, passed a decree for redemption on payment of Rs. 49-2 0 by the plaintiff to the defendant. The defendant preferred a second appeal contending that the words "the decree in the suit" in section 15D, clause (3) of the Act meant decree in the original Court and not of the Court of Appeal. *Held*, dismissing the second appeal that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings. *NAVLAJI SARDARMAL v. RAMA DHONDI*, (1909) 34 Bom. 158 ... **560**
- S. 63 (A)—Mortgage deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed concluding the writing of the body of the document that it was written by him—See TRANSFER OF PROPERTY ACT*, 33 Bom. 44 **28**



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*Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), s. 11. See LIMITATION ACT (XV of 1877), secs. 5 and 7, 34 Bom. 589*

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*Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act III of 1859), s. 15—15 and 16 Vic. c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son. See CIVIL PROCEDURE CODE (ACT VIII of 1859) s. 15—16 VIC. c. 86, s. 50, 34 Bom. 676*

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*Criminal Procedure Code (Act V of 1898), Ss. 162, 288—Indian evidence Act (I of 1872), Ss. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before the Committing Magistrate—Witness deposing to different story before the Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination in-chief—Practice and procedure. See EVIDENCE ACT, (I of 1872), Ss. 21, 157, 34 Bom. 599*

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**Directions.**

*Practice—Third party procedure—Directions, refusal to give Discretion. See THIRD PARTY, 34 Bom. 423*

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*Liability of the guardian to suit—Guardians and Wards Act (VIII of 1890), s. 41. See GUARDIANS AND WARDS ACT, 33 Bom. 419*

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*Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house—City of Bombay Municipal Act (Bom. Act III of 1888), s. 354. See BOMBAY MUNICIPAL ACT, 33 Bom. 334*

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*Suit dismissed owing to absence of Council—Plaintiff present with his witnesses—Civil Procedure Code (Act XIV of 1882), Ss. 102, 103, 117. See CIVIL PROCEDURE CODE, 33 Bom. 475*

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*Clerk in the cess collection department of a District Municipality—Public servant—Obstructions to a public servant—Penal Code (Act XLV of 1860), Ss. 21, 186. See PENAL CODE, 33 Bom. 213*

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Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882) secs. 5 and 6 to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.—As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan. <i>Held</i> , that as trustee of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed. <i>Bank of Bombay v. Suleman</i> (1908) 32 Bom. 466 at p. 474, referred to. <i>Held</i> , further, that the Mahajan fund of this caste being a purely secular fund the Indian Trusts Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance. <i>Held</i> , further, on the evidence, that there has been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed. <i>Held</i> , further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste. The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with decision in <i>Nemchand v. Savaichand</i> (1880) 5 Bom. at p. 84 F. N. <i>Lalji Shamji v. Walji Wardnman</i> (1895) 19 Bom. 507 referred to and distinguished. <i>Held</i> , lastly that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908). <i>JETHABHAI NARSEY v. CHAPSEY COOVERJI</i> (1909) 34 Bom. 467	755



**Domicile.**

*Application for guardianship of minor—Place where the minor ordinarily resides—Jurisdiction—Guardians and Wards Act (VIII of 1890), sec. 9. See GUARDIANS AND WARDS ACT, 34 Bom. 121* ...

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**Ejectment.**

*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title.—The Parsi Panchayat at Bombay appointed a Committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman. Held, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser. JIVANJI JAMSHEDJI v. BARJORJI NASSERVANJI, (1909) 33 Bom. 499...*

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**Ejectment, suit for.**

*Saranjam—Inam—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as mirasi tenant—Limited interest—Adverse possession. See SARANJAM, 34 Bom. 329* ...

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**Election of Municipal Councillors.**

*Specific Relief Act (I of 1877), s. 45—General principles underlying interference by High Court—Municipal election petition—Jurisdiction and discretion Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), ss. 33 and 34. See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888 AS AMENDED BY BOM. ACT V OF 1905) SS. 33 AND 34, 34 Bom. 659* ...

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**Equity of Redemption.**

*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of 1882), ss. 278, 282, 283 and 287. See CIVIL PROCEDURE CODE, 33 Bom. 311* ...

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**Estoppel.**

*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), s. 107—Lien—Charge—Assignment.—Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (i.e., a lease) conduct themselves towards each other as if they were landlord and tenants and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a*



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certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel. *Cornish v. Abington* (1859) 4 H. & N. 549, referred to. *ARDESIR BEJONJI SURTI v. SYD SIRDAR ALI KHAN*, (1908) 33 Bom. 610 ...

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*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtors—Civil Procedure Code (Act XIV of 1882), ss. 278, 282, 283 and 287. See CIVIL PROCEDURE CODE, 33 Bom. 311 ...*

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*Transfer of Property Act IV of 1882), s. 55, cl. (4) (b), cl. (6)—Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase money—Evidence Act (I of 1872), s. 115.—In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property. Held, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title deeds. Per Batchelor, J.:—A vendor of immovable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. *TEHILRAM v. KASHIBAI*, (1908) 33 Bom. 53 ...*

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*Saranjam—Inam—Miras (permanent tenancy)—Denial of—Saranjamdar's title—Attornment to successive Saranjamdars.—In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right. Held, that the defendant's contention involved the denial of the title to the reversionary rights*



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in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title. *Vasudev Daji v. Babaji Ranu* (1871) 8 Bom. H. C. R. (A. C. J.) 175 and *Doe dem. Marlow v. Wiggins* (1843) 4 Q. B. 367, referred to. *TRIMBAK RAMCHANDRA v. SHERH GULAM ZILANI*, (1909) 34 Bom. 329 ...

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**By Conduct.**

*Civil Procedure Code* (Act XIV of 1882), s. 258—*Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Indian Evidence Act* (I of 1872), s. 115. See *CIVIL PROCEDURE CODE*, (ACT XIV OF 1882), sec. 258, 34 Bom. 575 ...

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**Evidence Act (I of 1872.)**

Ss. 21, 157.—*Criminal Procedure Code* (Act V of 1898), Ss. 162, 288—*Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.*—During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the 'same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal: *Held*, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. (2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused. The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses



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- stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure which is that such statements should be used, if at all, on behalf of and not against the person under trial. *EMPEROR v. AKBAR BADOO*, (1910) 34 Bom. 599 ... 839
- S. 92—*Written agreement—Sale-deed—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c.—Oral agreement cannot be pleaded.*—Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void. *SANGIRA MALAPPA v. RAMAPPA*, (1909) 34 Bom. 59 ... 497
- S. 115—*Civil Procedure Code (Act XIV of 1882), s. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct.*—A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid, but was bound to execute the decree. The Subordinate Judge overruled the contention, holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872. *Held*, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. *Per Chandavarkar, J.*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law. *Per Heaton, J.*—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. *TRIMBAK RAMKRISHNA v. HARI LAXMAN*, (1910) 34 Bom. 575 ... 823



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- Criminal Procedure Code (Act V of 1898), ss. 162, 288—Indian Evidence Act (I of 1872), ss. 22, 157—Evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before the Committing Magistrate—Witness deposing to different story before the Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure. See EVIDENCE ACT (I of 1872), secs. 21, 157, 34 Bom. 599 ... 839*
- S. 115—Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Transfer of Property Act (IV of 1882), sec. 55, cl. (4) (b), cl. (6). See TRANSFER OF PROPERTY ACT, 33 Bom. 53 ... 34*

**Execution.**

- Civil Procedure Code (Act V of 1908), sec. 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable. See CIVIL PROCEDURE CODE, 34 Bom. 135 ... 546*
- Decree—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.—An application for redemption or foreclosure of a decree nisi is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree nisi is made absolute there is no decree capable of execution. Where a decree nisi contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree. *Ajudhia Pershad v. Baldeo Singh* (1894) 21 Cal. 818 and *Nandram v. Babaji* (1897) 22 Bom. 771, followed. *SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED*, (1908) 33 Bom. 273 ... 172*
- Decree—Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882) secs. 320, 323—Gujarat Talukdars' Act (Bom. Act VI of 1888, as amended by Act II of 1905), sec. 31. See GUJARAT TALUKDARS' ACT, 33 Bom. 443 ... 279*
- Decree—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under sec. 244, Civil Procedure Code, 1882—Civil Procedure Code (Act XIV of 1882), secs. 244, 310A, 311. See CIVIL PROCEDURE CODE, 33 Bom. 698 ... 439*



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- Decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.—* In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—*Held*, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set off. *MUGAPPA v. MAHAMADSAHEB*, (1909) 34 Bom. 260 ... 624
- Decree—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed—Limitation Act (XV of 1877), Art. 179, cl. 4. See LIMITATION ACT, 34 Bom. 68 ... 503*
- Gujarat Talukdar's Act (Bom. Act VI of 1838), secs. 28, 29B and 29E—Decree against Talukdar—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under s. 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1838)—Managing Officer—Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), secs. 235, 320. See CIVIL PROCEDURE CODE, 34 Bom. 142 ... 550*
- Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252—Limitation Act (XV of 1877), Sch. II, Art. 179. See HINDU LAW, 33 Bom. 39 ... 25*
- Limitation Act (XV of 1877), Art. 179—Decree—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law. See LIMITATION ACT, 34 Bom. 1189 ... 580*
- Money decree—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-*



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creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of 1882), secs. 278, 282, 283 and 287. See CIVIL PROCEDURE CODE, 33 Bom. 311 ...

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Pensions Act (XXIII of 1871), secs. 6, 8, 11—Toda giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector. See PENSIONS ACT, 34 Bom. 154 ...

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Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members—Transfer of Property Act (IV of 1882), sec. 85. See TRANSFER OF PROPERTY ACT, 34 Bom. 354. ...

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Toda Giras Allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold—Toda Giras Allowance Act, Bom.) Act VII of 1887), sec. 5. See TODA GIRAS ALLOWANCE ACT, 33 Bom. 258 ...

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—Of Decree.

Civil Procedure Code (Act XIV of 1882), secs. 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under sec. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.—C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree, but before it could be executed, both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title. *Held*, that as the property was sold by the Court at C's instance as that of M., the question so far was one relating to the execu-



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tion of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the explanation to section 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned. It was contended that whatever might have been the result, if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—*Held*, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. *GOKULSING BHIKARAM v. KISANSINGH*, (1910) 34 Bom. 546 ...

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divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them, <i>Held</i> , that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales <i>in invitum</i> the judgment-debtor. <i>VITHAL NARAYAN v. MARUTI NARAYAN</i> (1910) 34 Bom. 567	819
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<b>Guardians and Wards Act (VIII of 1890).</b>	
<i>S. 9—Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides.—One Panachand, a Jain inhabitant of Kapadwanj in the Ahmedabad District, lived in his house at that place. He died leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year after him. Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 1906. At Baroda Lallu embraced Christianity and placed his minor brother, who was also baptized, in the American Mission Boarding House at that place. Afterwards Lallu renounced Christianity and in the</i>	



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beginning of February 1909 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the American Mission at that place, and taken to Baroda. On the 29th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor's person. The appellant (opponent), at whose instance the minor was taken back to Baroda, contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under section 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain pleader, on his application, as the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction. *held*, on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of section 9 of the Guardians and Wards Act (VIII of 1890). ROBERT WARD (REV.) *v.* VELCHAND (1909) 34 Bom. 121

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- S. 41—*Guardian—Order of discharge by the Court—Liability of the guardian to suit.*—When a declaration is once made by the Court, under section 41 of the Guardians and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suits in connection with the management of the minor's property, except in the case of fraud discovered after the declaration. MURLIDHAR *v.* VALLABHDAS (1909) 33 Bom. 419

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**Guardian, Power of.**

*Limitation Act* (XV of 1877), sec. 8, sch. II, Art. 179, Expl. I—*Limitation Act* (IX of 1908), sec. 7—*Minor decree-holders—Application for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt.* See LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I, 34 Bom. 672

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<i>guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt. See LIMITATION ACT, (XV of 1877), sec. 8, sch. II, art. 179, expl. I, 34 Bom. 672</i>	...
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<b>Secs. 28, 29B and 29E—Civil Procedure Code (Act XIV of 1882), secs. 235, 320—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under sec. 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer.—When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882). <i>Hirachand Harjivandas v. Kasturchand Kasidas</i> (1893) 18 Bom. 224, explained. The effect of section 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with, the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarat Talukdar's Act (Bom. Act VI of 1888) it may then proceed with the execution. The expression "managing officer" in section 29E of the Act is merely a compendious term for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the "managing officer" is merely a synonym for "Talukdari Settlement Officer." Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Talukdari Settlement Officer is also the managing officer. <i>PURUSHOTTAM v. RAJBAL</i>, (1909) 34 Bom. 142 ...</b>	<b>550</b>
<b>—As Amended by Act (II of 1905).</b>	
<b>Sec. 31—Decree—Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), secs. 320, 323.—In execution of a money-decree against a talukdar, several villages belonging to him were attached; and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose</b>	



**Gujarat Talukdar's Act (Bom. Act VI of 1888 as amended by Act II of 1905).—(Concl'd.).**

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of execution of decrees against or in respect of talukdari lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment to section 31 of the Gujarat Talukdar's Act, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the *darkhast* preferred by the decree-holder should be disposed of. *Per CHANDAVAR-KAR, J.*:—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent, and is no legal ground or excuse for withdrawing it after he has once given it. Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*. In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred. Section 31 of the Gujarat Talukdars' Act (Bom. Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite. *PURSHOTTAM v. HARBHAMJI*, (1909) 33 Bom. 443

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**Hereditary Offices Act (Bom. Act III of 1874).**

*Ss. 25, 36—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.*—Section 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognizing as representative Vatandar. A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under section 36 of the Act notwithstanding that it is manifest that the declaration is sought for



**Hereditary Offices Act (Bom. Act III of 1874)—(Conold.).** PAGE

the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.  
**RAHIMKHAN v. DADAMIYA**, (1909) 34 Bom. 101 ... 524

**High Court.**

*Criminal revisional jurisdiction—Interference on question of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), s. 435—Indian Penal Code (Act XLV of 1860), ss. 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.*—It is the settled practice of the High Court of Bombay to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence. *Queen-Empress v. Shekh Saheb Badrudin* (1883) 8 Bom. 197; *Queen-Empress v. Mahomed Hasan* (1886) Unrep. Cri. Cas. 244; and *Queen-Empress v. Chagan Dayaram* (1890) 14 Bom. 331, follow. Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public. In cases of sedition, the question of intention is one of fact.  
**EMPEROR v. GANESH BALVANT MODAK**, (1909) 34 Bom. 378.. 699

**High Court's disciplinary Jurisdiction.**

*Pleader—Misbehaviour—Suspension of Sanad—Bombay Regulation II of 1827, s. 56.* See **PLEADER**, 33 Bom. 252 ... 159

**High Court Rules, Rule 540.**

*Petition—Taxing Master—Solicitors' retainer denied—Taxation of costs.*—An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill. *In re Jones* (1887) 36 Ch. D. 105, followed.  
*In re MADHAVJI*, (1908) 33 Bom. 667 ... 420

**Hindu Law.**

*Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.*—Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way



of sale or mortgage. Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate. *Lakshman v. Radhabai* (1887) 11 Bom. 609 and *Moro v. Balaji* (1894) 19 Bom. 809, followed. *Sreeramulu v. Kristamma* (1902) 26 Mad. 143, not followed. *RAMAKRISHNA v. TRIPURABAI*, (1908) 33 Bom. 88 ...

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*Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.—* When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted. In the absence of any special custom, Jains are governed by the ordinary Hindu Law. *KALGAVDA TAVANAPPA v. SOMAPPA TAMANGAVDA*, (1909) 33 Bom. 669 ...

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*Adoption—Mother's sister's son also father's brother's son.—* The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son. The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotras. *Ramohandra v. Gopal*. (1908) 32 Bom. 619, followed. *WALBAI v. HERBBAI*, (1909) 34 Bom. 491 ...

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*Alienation by widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow.—* The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1907) 30 All. 1 and *Vinayak v. Govind* (1900) 25 Bom. 129, followed. The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate. *PILU v. BABAJI*, (1909) 34 Bom. 165 ...

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*Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil Procedure Code (Act XIV of 1882), s. 276.—* When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree



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against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. *SUBRAYA v. NAGAPPA*, (1908) 33 Bom. 264 ...

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*Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes.*—One H. persuaded N. who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N. signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H. to B. who advanced moneys on them to H. On a suit by B. to recover the amount due on the notes from N.'s firm K., a minor coparcener, pleaded that he was not liable. *Held*, varying the decree of Heaton, J., that the minor's share in the firm was liable. *Per Chandavarkar, J.*—Under Hindu law a joint family, which carries on a trade handed down from its ancestors, becomes a trading family; trade being one of its *kulacharas* (duty or practice) it attracts to itself all the necessary incidents of trade. The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family. Where a minor is a coparcener in a joint family his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes. The minor's share is therefore bound by it since it constitutes an obligation of the firm. *Per Batchelor, J.*—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. *RAGHUNATHJI TARACHAND v. THE BANK OF BOMBAY*, (1909) 34 Bom. 72 ...

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*Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers.*—M., a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5,000. At the time of this release M. had one son living. On this son suing the coparcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M. had another son born, who sued the first son to recover from him a moiety of the sum allotted to the first son on partition. *Held*, that the second son was not entitled to any share in the property. *SHIVAJIRAO v. VASANTIRAO*, (1908) 33 Bom. 267 ...

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*Maintenance—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance.*—A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child; but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance. *Held*, negating the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will. The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence. *Honamma v. Timannabhat* (1877) 1 Bom. 559; *Valu v. Ganga* (1882) 7 Bom. 84; and *Vishnu Sambhog v. Manjamma* (1884) 9 Bom. 108, discussed. *PARAMI v. MAHADEVI*, (1909) 34 Bom. 278

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*Marriage—Asura form—Brahma form—Construction of texts.*—Under Hindu law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the transaction makes it not a gift but a sale of the girl. The money received is what is called the "bride-price"; that is the essential element of the *Asura* form. The



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fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her. It is a principle enunciated by Vijnaneshvara that were all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes. *CHUNILAL v. SURAJRAM*, (1909) 33 Bom. 433 ...

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*Mitakshara*—*Adopted son*—*Succession to the adopted son*—*Adoptive mother entitled to succeed in preference to adoptive father*.—Under the *Mitakshara* school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption. *ANANDI v. HARI SUBA*, (1909) 33 Bom. 404 ...

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*Mitakshara*—*Daughters inheriting property from their father*—*Shares separate and absolute*—*Tenants-in-common*.—In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely. When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them. In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject. *VITHAPPA v. SAVITRI*, (1910) 34 Bom. 510 ...

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*Mitakshara*—*Liability of sons to pay father's debt*—*Money decree*—*Appeal by some of the parties to a decree*—*Decree in appeal final*—*Execution*—*Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252*—*Limitation Act (XV of 1877), sch. II, art. 179*.—A money-decree obtained against the father of an undivided Hindu family governed by the *Mitakshara* law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands, even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882). *Umed Hathising v. Goman Bhaiji* (1895) 20 Bom. 385, followed. There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882). Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties. *SHIVRAM v. SAKHARAM*, (1908) 33 Bom. 39 ...

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*Mitakshara*—*Mayukha*—*Kamathis*—*Law governing Kamathis who live in Bombay*—*Succession*—*Anvadhya Stridhan*—*Preference between husband and son born of adulterous intercourse*—



- Shudras—Forms of marriage—Presumption as to form.*—The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail. The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse. The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belong to a respectable family.—JAGANNATH RAGHUNATH v. NARAYAN, (1910) 34 Bom. 553 ... 809
- Mitakshara—Stridhan—Succession—Competition between husband and step-son.*—Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife. BHIMACHARYA v. RAMACHARYA (1909) 33 Bom. 452 ... 284
- Nibandha—Gift—Sale—Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Registration Act (III of 1877), sec. 17—Transfer of Property Act (IV of 1882), secs. 55 (6) (b), 123.* See TRANSFER OF PROPERTY ACT, 34 Bom. 287 ... 642
- Panchals—Kurbars—Sub-divisions of Shudra tribe—Intermarriage valid—Custom as to illegality—Burden of proof.*—A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe. The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom. *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1869) 13 Moo. I. A. 141 and *Fakirgauda v. Gangi* (1896) 22 Bom. 277, followed. MAHANTAWA v. GANGAWA (1909) 33 Bom. 693 ... 436
- Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.*—Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it. Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property. *Held*, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition. BAJABA v. TRIMBAK VISHVANATH (1909) 34 Bom. 106 ... 527
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property which she inherited from her father, under a deed of gift subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen:—*Held*, that the property being *anvadhya* stridhan, should be divided equally among the son and daughters: with this difference, however, as to the latter, that the unmarried should have preference over the married. *Ashabai v. Haji Tyeb Haji Rahimtulla* (1882) 9 Bom. 115 and *Sitabai v. Wasantrao* (1901) 3 Bom. L. R. 201, followed. *DAYALDAS LALDAS v. SAVITRIBAI* (1909) 34 Bom. 300 ...

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*Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), art. 120.—Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs. The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir. RAVJI VALAD MAHADU v. SAKUJI VALAD KALOJI* (1909) 34 Bom. 321 ...

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*Widow—Gift of a son by first husband in adoption by widow after her remarriage—Hindu Widow Remarriage Act (XV of 1856), ss. 2, 3, 4, and 5. See ADOPTION, 33 Bom. 107 ...*

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**Hindu Widow Remarriage Act (XV of 1856).**

*Ss. 2, 3, 4, and 5—Hindu widow—Gift of a son by first husband in adoption by widow after her remarriage.—According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu law a right to give her son in adoption the Hindu Widow Remarriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it. The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent. Panchappa v. Songanbasawa* (1899) 24 Bom. 89, considered. *PUTLABAI v. MAHADU* (1908) 33 Bom. 107 ...

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*Ss. 2 and 5—Indian Succession Act (X of 1865), s. 187—Administrator-General's Act (II of 1874), s. 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.—A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of*



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the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870). The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of s. 187 of the Indian Succession Act (X of 1865). <i>NARAYAN SHRIDHAR v. PANDURANG BAPUJI</i> (1910) 34 Bom. 506 ...	780
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Ss. 128, 129, 130, and 131—Winding up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), secs. 128, 129, 130 and 131—Schemes of arrangement—Practice.—The definition of "debt" in section 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor". A "creditor" is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor. If the petitioners can satisfy the Court that the Company on a general perusal of its	



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balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up. If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement . . . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. IN THE MATTER OF INDIAN COMPANIES ACT, IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING COMPANY AND IN THE MATTER OF RATILAL KARSONDAS, (1909) 34 Bom. 533 ...	797
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**Insolvency Act, Indian, (11 and 12 Vict., c. 21).**

- Ss. 7, 26 and 36—Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtors Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai.—*The firm of T. and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M. was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907. On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act. A Rule nisi was obtained on behalf of M. calling upon the opposing creditors to show cause why the above order should not be set aside. These creditors also obtained a Rule nisi calling on M. to show cause why he should not deliver up to the Official Assignee goods belonging to the insolvent firm in his possession at Shanghai. These two Rules were heard together. *Held*, that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors' Court at Bombay, and that Court could order M. to hand over such property to the Official Assignee in Bombay. *Held*, further, that the Insolvent Debtors' Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose. *In re NAOROJI SORABJI TALATI*, (1908) 33 Bom. 462 ... 291

**Insurance, Fire.**

- Liability of Company for further loss.* Per CHANDAVARKAR, J.—The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred. *Montoya v. London Assurance Company* (1851) 6 Ex. 451 at p. 458, referred to. Per Batchelor, J.—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could



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by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact. *ATLAS ASSURANCE COMPANY, LIMITED v. AHMEDBHOY HABIBHOY*, (1908) 34 Bom. 1 ...

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*Indian Penal Code (Act XLV of 1860), secs. 511, 124A—Attend to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact. See HIGH COURT, 34 Bom. 378.*

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**Interlocutory Judgments.**

*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Misjoinder of parties and causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of 1882), sec. 28. See CIVIL PROCEDURE CODE, 33 Bom. 293 ...*

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*Criminal Procedure Code (Act V of 1898), secs 162, 288—Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of as to statements made by witnessjs to him—Examination-in-chief—Practice and procedure. See CRIMINAL PROCEDURE CODE, (ACT V OF 1898), SECS. 162, 288, 34 Bom. 599 ...*

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*Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth—Hindu law. See HINDU LAW, 33 Bom. 669 ...*

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*Charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), ss. 124A, 153A—Criminal Procedure Code (Act V of 1898), ss. 225, 233, 234, 235, 236 and 237. See CRIMINAL PROCEDURE CODE, 33 Bom. 77 ...*

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*Criminal Procedure Code (Act V of 1898), ss. 233, 234, 235, 236, 237 and 239—Privy Council, leave to appeal to, in criminal case—Practice and procedure. See CRIMINAL PROCEDURE CODE, 33 Bom. 221 ...*

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**Joinder of Parties.**

*Non-joinder of some of the partners—Suit cognizable by Small Causes Court brought in High Court—Practice—Jurisdiction. See JURISDICTION, 34 Bom. 13 ...*

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**Joint Hindu Family.**

*Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers—Hindu law.* See HINDU LAW, 33 Bom. 267

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**Juddins.**

*Conversion among Indian Zoroastrians—Convert not entitled to certain religious and charitable institutions of Parsis.—Held by Davar, J.:—*Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism. Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who came to India either temporarily, or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion. *Held by Beaman, J.:—*The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organization. Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father. *SIR DINSHA MANEKJI PETIT v. SIR JAMSETJI JIJIBHAI, (1908) 33 Bom. 509*

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*Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Appeal—Construction of submission to arbitration—Letters Patent, 1865, cl. 15. See LETTERS PATENT, 34 Bom. 1* ...

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**—debtor.**

*Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective. See PRE-EMPTION, 34 Bom. 567* ...

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**Jurisdiction.**

*Aden Act (II of 1864), secs. 8 and 15—Court-fees Act (VII of 1870), sec. 7, sub-sec. 4, cls. (c) and (d)—Suits Valuation Act (VII of 1887), sec. 8—Civil Procedure Code (Act (XIV of 1882), sec. 551—Civil Procedure Code (Act V of 1908), sec. 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision.—*  
*The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant resident rejected the plaint on the ground that it was not properly stamped. Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden, and on the 23rd September 1908 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court. The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case. A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864). *Held*, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court. Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the*



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High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden. *Held*, further, that the plaintiff's claim being valued at Rs. 130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit. *RHIMBAI JAMALBHOY v. MARIAM BINTE ABDUL*, (1909) 34 Bom. 267

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*Application for guardianship of minor—Domicile—Place where the minor ordinarily resides—Guardians and Wards Act (VIII of 1890), sec 9. See GUARDIANS AND WARDS ACT, 34 Bom. 121*

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*Arbitration—Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded. See ARBITRATION, 33 Bom. 401*

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*Civil Procedure Code (Act V of 1908), sec. 9—Civil Court—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.—*The plaintiffs, as members of the committee of management of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office. *Held*, that the suit was of a civil nature. An action would lie against the plaintiffs by the Advocate General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the



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- adjudication of any rights or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered. **TRIMBAK GOPAL v. KRISHNARAO PANDURANG**, (1909) 33 Bom. 387 ... **243**
- Court Fees Act (VII of 1870)**, s. 7, cl. (iv) (b), s. 7, cl. (v)—**Suits Valuation Act (IX of 1887)**, s. 8—*Suit for partition and separate possession of joint family property—Valuation for Court-fee purposes—Market value of subject-matter determines jurisdiction.*—The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in lands at five times the assessment (i.e., at Rs. 489-6-0) for Court-fee purposes and in the moveables at Rs. 1,455-8-0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of the First Class Subordinate Judge as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court-fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under section 7, clause (iv) (b) of the Court Fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of the Second Class Subordinate Judge. *Held*, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge. **DAGDU v. TOTARAM**, (1909) 33 Bom. 658 ... **414**
- Dispute as to precedence or privilege between purely religious functionaries—Civil Procedure Code (Act XIV of 1882)*, s. 11. See **CIVIL PROCEDURE CODE**, 33 Bom. 278 ... **175**
- Hereditary Offices Act (Bom. Act III of 1874)**, ss. 25, 36—*Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration.* See **HEREDITARY OFFICES ACT**, 34 Bom. 101 ... **524**
- Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act (11 and 12 Vict., c. 21)*, ss. 7, 26 and 36.—See **INSOLVENCY ACT (INDIAN)**, 33 Bom. 462 ... **291**
- Land Acquisition Act (I of 1894)**—*Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Practice and procedure—Bombay Civil Courts Act (XIV of 1869)*, s. 16. See **BOMBAY CIVIL COURTS ACT**, 33 Bom. 371 ... **233**
- Land held as saranjam—Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Revenue Jurisdiction Act (X of 1876)*, s. 4, sub s. (a)—**Act XI of 1852**. See **REVENUE JURISDICTION ACT**, 34 Bom. 232 ... **607**
- Letters Patent**, clauses 12 and 14—*Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.*—An application under clause 14 of the Letter Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under clause 12; nor is there anything in clause 14 to show that this



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application must be made before the plaint is filed. There is nothing to prevent plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented. *JOHN GEORGE DOBSON v. THE KRISHNA MILLS, LTD.*, (1910) 34 Bom. 564

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*Pakki Adat Agency—Place of performance of contract by Pakki Adatya—Custom.*—K., a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an agency account being taken, a sum of money was found to be due from S. to K. On K. suing for this sum, S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay. *Held*, in the case of *Pakki adat* agency primarily the place of payment is the place where the constituent resides, but payment shall be made in any other place of the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit. Per CHANDAVARKAR, J.:—A *pakki adatya's* liability ceases when hard cash has come into the hands of his constituent. *KEDARMAL v. SURAJMAL*, (1909) 33 Bom. 364

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*Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court*—The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates; or from filing further suits relating to the same subject matter pending the hearing of the High Court suit. *Jairamdas v. Zamonlal* (1906) 27 Bom. 357, not followed. *UDERAM KESAJI v. HYDERALLY*, (1908) 33 Bom. 469

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*Practice—Presidency Small Cause Courts Act (Act XV of 1882), s. 22—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants' Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing *vaida* rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), s. 93—Sale—Tender.*—The Bombay United Rice Merchants' Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated "to decide all disputes which may arise as to contracts and do all other business relating to contracts." It was also provided that the "exclusive authority"



to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the *vaida* should fix the *vaida* rate (*i.e.*, the market rate of the day) on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in Bombay, who were members, to purchase rice for them and on the 24th November 1906 these agents bought from the defendants 1340 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud 1963 (*i.e.* from the 18th November 1906 to 30th November 1906). The contract which was in the printed form framed under the rules as above-mentioned contained the following clause:—"This contract is made subject to the rules of the Bombay United Rice Merchant's Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that in settling the *vaida* rate the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice a general meeting of the Association was held on the 30th November 1906 at which after discussion a special Sub-Committee was appointed to fix the rate consisting only of three persons one of whom was not a member of the standing Sub-Committee and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee and the other because he was interested in fixing a low rate, and they contended that for these reasons (*inter alia*) they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November 1906. The sum claimed as damages was less than Rs. 1,000. The defendants pleaded—1. That having regard to section 15 of the Civil Procedure Code (Act XIV of 1882) and section 18 of the Presidency Small Cause Courts Act (XV of 1882) the suit was not maintainable in the High Court. 2. That certain



alleged partners of the plaintiffs not being parties to the suit it should be dismissed for non-joinder. 3. That having regard to the rules of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law at all events until they had exhausted the remedies provided by the rules. 4. That the plaintiffs were bound by the *vaida* rate fixed by the Sub-Committee appointed by the Association. *Held*, (1) That the High Court had jurisdiction and that the suit should proceed subject to the provisions as to costs contained in section 22 of the Presidency Small Cause Courts Act (XV of 1882). (2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder. (3) That the plaintiffs were entitled to sue at law notwithstanding the provisions contained in the rules of the Association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other. (4) That at the meeting of the Association held on the 30th November 1906 the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *vaida* rate and that they were therefore bound by the rate then fixed. Any stipulation that the award of an arbitrator shall be accepted as final restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void. The effect of section 28 of the Indian Contract Act (IX of 1872), section 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899) and of the Civil Procedure Code dealing with arbitration is that a person may not contract himself out of his right to have recourse to Courts of law but that in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts. *MULJI TEJSING v RANSI DEVRAJ*, (1909) 34 Bom. 13

*Provincial Small Cause Courts Act (IX of 1887), ss. 16, 27, 32, sch. II, cls. (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Cause Courts Act (IX of 1887). Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining*



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the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point. *Held*, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction. *Ledgard v. Bull* (1886) L. R. 13 I. A. 134 and *Meenakshi Naidoo v. Subramaniya Sastri* (1887) L. R. 14 I. A. 160, referred to. Decree of the District Court reversed and that of the first Court restored. *DAULAT-SINHJI (MAHARANA SHRI) v. KACHAR HAMIR MON*, (1909) 34 Bom. 171

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*Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), s. 24—Suits Valuation Act (VII of 1887), s. 11. See RESTITUTION OF CONJUGAL RIGHTS, 34 Bom. 236*

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*Small causes suit—Suit brought in the Court of the First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.—A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause. *Held*, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause. *NARAYAN RAVJI v. GANGARAM RATANCHAND*, (1909) 33 Bom. 664*

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*Suit for declaration and consequential relief—Valuation—Court-fees—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), s. 8. See SUITS VALUATION ACT, 33 Bom. 307.*

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*Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immovable property—Suit to enforce the right in British Courts.—The plaintiff sued to recover from the defendant a certain sum of money on account of toll leviable, under a grant from the Peshwas and known as the Tipnis Pansare right, on paddy exported from the territory of the Pant Sachiv to Pen, via Umber Khind in British territory. The cause of action arose admittedly in foreign territory; but it was contended the suit lay in the British Courts because the defendant*



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resided in British jurisdiction. *Held*, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being according to Hindu law, *nibandha*, was immoveable property. *The Collector of Thana v. Hari Sitaram* (1882) 6 Bom. 546, followed. *Held*, further, that this immoveable property was situate, in the eye of law, in a foreign state ; and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied. *Keshav v. Vinayak* (1897) 23 Bom. 22 applied. The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immoveables situated out of the jurisdiction. *KRISHNAJI v. GAJANAN*, (1909) 33 Bom. 373 ...

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*Civil Procedure Code (Act V of 1908), s. 24—Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction. See CIVIL PROCEDURE CODE, 34 Bom. 411* ...

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**Jurisdiction of Civil Courts.**

*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882), ss. 5 and 6 to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), s. 151. See TRUSTS ACT (II OF 1882) SS. 5 AND 6, 34 Bom. 467* ...

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**Jury, Trial by.**

*Trial with the aid of assessors—Difference in the mode of trial—Accused if prejudiced can complain—Practice—Procedure—Criminal Procedure Code (Act V of 1898), s. 269. See CRIMINAL PROCEDURE CODE, 33 Bom. 423* ...

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**Kamathis.**

*Hindu Law—Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Anvadhya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form. See HINDU LAW, 34 Bom. 553* ...

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*Bombay Land Revenue Code (Bom. Act V of 1879), ss. 3 (11) and 217—Survey settlement introduced into Inam village—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent. See LAND REVENUE CODE (BOM. ACT V OF 1879), SS. 3 (11) AND 217, 34 Bom. 686* ...

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**Kurbars.**

*Panchals—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law. See HINDU LAW, 33 Bom. 693* ...

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**Land Acquisition.**

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*Compulsory acquisition of land—Compensation—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites.—The two methods employed in conjunction and producing the same result.—The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself. When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway. Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated. In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule. TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY v. KARSONDAS, (1908) 33 Bom. 28 ...*

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**Land Acquisition Act (I of 1894).**

*Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and Procedure—Bombay Civil Courts Act (XIV of 1869), sec. 16. See BOMBAY CIVIL COURTS ACT, 33 Bom. 371 ...*

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*"Land"—Acquisition of outstanding interests where Government owns fee-simple. —Per Chandavarkar, J.—To acquire a land [So,*



under the Land Acquisition Act] is not necessarily the same thing as to purchase the right of fee-simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like. The definition given to the word "land" in section 3 (a) of the Act is not exhaustive.....The use of the inclusive verb "includes" shows that the legislature intended to lump together in one single expression—viz. "land"—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all of which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require. *Per Batchelor, J.*—Government are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation, based upon the market value of the whole land, must be distributed among the claimants. In such circumstances there is no insuperable objection to adopting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for. **IN THE MATTER OF THE LAND ACQUISITION ACT—THE GOVERNMENT OF BOMBAY v. ESUFALI SALBBHAI, (1909) 34 Bom. 618** ...

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8. 18—*Compensation—Mode of valuation when no recent sales—Market value—Surveyor's opinions—Objections to Surveyor's reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award.*—In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood. The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots. Where no evidence has been adduced of sales in the neighbourhood of such a large block of land as the one under reference the evidence before the Court of sales of small pieces of land in the neighbourhood enables the Court to give an opinion regarding the values of different portions of the block, and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument. The practice which has grown up in references under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence. When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the



buildings in the locality. It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its costs ; and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each. It cannot be taken as a hard and fast rule that back land must be worth half the frontage land. *Per Curiam* :—" Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious." The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle. IN THE MATTER OF KARIM TAR MAHOMED, (1908) 33 Bom. 325 ...

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S. 18—*Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.*—

The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration. In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity. The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration. It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal. IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF GOVERNMENT AND SUKHANAND, (1909) 34 Bom. 486 ...

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S. 23—" *Market value of land* "—*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references.*—The Government of Bombay, acting on behalf of the Improvement Trustees, under the City of Bombay Improvement Act (Bombay Act IV of 1898), notified for acquisition nine parcels of land in December 1898. At the date of the notification, J. the owner of the parcels, was in unencumbered possession of only one of them ; and the remaining parcels were let on permanent leases as building sites. Between the dates of notification and acquisition, J. bought out the interests of the tenant in one of the parcels. The situation of the land was such that the whole plot consisting of the nine parcels was capable of forming a valuable quarry. The Collector in assessing compensation dealt with



all the parcels separately; and refused compensation on a quarrying basis. As regards the seven parcels, the award was arrived at on a rental basis. In all nine cases, references were claimed and made to the Tribunal of Appeal constituted under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898). After the Collector had made his award and before the references were heard, J. bought out the tenants' rights in the seven parcels. J. next applied to the Tribunal of Appeal for consolidation of the references into one: this was allowed. The Tribunal of Appeal allowed J.'s claim for compensation for the whole land on a quarrying basis. On appeal, it was objected that the consolidation was wrongly allowed for J. was thereby permitted to advance a claim—namely the claim to the quarrying value—which otherwise he would not have been able to make. *Held*, that the consolidation was rightly allowed and had not the effect which was contended for. It was not by reason of the consolidation of references that J. was enabled to put forward what might be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector. *Held*, further, that compensation should not be assessed on a quarryable basis, for the land was never a marketable quarry at the material time, and did not become so till after the Collector had made his award. *Per* BATCHELOR, J.:—For the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act (I of 1894), the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it. *Collector of Belgaum v. Bhimrao* (1908) 10 Bom. L. R. 657, followed. The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell; and then of apportioning that value among the persons interested. The "market value of the land" means the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights. *Per* HEATON, J.:—Taking the scope of the Land Acquisition Act (I of 1894) and its words, it seems that in ascertaining compensation for land taken up neither the method of valuing each interest in it separately nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded. What is intended is a fair and reasonable estimate of the compensation to be awarded: and this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land by either of the two methods. This



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opinion does not conflict with what was decided in <i>Collector of Belgaum v. Bhimrao</i> (1908) 10 Bom. L. R. 657. BOMBAY IMPROVEMENT TRUST v. JALBHOY (1909) 33 Bom. 483 ...	304
<b>Land for Agricultural Purposes.</b>	
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<i>ss. 3 (11) and 217—Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.—Section 217 of the Bombay Land Revenue Code (Bom. Act V of 1879) is not restricted in its application to registered occupants only: it invests "the holders of all lands" in alienated villages with the same rights and imposes upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have. The term "holder" as defined in class 11, section 3 of the Land Revenue Code, is wide enough to include even a tenant who has entered into possession under an occupant. NANABHAI BAJIBHAI v. THE COLLECTOR OF KAIRA, (1910) 34 Bom. 686</i> ...	894
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<b>Lease.</b>	
<i>Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), s. 107—Lien—Charge — Assignment.—Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms, whatever they were, or if a certain course of conduct has been pursued by either party which in point of fact constitutes the relation of landlord and tenant between them, and if in pursuance of that relation one party has paid certain moneys from time to time to another as a deposit to secure the performance by the former of the covenants and conditions of the lease, then a person suing to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit. Such admission of the lease would not contravene the provisions of the Registration Act, because it would in that case be put in evidence not for the purpose of affecting any immoveable property but for a collateral purpose, i.e., for the purpose of proving a money debt arising from the conduct of the parties. Pullbrook v. Lawes (1876) 1 Q. B. D. 284, referred to. Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (i.e., a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance</i>	



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of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel. *Cornish v. Abington* (1859) 4 H. & N. 549, referred to. The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning, except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another. *ARDESIR BEJONJI v. SYED SIRDAR ALI KHAN*, (1909) 33 Bom. 610

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*Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), s. 50. See TRANSFER OF PROPERTY ACT, 33 Bom. 96*

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*Salt pans—Lease under a license from Collector—Lessee not to sub-let without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie—Salt Act (Bom. Act II of 1890), Ss. 11 and 47. See SALT ACT, 33 Bom. 636*

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**Leave to appeal to Privy Council.**

*Joinder of charges—Criminal Procedure Code (Act V of 1898), ss. 233, 234, 235, 236, 237 and 239—Practice. See CRIMINAL PROCEDURE CODE, 33 Bom. 221*

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*Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.—It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal. See LAND ACQUISITION ACT, (I OF 1894), 34 Bom. 486*

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**—Representative.**

*Civil Procedure Code (Act XIV of 1882), Ss. 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Legal representatives should put forward their claim under s. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger. See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), Ss. 244, 252, 647, 34 Bom. 546*

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**Lessees Liability of.**

*City of Bombay Municipal Act (Bom. Act III of 1888), s. 305—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes. See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), s. 305, 34 Bom. 593*

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**Letters Patent, cls. 12 and 14.**

*Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.—An application under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under clause 12; nor is there anything in clause 14 to show that this application must be made before the plaint is filed. There is nothing to prevent the plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented. JOHN GEORGE DOBSON v. THE KRI-HNA MILLS, LTD. (1910) 34 Bom. 564*

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**Letters Patent, 1865, cl. 15.**

*Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration.—An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion. ATLAS ASSURANCE COMPANY, LIMITED v. AHMEDBOY HABIBBOY, (1908) 34 Bom. 1*

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**License.**

*Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie—Salt Act (Bom. Act II of 1890), ss. 11 and 47. See SALT ACT, 33 Bom. 636*

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*Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary—City of Bombay Municipal Act (Bom. Act III of 1888), s. 394—Indian Railways Act (IX of 1890), s. 7. See RAILWAYS ACT, 34 Bom. 252*

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**Lien.**

*Charge—Assignment—Transfer of Property Act (IV of 1882), s. 107—The mere fact that parties have described a transaction*



- as a "lien" or "charge" cannot deprive it of its real nature, if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning, except as giving the latter a right to recover the debt from the debtor. *ARDESIR BEJONJI v. SYED SIRDAR ALI KHAN*, (1908) 33 Bom. 610 ... 383
- Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration-money in full—Mortgages taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of 1872), s. 115—Transfer of Property Act (IV of 1882), s. 55, cl. (4) (b), cl. (6). See TRANSFER OF PROPERTY ACT, 33 Bom 53* ... 34
- Practice—Dissolution of partnership—Assets in the hands of receiver—Judgment-creditor—Charging order—Solicitor's lien for costs. See SOLICITOR'S LIEN FOR COSTS, 34 Bom. 484* ... 766
- Limitation.**
- Bhagdari Act (Bom. Act V of 1862), s. 3—Bhag—Unrecognised subdivision of a bhag—Alienation—Suit to set aside the alienation.—Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest. The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person. *Dala v. Parag* (1902) 4 Bom. L. R. 797 and *Jethabhai v. Nathabhai* (1904) 29 Bom. 399, distinguished. *ADAM UMAR v. BAPU BAWAJI*, (1908) 33 Bom. 116* ... 73
- Civil Procedure Code (Act (XIV of 1882), ss. 43 and 50—Transfer of Property Act (IV of 1882), s. 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decrees against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decrees to recover balance by sale of other property—Putting forward allegations at a late stage. See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 90, 34 Bom. 540* ... 801
- — — **Act (XV of 1877).**
- Ss. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), s. 11.—A suit filed in forma pauperis was decided on the 10th February 1908. An application for leave to appeal in forma pauperis was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in forma pauperis must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it. Held, overruling the con-*



## Limitation Act (XV of 1877)—(Contd.).

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- tention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period. The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition. *CHINTAMAN VYANKATRAO v. RAMCHANDRA VYANKATRAO*, (1910) 34 Bom. 589 ...
- S. 8, sch. II, art. 179, expl. I—Limitation Act (IX of 1908) sec. 7—*Minor decree-holders—Applications for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt.*—Two minor sisters, who were born in the years 1881 and 1887, obtained a decree against the defendants in May 1900. The minor decree-holders were represented by a guardian appointed by the Court. The said decree was confirmed by the High Court in appeal in March 1901. Subsequently the guardian presented applications for the execution of the decree in 1904, 1905 and 1906, and while the last application was pending the guardian died. Thereupon the decree-holders presented an application for execution as majors in 1908. The defendants contended that as the elder decree-holder had attained majority, the application by the guardian was, as to her, unauthorized and the execution of the decree was barred as against her. It was further contended that as the elder decree-holder could from the time of her attaining majority make an application and give a good discharge to the judgment-debtor for the decretal-debt without the concurrence of the minor, time had, therefore run against both under section 8 of the Limitation Act (XV of 1877) or section 7 of the Limitation Act (IX of 1908). *Held* that by reason of the first explanation of article 179 of the Limitation Act (XV of 1877) an application made by a representative of one of joint decree-holders takes effect in favour of all. Therefore, though the elder decree-holder had attained majority, the applications made by the guardian as the next friend of the minor decree-holder took effect in favour of both.—*Held*, further, that the contention under section 8 of the Limitation Act of 1877 or section 7 of the Limitation Act of 1908 was inconsistent with the decisions in *Govindram v. Tatia* (1895) 20 Bom. 383 and *Zamir Hasan v. Sundar* (1899) 22 All. 199, the applicability of which had not ceased owing to any

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- change in the words of section 7 of the Limitation Act of 1908. MANCHAND PANACHAND v. KESARI, (1910) 34 Bom. 672 ... 885
- Ss. 22, 28—*Civil Procedure Code (Act XIV of 1882), sec. 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiff's claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decrees.*—Certain lands attached to a vatan belonged jointly to two brothers V and D. In the year 1872 the lands were let by V. under a perpetual lease which was attested by D. D. predeceased V. In the year 1905 within twelve years from the death of V., his representatives brought a suit for the recovery of the lands let by V. They sought to recover the entire lands on the ground of eldership. The suit was brought against defendants 1a, 1b, and 1c as the heirs of the mortgagee of the lessee (the original 1st defendant), against defendants 2 and 3 as the heirs of the lessee and against defendants 4 and 5 as the heirs of D. The heirs of defendant 1 and defendants 2 and 3 defended the suit on the ground, *inter alia*, of limitation, the suit not having been brought within twelve years from the date of the lease. Defendants 4 and 5 did not contest the plaintiffs' claim. The first Court allowed the plaintiff's claim to the extent of their share, namely, a moiety on the ground that their claim to that extent was not time-barred. On appeal by the plaintiffs and defendants 4 and 5 the latter of whom in appeal claimed their share, namely, the other moiety, the appellate Court awarded the other moiety to defendants 4 and 5. On second appeal by the heirs of the mortgagee. *Held*, affirming the decree, that the whole claim was within time. A Vatandar is entitled to alienate vatan lands for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death. Where a lease of vatan property is effected by one joint owner with the consent of the other joint owner, the time for the recovery of the vatan property from the lessee runs from the date of the death of the survivor of the joint lessors. Defendants 4 and 5 having sought to recover in appeal their share which they had not asked for in the first Court. *Held*, allowing their claim that they being parties to the suit instituted within the twelve years during which their right to a share in the vatan property could be effectually determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit. A party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act (XV of 1877) apply. *Nayendrabala Debya v. Tarapada Acharjee*



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- (1908) 35 Cal. 1065, concurred in. Plaint and decree of the lower appellate Court amended by entering defendants 4 and 5 as co-plaintiffs. *NARSINH v. VAMAN VENKATRAO*, (1909) 34 Bom. 91 ... 518
- Sch. II, Art. 120—Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right.—* Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit vatan collaterally in preference to legitimate heirs. The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir. *RAVJI VALAD MAHADU v. SAKUJI VALAD KALOJI*, (1909) 34 Bom. 321 ... 663
- Sch. II, Art. 127—Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation.—* Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property. *Sayad Gulam Hussein v. Bibi Anvarnisa*, P. J. 1885, p. 170, followed. *BOO FATMA v. BOO GHISANBOO*, (1909) 33 Bom. 719 ... 453
- Sch. II, Arts. 131, 62—Cash allowance—Tastik—Arrears of cash allowance, suit to recover.—* The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shri Madhukeshwar at Banawasi, a sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance, but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal, *Held*, that the claim was properly allowed. A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right. The important question is, who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears,



which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and article 62 applies to the co-sharer who has received the payment. *SAKHARAM HARI v. LAXMI-PRIYA TIRTHA SWAMI*, (1910) 34 Bom. 349 ...

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*Art. 178 — Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252. See HINDU LAW, 33 Bom. 39* ...

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*Art. 179 — Decree—Execution—Execution made conditional upon payment of Court fees—Application for execution without payment — Dismissal — Second application with payment—Application made in accordance with law.—A decree was passed on the 30th June 1900 whereby partition of immoveable property was ordered : but the execution of the decree was made conditional on the payment of the proper Court-fees. On the 29th June 1903 an application to execute the decree was made, but it was dismissed and it was not accompanied by payment. A second application to execute the decree was presented on the 27th June 1906 : it was accompanied by payment. The lower Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 was not one in accordance with law as required by article 179 of schedule II to the Limitation Act, 1877. Held, that the first application was made in accordance with law, for, upon that application, it was competent for the Court to order that the execution should begin on the Court-fees being paid within a certain date. Held, further, that the second application was within time. Per curiam :—An application for execution of a decree to be in accordance with law must ask for something within the decree and not outside it. *NATHUBHAI KASANDAS v. PRANJIVAN LALCHAND*, (1909) 34 Bom. 189 ...*

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*Art. 179, cl. 4—Decree—Execution—Step-in-aid of execution—Application for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed.—A decree was passed on the 12th October 1894 and an application to execute it was made by the decree-holder on the 16th August 1897. The process fee not having been paid the application was struck off. The second application to execute the decree was presented on the 16th August 1900 by the assignee of the decree-holder ; but as he did not produce the assignment the application was struck off on the 27th October 1900. The third application was presented by a *mukhtyar* of the assignee on the 11th August 1903 ; but as neither the assignment nor the *mukhtyarnama* was produced it was struck off on the 9th October 1903. The *mukhtyar* presented a fourth application on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882) and*



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the application was disposed of, the decree-holder agreeing to accept a payment of Rs. 45 from the judgment-debtor. On the 11th December 1906 the fifth application to execute the decree was filed. The lower Courts holding that the second and third applications could not be regarded as applications for execution made in accordance with law, dismissed the fifth application as barred by the law of limitation. *Held*, that the present application was not barred, for the non-production of the *mukhtyar-nama* and the assignment did not prove that they did not exist in fact. *Abdul Majid v. Muhammad Faizullah* (1890) 13 All. 89, followed. *VINAYAK VAMAN v. ANANDA VALAD RAMJI*, (1909) 34 Bom. 68

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(IX of 1908,—

*Art. 106.—Suit for partnership accounts—Specific assets realised within period of limitation.*—If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation. *Merwanji Hormusji v. Rustomji Burjorji* (1882) 6 Bom. 628, distinguished. *AHMED SULEMAN v. BHAGWANDAS VISRAM AND Co.* (1909) 34 Bom. 515

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Lunatic.

*Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal—Costs.* See COSTS, 34 Bom. 374

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Mahomedan Law.

*Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.*—Under Mahomedan Law a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (i.e. fornication, adultery or incest). *Muhammad Allahabad Khan v. Muhammad I-mail Khan* (1888) 10 All. 289, followed.—*MARDANSAHEB v. RAJA-SAHEB*, (1909) 34 Bom. 111

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*Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders*—In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts. In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed. His daughter then filed a suit for a declaration *inter alia* that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted. *Held*, that



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the conveyance in 1902 was invalid. Looked at from the stand-point of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party, and therefore subject to all the conditions of a valid gift, but *quære* whether private trusts were known to Mahomedan law. *Banoo Begum v. Amir Abed Ali* (1907) 32 Bom. 172, discussed and distinguished. *JAINABAI v. R. D. SETHNA*, (1910) 34 Bom. 604 ...

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## Mahomedan, Suit by.

*Limitation Act* (XV of 1877), sch. II, art. 127. See LIMITATION ACT, 33 Bom. 719 ...

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## Maintenance.

*Hindu widow*—Widow having her husband's property in her hands

—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.

—The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court. *Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later. *DATTATRAYA WAMAN v. RUKHMABAI*, (1908) 33 Bom. 50 ...

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*Hindu Law*—Maintenance allowed by will of husband to wife—

Unchastity of wife after husband's death—Maintenance not affected — Widow — Unchastity — Starving maintenance.—A

Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child: but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance. *Held*, negating the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will. The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right.



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If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence. <i>Honamma v. Timannabhat</i> (1877) 1 Bom. 559; <i>Valu v. Ganga</i> (1882) 7 Bom. 84 and <i>Vishnu Shambhog v. Manjamma</i> (1884) 9 Bom. 108, discussed. <i>PARAMI v. MAHADEVI</i> , (1909) 34 Bom. 278	636
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<i>Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of 1894), s. 23. See LAND ACQUISITION ACT</i> , 33 Bom. 483	304
<i>Valuation—Mode of valuation when no recent sales—Compensation—Land Acquisition Act (I of 1894), s. 18.—In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood. IN THE MATTER OF KARIM TAB MAHOMED</i> , (1908) 33 Bom. 325	205
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<i>Asura form—Brahma form—Construction of texts—Hindu law. See HINDU LAW</i> , 33 Bom. 433	273
<i>Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law. See HINDU LAW</i> , 33 Bom. 693	456
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<i>Transfer of Property Act (IV of 1882), s. 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.—On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna, and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same. Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during</i>	



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<i>Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.—A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which, on 13th September 1890 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title-deeds relating to the property charged by the will; and on 12th January 1899 executed a mortgage of the same property in favour of the Bank for Rs. 52,000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would have become aware of the charge created on the property by the will. The younger</i>	



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sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter pleaded that the mortgage was made for valuable consideration, and that they were *bond fide* transferees without notice. *Held*, (upholding the decision of the High Court), that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees. *In re Queale's Estate* (1886) Ir. L. R. 17 Ch. D. 361 at p. 368, followed. *Held*, also, that the plaintiff's being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between the creditors and legatees in such a case: Spence's "Equitable Jurisdiction," Vol. II, page 376, referred to. By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891, and the mortgage was not executed until eight years afterwards; and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs). *Held* that, although in cases of this kind delay was a circumstance to be taken into consideration, yet, having regard to the fact that two of the plaintiffs were still minors when the title-deeds were deposited with the bank, and that continued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance. *BANK OF BOMBAY v. SULEMAN SOMJI*, (1903) 33 Bom. 1

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Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktad ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion. The performance of the Muktad ceremonies is a *religious duty* imposed on the Zoroastrians by the proved tenets of the religion they profess. The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanks giving for all His mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well being and long reign of the sovereign, for good government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense. The monies paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians. According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow another Judge's *findings of fact based on the evidence recorded by him*, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion. *Limji Nowroji Banaji v. Bapuji Ruttonji Limbuwalla* (1887) 11 Bom. 441, not followed. *JAMSHEDJI C. TARACHAND v. SOONABAI* (1907) 33 Bom. 122

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apparent to both or at least one of the parties before the accident actually happened. *DULLABHJI SAKHIDAS v. THE G. I. P. RAILWAY CO.*, (1909) 34 Bom. 427 ...

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<i>Limitation Act (IX of 1908), Art. 106—Specific assets realized within period of limitation.</i> —If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation. <i>Merwanji Hormusji v. Rustomji Burjorji</i> (1882) 6 Bom. 628, distinguished. <i>AHMED SULEMAN v. BHAGWANDAS VISRAM &amp; Co.</i> , (1909) 34 Bom. 515	785
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<b>Pauper, Application to sue as.</b>	
<i>Disqualification—Subject-matter of suit—Cause of action—Civil Procedure Code (Act V of 1908), Order XXXIII, Rules 1, 2 and 5.</i> —A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action. <i>Held</i> , that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, Rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action. <i>Dwarkanath v. Madhavray</i> , (1886) 10 Bom. 207, not followed. <i>FATMABAI v. DOSSABHOY RUSTOMJI UMRIGAR</i> , (1909) 34 Bom. 638	863
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<i>Ss. 21, 186—Public servant—Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bom. Act III of 1901).</i> —A clerk in the cess-collection department of a District Municipality constituted under the Bombay District Municipal Act (Bom. Act III of 1901) is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860); and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code. <i>EMPEROR v. BABULAL</i> , (1908) 33 Bom. 213	413



## Penal Code (Act XLV of 1860).—(Contd.).

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Ss. 107, 108, 121, 124A—*Abetment—Sedition—Waging of war.*—

The accused published a book containing eighteen poems, of which four were the subject-matter of the charge. The general trend of the poems charged, as well as the remaining ones in the book, evinced a spirit of blood-thirstiness and murderous eagerness directed against the Government, conveyed the urgency of taking up the sword, and made an appeal of blood-thirsty incitement to the people to take up the sword, form secret societies and adopt guerilla warfare for the purpose of rooting out the British rule. *Held*, that the accused committed the offence of abetting the waging of war (section 121 of the Indian Penal Code), by the publication of the poems charged. *Held*, further, that the Court was entitled to look into the poems other than those forming the subject-matter of the charge, for the purpose of finding out the intention of the writer and the design of the publication. *Per Chandavarkar, J.*—Under the Indian Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121: that is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself. The word "abetment" is defined in section 107 of the Code and one of its meanings, as given there, is "instigating any person to do any thing." This meaning is not excluded by anything that occurs in section 121. The general law is laid down in sections 107-120 of the Code. According to it, "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded and abetment which has failed, section 121 does away with that distinction so far as the offence of waging war is concerned, and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with strong hand. *Per Heaton, J.*—Under section 107 of the Indian Penal Code there may be an instigation of an unknown person. The word "abet," as used in section 121 of the Code, has the same meaning as is given to it by section 107. The "abetment" meant by section 121 is not necessarily confined to abetment of some war in progress. There may be and usually is instigation of rebellion before rebellion actually begins: that kind of instigation is under the Code abetting waging war against the King. So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war. *EMPEROR v. GANESH DAMODAR SAVARKAR* (1910) 34 Bom. 394 ...

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**Ss. 124A, 153A—Sedition—Promoting enmity, &c., between classes—Publication, what constitutes—Criminal Procedure Code (Act V of 1898), ss. 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges.**—The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial. *Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay. *Held*, further, that the trial was not bad as there had been no misjoinder of charges. **EMPEROR v. TRIBHOVANDAS**, (1908) 33 Bom. 77

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**Ss. 6, 8, 11—Toda Giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector.**—It was directed by a decree that the purchaser at a Court sale of a Toda Giras allowance should recover from the Collector the amount due for arrears of the allowance from the date of his purchase. An application to execute this decree was made in 1864, in consequence of which the decree-holder's name was entered in the Collector's books as the person entitled to the allowance in question, and the arrears up to 1864 were paid. In 1903, the decree-holder's heirs applied to the



**Pensions Act (XXIII of 1871) —(Concl'd.).**

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Court to recover the arrears of allowance that had remained unpaid since 1896. The Collector contended that the application could not be entertained in the absence of a certificate from the Collector under the provisions of section 6 of the Pensions Act, 1871. *Held*, overruling the contention, that the power of the Collector under the Act had been exhausted and there was no discretion for that officer to exercise either under the Act or the rules, so far as the applicant's right to recover the arrears that had become due in the life-time of the last holder, was concerned. *Held*, further, that if those amounts remained unpaid, the Collector held them for and on behalf of the last holder, as moneys due to him, and as moneys therefore recoverable on his death by his heirs independently of any question which might arise under the Pensions Act, 1871, or the rules framed thereunder. *CHHAGANLAL v. PRANJIVAN*, (1909) 34 Bom. 154

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<i>Civil Procedure Code (Act V of 1908), Order I, Rule 3, Order II, Rule 3—Grades of several defendants in one suit—"Same act or transaction"—"Series of acts or transactions."—In reading Order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "act or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit both the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative, must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact. The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are</i>	



- "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested. It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary. *UMABAI v. BEAU BALVANT*, (1908) 34 Bom. 358 ... *Civil Procedure Code (Act V of 1908), O. I, r. 8—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit. See ADMINISTRATION SUIT, 34 Bom. 420* 687
- Court—Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside.*—In the course of a suit, a compromise was presented which was signed by the defendant's pleader who was not specially authorised in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to the Court to set aside the decree on the ground that he did not engage the pleader and that he had not authorised the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing. *Held*, that it is the inherent power of every Court to correct its own proceedings where it has been misled. *Held*, also, that under the circumstances, the compromise was not binding upon the defendant and the decree passed upon it was void as to him. *BASANGOWDA v. CHURCHIGIRIGOWDA*, (1910) 34 Bom. 408 ... *Criminal Procedure Code (Act V of 1898), sec. 269—Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Procedure.*—The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively. The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors in the second charge and to write a judgment. *Held*, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of 718



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**Presidency Small Cause Courts Act (XV of 1882)**

Ss. 37, 38—*Criminal Procedure Code* (Act V of 1898), s. 195—*Sanction to prosecute*—*Order granted by single Judge*—*Powers of Full Court to revoke the sanction*—*Full Court not an appellate Court*—*Presidency Small Cause Courts Act* (XV of 1882), ss. 37, 38.—Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, a Full Court of that Court has no power to revoke the sanction. *Per Chandavarkar, J.*—The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court. *Per Batchelor J.*—The jurisdiction conferred by section 38 of the Act is not appellate, but revisional only. SBIVLAL PADMA, *In re*, (1909) 34 Bom. 316 ...

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*Construction of Contract—Indian Contract Act (IX of 1872), ss. 215, 216—Agent appointed to sell goods buying them on his own account.—Section 216 of Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not. The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. *Salomons v. Pender* (1865) 3 H. & C. 639 and *Andrews v. Ramsay & Co.* (1903) 2 K.B. 635, referred to. *JOACHINSON v. MEGHJEE VALLABHDAS* (1909) 34 Bom. 292*

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**Private streets, levelling and draining of.**

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**Provincial Small Causes Courts Act (IX of 1887.)**

Ss. 16, 27, 32, SCH. II, CLS. (2) AND (3)—*Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.*—A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887). Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point. *Held*, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction. *Leagard v. Bull* (1886) L. R. 13 I. A. 134 and *Meenakshi Naidoo v. Subramania Sastri* (1887) L. R. 14 I. A. 160, referred to. Decree of the District Court reversed and that of the first Court restored. *DAVLATSINHJI (MAHARANA SRI) v. KHACHAR HAMIR MON*, (1909) 34 Bom. 171 ...

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*Civil Procedure Code (Act V of 1908), secs. 2 (17), 80—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889), sec. 80—applies to actions ex delicto and not to actions ex contractu.* See CANTONMENTS ACT (XIII OF 1889), SEC. 80, 34 Bom. 583 ...

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**Public road, right to use.**

*Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.*—Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved. On second appeal by the



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<p>plaintiffs <i>held</i>, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege. <i>Sadgopachariar v. A. Rama Rao</i>, (1902) 26 Mad. 376, followed. <i>BASLINGAPPA PARAPPA v. DHARMAPPA BASAPPA</i>, (1910) 34 Bom. 571</p>	... 821
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<p>S. 7—City of Bombay Municipal Act (Bom. Act III of 1888), s. 394—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.—The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act (IX of 1890)) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?" <i>Held</i>, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and using the Railway notwithstanding anything in any other enactment for the time being in force. The storing of timber was necessary for the convenient making, &amp;c., of the Railway</p>	



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line. Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890), the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1. <b>MUNICIPAL COMMISSIONER OF BOMBAY v. G. I. P. RAILWAY COMPANY</b> , (1909) 34 Bom. 252 ...	619
<b>S. 75, sch. II, cl. (1)</b> — <i>Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package.</i> —Plaintiff's agent at Poona consigned a parcel to plaintiff at Dharwar. The parcel contained goods which, according to section 75 and Schedule II of the Indian Railways Act (IX of 1890), were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Maratha Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability. <i>Held</i> that the Railway Company was not liable. The words of section 75 of the Railways Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package. <b>PUNDALIK v. S. M. RAILWAY COMPANY</b> , (1909) 33 Bom. 703 ...	443
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of 1829), s. 107—*Lien—Charge—Assignment.* See LEASE, 33  
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—Act (III of 1877).

Ss. 17 and 49—*Release—Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to affect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration.*—A release whereby a father transferred all his rights of ownership in his immoveable and moveable property in favour of his son was registered not in Book No. 1, but in Book No. 4, that is to say, not in the book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act (III of 1877). *Held*, that the release must be considered as having been duly registered. The father's property was capable of identification and the error of the registrar in registering the document in Book No. 4 should not be allowed to affect the parties prejudicially. *Sorabji Edalji v. Ishwardas Jagjivandas* (1892) P. J. p. 5, followed. An endorsement made by a mortgagee (on the back of the mortgage-deed) releasing the mortgaged property in consideration of a cash payment of Rs. 300 is a document which requires registration, and not being registered was not admissible in evidence either of the redemption of the property or of the real nature of the original transaction between the parties. *PARASHARAMPANT v. RAMA*, (1909) 34 Bom. 202 ...

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S. 17—*Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha—Transfer of Property Act (IV of 1882) Ss. 55 (6) (b), 123.* See TRANSFER OF PROPERTY ACT, 34 Bom. 287 ...

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Regulation II of 1827.

S. 21—*Caste question—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.*—The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff. *Held*, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court. *Held*, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely



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to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. <i>GADIGEYA v. BASAYA</i> , (1910) 34 Bom. 4 <sup>5</sup> 5	748
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<b>Relinquishment of Claim.</b>	
<i>Reversioner</i> — <i>Release</i> — <i>Stamp</i> .—The relinquishment of his claim by a reversioner is a release and must be stamped accordingly. <i>KRISHNAJI NARAYAN v. BALKRISHNA VENKATESH</i> , (1909) 33 Bom. 657	413
<b>Rent.</b>	
<i>Mortgage with possession</i> — <i>Lease to mortgagor</i> — <i>Death of the mortgagee, and his surviving undivided brother</i> — <i>Sister entitled as heir</i> — <i>Possession and management by mortgagee's widow</i> — <i>Payment of the rent by the tenant in good faith to mortgagee's widow</i> — <i>Suit by sister for recovery of rent</i> — <i>Assignment by lessor not necessary</i> — <i>Transfer of Property Act</i> (IV of 1882), s. 50. See <i>TRANSFER OF PROPERTY ACT</i> , 33 Bom. 96	61
<b>Representation.</b>	
<i>Hereditary Offices Act</i> (Bom. Act III of 1874), ss. 25, 36— <i>Death of registered Vatan-dar</i> — <i>Eldest son or other nearest heir of the deceased</i> — <i>Suit for declaration</i> — <i>Jurisdiction</i> . See <i>HEREDITARY OFFICES ACT</i> , 34 Bom. 101	524
<b>Res Judicata.</b>	
<i>Civil Procedure Code</i> (Act XIV of 1882), s. 13— <i>Plea of res judicata can prevail even where its effect is to sanction what is illegal</i> —	



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—*Bhagdari and Narwadari Tenures Act* (Bom. Act V of 1862), s. 3. A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. *CHHAGANLAL v. BAI HARKHA*, (1909) 33 Bom. 479 ...

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**Capacity of parties—Matter substantially in issue—Civil Procedure Code** (Act XIV of 1882), sec. 13.—The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager. *Held*, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*. If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply. *HARGOVAN RAMJI v. MULJI HARJIVAN*, (1909) 34 Bom. 416 ...

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**Limitation Act** (XV of 1877), secs. 5 and 7—*Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Civil Procedure Code* (Act V of 1908), sec. 11. See **LIMITATION, ACT**, (XV OF 1877), SECS. 5 AND 7, 34 Bom. 589 ...

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**Practice—Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed.**—A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting. After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character. H. filed a suit in 1904 against A. and J. the drawer and indorser respectively of two hundies. At the time of filing the suit J. was dead. H. obtained a decree against both defendants, which decree remained unsatisfied. In 1905 H. filed a suit against the heirs of J. on the same two hundies. *Held*, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit. *BAYABAI v. HAJI NOOR MAHOMED*, (1908) 34 Bom. 244 ...

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**Resident's Court.**

**Application to state a case to the High Court—Application unconditional before delivery of judgment—Presidency Small Cause Courts Act** (XV of 1882), sec. 69—**Aden Courts Act** (II of 1864), secs. 8 and 9. See **ADEN COURTS, ACT**, 33 Bom. 708 ...

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**Restitution of Conjugal Rights.**

*Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), s. 24—Suits Valuation Act (VII of 1887), s. 11.*—A suit for restitution of conjugal rights, wherein the claim was valued by the plaintiff at Rs. 65, was instituted in the Court of the Second Class Subordinate Judge. The First Court decreed the claim; and on appeal the decree was confirmed. On second appeal it was contended that the First Court had no jurisdiction to try the suit. *Held*, that the valuation of the claim by the plaintiff must be accepted for the purpose of jurisdiction, unless it was shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which in fact it had not. *Jan Mahomed Mandal v. Mashar Bibi*, (1907) 34 Cal. 352, followed. *JASODA v. CHHOTU*, (1909) 34 Bom. 238

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**Revenue Jurisdiction Act (X of 1876).**

*S. 4, sub s. (a)—Act XI of 1852—Land held as Saranjam—Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Exclusion of jurisdiction of Civil Courts.*—In the year 1858 the Inam Commissioner decided that a certain estate was Saranjam of P. and not his Sarv Inam. On P.'s death in 1899 Government resumed the estate on the ground that it was Saranjam and re-granted it to V. one of P.'s grandsons. Subsequently the plaintiff, another grandson of P. brought a suit against the Secretary of State for India and V. for declaration of title and possession on the ground that the immoveable property in suit was plaintiff's Sarv Inam property and could not be taken from his possession by Government or its officers or re-granted to any one else. *Held*, 1. That the decision of the Inam Commissioner was, by virtue of the provisions of Rule 2, Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision. 2. That after such final decision, the title and continuance of the estate must be determined under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time. 3. That in accordance with those rules the estate was, on P.'s death, resumed by Government who re-granted it to V. *Held*, further, that the suit having been against Government relating to land as Saranjam was excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876). *RAMRAV GOVINDRAO v. SECRETARY OF STATE*. (1909) 34 Bom. 232

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**Reversioner.**

*Relinquishment of claim by—Release—Stamp.* See STAMP, 33 Bom. 657

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**Revision.**

*Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to the High Court—Summary dismissal of appeal.* See JURISDICTION, 34 Bom. 267

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**Rice Merchants Association Rules.**

*Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), s. 93—Sale—Tender—Non-joinder—Practice—Suit cognizable by Small Causes Court brought in High Court—Jurisdiction. See JURISDICTION, 34 Bom. 13*

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**Sale.**

*Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), s. 93—Tender. See JURISDICTION, 34 Bom. 13*

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*Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Gift—Hindu Law—Nibandha—Registration Act (III of 1877), s. 17—Transfer of Property Act (IV of 1882), ss. 55 (6) (b), 123. See TRANSFER OF PROPERTY ACT, 34 Bom. 287*

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*Ss. 45 and 47—Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Measure of damages.—The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed in the following manner. M. & Co., on shipping the goods, handed over the complete shipping documents to B, and received from him an*



advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B. On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. Clan Macleod for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes and on 27th March another invoice for the remaining 50 boxes, the material part of the invoice in each case being "No claim concerning these goods can be recognized unless made within fifteen days from delivery to Messrs. W. & Co., Newport, for shipment on your account." The 250 boxes were put on board the steamer by W. & Co. as the agents of L. & Co., but in obtaining a bill of lading for 500 boxes (including the 250 in question) W. & Co. acted as agents of M. & Co. The steamer left Newport on 4th April. Following the usual course of business as above described, M. & Co. handed over to B. the shipping documents relating to the 500 boxes and obtained an advance of £255 5-2 (being 65 per cent. of the invoice value). B., on the 6th April, obtained a similar advance from the Bank. On the same day M. & Co. suspended payment, and on 9th April L. & Co., as unpaid vendors of 250 boxes, notified the steamship owners, the first defendants, to stop these goods in transit. The S. S. Clan Macleod arrived in Bombay on the 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled. On the plaintiffs subsequently suing the steamship owners and their agents for damages, *Held*, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay. *Ex parte Golding Davis & Co.* (1880) 13 Ch. D. 628, followed. *Held*, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledgees for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants. *Held*, further, that the plaintiffs were entitled to join both defendants in the suit.



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In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right. *Held*, that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title. *Vasudev Daji v. Babaji Ranu* (1871) 8 Bom. H. C. R. (A. C. J.) 175 and *Doe dem. Marlow v. Wiggins* (1843) 4 Q. B. 367, referred to. The rights of successive holders of hereditary and impartible estates not governed by the ordinary rules of inheritance but subject to the condition that Government shall approve of the heir may be barred by adverse possession. *Tekait Ram Chunder Singh v. Srimati Madho Kumari* (1885) L. R. 12 I. A. 197, referred to. Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants. *Held*, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected. *TRIMBAK RAMCHANDRA v. SHEKH GULAM ZILANI* (1909) 34 Bom. 329

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*Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Exclusion of jurisdiction of Civil Courts—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a)—Act XI of 1852. See REVENUE JURISDICTION ACT, 34 Bom. 232*

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*Suit brought in the Court of First Class Subordinate Judge having Small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.—A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause. Held, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause. NARAIN RAVJI v. GANGARAM RATANCHAND, (1909) 33 Bom. 664 ... 418*

**Solicitor's Lien for Costs.**

*Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Charging order.—The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership. Ridd v. Thorne (1902) 2 Ch. 344, followed. Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court. Kewney v. Attrill (1886) 34 Ch. D.*



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S. 42—*Civil Procedure Code (Act VIII of 1859), s. 15—15 and 16*  
*Vic. c. 86, s. 50—Suit by plaintiff for mere declaration that the*  
*minor defendant was not his son—Investigation of claim with-*  
*out delay.*—A Talukdar-plaintiff brought a suit for a declaration  
that defendant 2, a minor, was not his son and that he was not  
born to the plaintiff's wife, defendant 1, and for an injunction  
restraining defendant 1 from proclaiming to the world that de-  
fendant 2 was plaintiff's son and from claiming maintenance for  
him as such son. The defendants contended that the suit was  
not maintainable under the provisions of the Specific Relief  
Act (I of 1877) and that it was premature. *Held*, that the  
suit was maintainable, it being within the provisions of section  
42 of the Specific Relief Act (I of 1877). *Held*, further, that in  
the interest of justice it was of the highest importance that  
such claims should be investigated and decided without un-  
necessary delay, and when the controversy had once been brought  
to trial the decision should ordinarily follow the usual course.  
*Yool v. Ewing* (1903) Ir. Rep 1 Ch. 434, distinguished. BAI  
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S. 45—*General principle underlying interference by High Court—*  
*Municipal election petition—Jurisdiction and discretion of Chief*  
*Judge of Small Causes Court—City of Bombay Municipal Act*  
*(Bom. Act III of 1888 as amended by Bom. Act V of 1905), ss. 33*  
*and 34.*—A Municipal election petition having been lodged with  
the Chief Judge of the Small Cause Court, the latter unseated two  
of the successful candidates and found cause of objection against  
the candidate in whose favour were recorded "the next highest  
number of valid votes after those returned as elected." He  
declined to inquire further into the claims of any other candi-  
date or to declare any other candidate elected, as, on his  
interpretation of section 33 (2) of the Bombay Municipal Act  
(Bom. Act III of 1888 as amended by Bom. Act V of 1905), he  
was not enabled to do so. The two highest of the other  
unsuccessful candidates thereupon obtained rules against the  
Chief Judge under section 45 of the Specific Relief Act (I of  
1877), to show cause why he should not proceed to declare  
them elected under section 33 (2) above mentioned. *Held*, that  
the case fell within the general principle referred to in *Ex*  
*parte Milner* (1851) 15 Jur. 1037 that where an inferior tribunal  
improperly refused to enter upon a complaint, a mandamus  
would issue. Section 33 having been held to empower the  
Chief Judge to set aside the election of any number of candi-  
dates returned as elected, there was nothing repugnant in  
construing the section as empowering the Chief Judge to fill up  
any number of vacancies so created from the list of unsucces-  
ful candidates subject to the provisions of the section. It was  
clearly incumbent on the Chief Judge to deal with the question



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of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34. An application under section 33 (1) should name the persons whose election is objected to. IN THE MATTER OF THE SPECIFIC RELIEF ACT, AND IN THE MATTERS OF SARAFALLY MAMOOJI AND JAFFER JUSUB, (1910) 34 Bom. 659	877
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<i>Relinquishment of claim by reversioner—Release.</i> —The relinquishment of his claim by a reversioner is a release and must be stamped accordingly. KRISHNAJI NARAYAN v. BALAKRISHNA VENKATHS (1909) 33 Bom. 657	418
<b>—Act (II of 1899).</b>	
S. 2 (5) (b)— <i>Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.</i> —The transactions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill. A question having arisen as to what was the proper stamp duty payable on the document. Held, that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs. 5-3-0 in all. An agreement to lend money does not create an obligation to pay money within clause (5) (b) of section 2 of the Indian Stamp Act (II of 1899). An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages. H. T. WARDHAK COTTON MILLS CO. v. SORABJI. (1909) 33 Bom. 426	268
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*Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.* See *HINDU LAW*, 34 Bom. 321 ...

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*Stridhan—Anvadheya—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha—Hindu Law.* See *HINDU LAW*, 34 Bom. 385 ...

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**—Act (X of 1865.)**

S. 187—*Hindu Wills Act (XXI of 1870), Ss. 2 and 5—Administrator-General's Act (II of 1874), s. 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.*—A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870). The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of section 187 of the Indian Succession Act (X of 1865). *NARAYAN SHRIDHAR v. PANDURANG BAPUJI*, (1910) 34 Bom. 506 ...

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S. 250—*Probate and Administration Act (V of 1881), sec. 81—Will—Probate—Caveator—Interest possessed by the caveator.*—The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865), enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the



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person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise. <i>Abhiram Dass v. Gopal Dass</i> (1889) 17 Cal. 48, followed. <i>PIROJSHAH BHIKAJI v. PESTONJI MERWANJI</i> , (1910) 34 Bom. 459	...
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<i>Objections to surveyors' reports—Land Acquisition Act (I of 1894), s. 1<sup>a</sup>—Compensation—Mode of valuation when no recent sales—Market value.—Held, that in addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument. The practice which has grown up in reference under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence. IN THE MATTER OF KARIM TAR MAHOMED, (1908) 33 Bom. 325</i>	205
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Practice—Third party procedure—Directions refusal to give—Discretion.—The general principle on which the Court will issue third parties directions is :—(1) That there must be a clear case of contribution or indemnity from the third party. (2) that all the disputes arising out of a transaction between the plaintiff and the defendant and a third party can be tried and settled in one suit, and (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party. <i>Baxter v. France</i> (No. 2) [1895] 1 Q. B. 591, followed. <i>W. &amp; A. GRAHAM &amp; Co., v. CHUNILAL HARILAL &amp; Co.</i> , (1909) 34 Bom. 423	727
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<i>S. 5—Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold.—The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the toda giras allowance which the latter was entitled to receive periodically from the Mamlatdar's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest the toda giras allowance computed as its valuation for twenty years, could be attached and sold in execution of the decree. Held, reversing the order, that it is clear from the language of section 5 of the Toda Giras Allowance Act (Bom. Act VII of 1887) that it is not the life interest of the judgment-debtor in a toda giras allowance, but something short of it that is allowed by the Act to be attached. The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a toda giras allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character. Under what circumstances money is likely to become due on account of a toda giras allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. AMARSANG v. JETHALAL (1909) 33 Bom. 258</i>	163
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<i>Negligence of Railway Company—Breach of Statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations. See CONTRIBUTORY NEGLIGENCE, 34 Bom. 427</i>	730
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<i>Hindu family firm—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes—Hindu law. See HINDU LAW, 34 Bom. 72</i>	505



**Transfer.**

*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document—Stamp Act (II of 1899) sec. 2 (5) (b). See STAMP ACT, 33 Bom. 426* ...

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**—of Application.**

*Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction—Bombay Civil Courts Act (XIV of 1869), Part V—Civil Procedure Code (Act V of 1908), sec. 24. See CIVIL PROCEDURE CODE, 34 Bom. 411* ...

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**—Property Act (IV of 1882).**

*S. 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property Mortgagee's claim to hold the property against the mortgagor's heir—Regulation XVI of 1827.—A mortgage of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagee having claimed to hold the property against the heir of the mortgagor. Held, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor. GANGABAI v. BASWANT, (1909) 34 Bom. 175* ...

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*S. 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.—On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same. Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of*



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Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary. *KAVERIAMMA v. LINGAPPA*, (1908) 33 Bom. 96

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S. 54—*Sale—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.*—The terms of a compromise affecting a claim to land of the value of less than Rs. 100 were reduced to writing. The document was not registered, nor was the transaction accompanied by delivery of possession. The material provisions of the deed were as follows :—" You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give 9 *pands* more from our share and both of us should put up *bandh* (embankment) in the middle of the well, and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused." The lower appellate Court regarded the transaction as a sale which under the provisions of the Transfer of Property Act (IV of 1882) required delivery of possession in order to validate it. *Held*, that the terms of the deed did not bring the transaction within the category of a sale, as defined in the Transfer of Property Act (IV of 1882). *Held*, further, that the document in question merely embodied a compromise between the parties and was in effect an acknowledgment of existing rights; and that therefore no delivery of possession was necessary. *Rani Mewu Kuwar v. Rani Hulas Kuwar* (1874) L. R. 1 I. A. 157, followed. *KRISHNA TANHAJI v. ABA SHETTI PATIL*, (1909) 34 Bom. 139

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S. 55, Cl. (4) (b), cl. (6) —*Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase money—Estoppel—Evidence Act (I of 1872), sec. 115.*—In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property. *Held*, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds. *Per Buchanan, J.* :—A vendor of immovable



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- property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. *TEHILRAM v. KASHIBAI*, (1908) 33 Bom. 53... 34
- Ss. 55 (6) (b), 123—*Registration Act* (III of 1877), sec. 17—*Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha.*—In consideration of services already rendered or thereafter to be rendered by the defendant to the predecessor-in-title of the plaintiff, the latter executed two documents whereby he released the defendant from payment to him of the assessment on certain lands. Those documents were not stamped or registered. The plaintiff sued to recover arrears of assessment from the defendant, who pleaded exemption under the two documents. The lower appellate Court found the transaction to be one of sale, and applying section 55 (6) (b) of the Transfer of Property Act, 1882, ordered the plaintiff to pay to the defendant what the Court calculated to be the equivalent of purchase-money before he (the plaintiff) could recover the assessment. *Held*, that the transaction evidenced by the documents could not be regarded as a sale, for the consideration could not be regarded as "price"; and even if it could be assessed in money value, it was vitiated by the fact that it was vague and uncertain as to future services. *Held*, further, that the transaction must be regarded as one of gift. It was a gift of the grantee's rights to assessment; and such a right is regarded as *nibandha* in Hindu Law and therefore immoveable property. The documents not having been registered, the gift did not operate. *Held*, also, that there having been no registered instrument in support of the defendant's title the right set up in defence must be negatived. *MADHAV-RAO v. KASHIBAI* (1909) 34 Bom. 287 ... 642
- S. 59—*Dekkhan Agriculturists' Relief Act* (XVII of 1879), s. 63 (A)—*Mortgage deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*—A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882). *Held*, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage. An attesting witness is a "witness who has seen the deed executed and who signs it as a witness." *Burdett v. Spilsbury* (1843) 10 C. & F. 340, followed, *RANU v. LAXMANRAO*, (1902) 33 Bom. 44 ... 28
- S. 67—*Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagees right to an order for sale,*



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—Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable. *Mahadaji v. Joti* (1892) 17 Bom. 425 and *Krishna v. Hari* (1908) 10 Bom. L. R. 615, explained. *DATTAMBHAT RAMBHAT v. KRISHNABHAT*, (1910) 34 Bom. 462 ...

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S. 85—*Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members.*—A Hindu family living jointly consisted of S. his son M. and his two grandsons S<sup>1</sup> and R. (minors) by a predeceased son. S. mortgaged a house for purposes allowed by Hindu law. The deed of mortgage was signed by S. M. and S<sup>1</sup>. represented by his mother. The mortgagee sued on the mortgage and joined S. M. and S<sup>1</sup>. as party defendants. The suit passed into a decree, in execution of which the house was sold at a Court auction and purchased by the plaintiff. In a suit by the plaintiff against M. S. and R. (S. having died) for possession of the house, R. claimed to exempt from the sale his share in the house which was one-fourth, on the ground that as he was not a party to the suit, he was not bound by the decree. *Held*, that though R. was omitted from the suit he was represented by the adult members, who were the managing members of the family. *Held*, also, that the debt was contracted by S., the grandfather of R. and R. was bound by it unless it had been contracted for illegal or immoral purposes. *RAMKRISHNA v. VINAYAK NARAYAN*, (1909) 34 Bom. 354 ...

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S. 90—*Civil Procedure Code (Act XIV of 1882), secs. 43 and 50—Suit to recover mortgage-debt by sale of mortgaged and un-hypothecated property—Decree against mortgaged property alone—Sale—Amount realized not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.*—In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor. The first Court found that the claim for a personal decree against the mortgagor was time-barred. On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant, but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree. On second appeal 'by the plaintiff



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<p><i>held</i>, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed. <i>Held</i>, further that the plaintiffs could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally. GULAM HUSSEIN v. MAHAMADALI IBRAHIMJI, (1910) 34 Bom. 540</p>	801
<p>S. 93—Decree—Execution—Civil Procedure Code (Act XIV of 1882), s. 244. See DECREE, 53 Bom. 273</p>	172
<p>S. 107—Lien—Charge—Assignment—Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose."—Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (i.e., a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel. ARDESIR BEJONJI v. SYED SIRDAR ALI KHAN, (1903) 33 Bom. 610</p>	383
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<p>Stoppage in transitu—Ultimate destination of goods—Pledge of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), ss. 45 and 47. See SALE OF GOODS ACT (56 AND 57 VIC., C. 71), SS. 45 AND 47, 34 Bom. 640</p>	865
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<p>Appointment of a committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by committee against a trespasser in ejectment—Title. See EJECTMENT, 53 Bom. 499</p>	315
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<p>S. 34 Non-propriability to charitable Trusts—Indian Trusts Act (II of 1882) secs. 1 and 2—Statute of Frauds 29 Ch. II, C. 3, sec. 7.—The Trustees and Mortgagees Powers Act (XXVIII of</p>	



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1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did, the Indian Evidence Act entirely superseded it. *SIR DINGHA MANEKJI PETIT v. SIR JAMSETJI JIJIBHAI*, (1908) 33 Bom. 509 ... 321

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sions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan, *Held*, that as trustees of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed. *Bank of Bombay v. Sulman* (1908) 32 Bom. 466 at p. 474 referred to. *Held*, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance. *Held*, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed. *Held*, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste. The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savarchand* (1880) 5 Bom. at p. 84 F. N. *Lalji Shamji v. Walgi Wardhman* (1895) 19 Bom. 507 referred to and distinguished. *Held*—lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under S. 151 of the Civil Procedure Code (Act V of 1908). *JETHABHAI NARSEY v. CHAPSEY COOVERJI*, (1909) 34 Bom. 467 ...

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dant's mortgage-deed and that the defendant had obtained by his purchase no right as against the plaintiff's right in the property, *Held*, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undislosed partner, the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business. The mortgage was therefore valid and binding on the executor as principal. *Juggeewundas Keeka Shah v. Ramadas Brijbookun Das* (1841) 2 Moo. I. A. 487, followed. A mortgage by a trader under a testamentary trust of the testator's property is referable to his implied authority as a trustee and not to his position as executor. *Devitt v. Kearney* (1883) 13 L. R. Ir. 45 at p. 52, followed. An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee. The trustee though personally liable for the debts which he contracts in the course of his business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. *JETHABAI v. CHOTALAL*, (1909) 34 Bom. 209

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sufficient to satisfy its liabilities, that will enable the Court to order its winding up. If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement . . . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourth majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. IN THE MATTER OF INDIAN COMPANIES ACT, IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING COMPANY AND IN THE MATTER OF RATILAL KARSONDAS (1909) 34 Bom. 533 ...	797
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